The Oklahoma Community Property Act: A Comparative Study

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The civilian system of community property has stood the
tests of social and economic changes from its virtually prehistoric
inception. The reason for its longevity must ground upon the
fact that the system was founded upon a simple idea of justice
and respect for individual rights. The system has long existed in
eight states of this country. The ancestry is easily traced to
Spanish and French sources. Louisiana, the only state in the
group of eight which lays claim to civilian principles in toto, is
relatively free from common law disaffections of the ideal of
community property. In the other seven states, though the in-
fluence of common law ideas is strong, this one civilian trait has
been handed down despite disavowals of civilian family ties in
all other respects and clear adoption of the common law.

Commentators on family law, property law of husband and
wife, and the doctrine of individual rights in property have
praised the system of community property and have prophesied
the further adoption of its principles, with or without the name.
Their forecasts have been predicated upon the natural sequence
to be expected from greater recognition of the rights of individ-
uals and larger participation by married women in business and
industry, due to changes in the economic life of the United States.
The eight original jurisdictions really gained the system, either
wholly or in part, by civilian inheritance. The new addition of

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Kephart, Origin of the Conjugal Community (1938); McCurdy, Cases Domes-
tic Relations (3 ed. 1939) 547; McKay, Community Property (1910) Introduct-
tion 36-37, and notes.
2. Arizona, California, Idaho, New Mexico, Nevada, Texas, Washington,
Louisiana.
3. Burby, Cases on Community Property (1933) vil, preface.
4. "In California, Louisiana and Texas, the system was established by
the Spaniards, and has been continued by statute and code, but with some
modifications. In New Mexico, the Spanish system with slight modification
prevailed till 1901. Nevada and Arizona, while at one time Spanish territory,
never had a sufficient number of Spanish settlers to establish Spanish law,
and the system there is of statutory origin. In Idaho and Washington the
system is an exotic." McKay, op. cit. supra note 1, at 37-38, and note.
Oklahoma apparently was not due to the expected causes—i.e., the idea of implanting a more equitable property system for spouses and of providing a family binder at a time of apparent crisis in family relation. It would seem these considerations did not sway the Oklahoma legislators and proponents so much as the idea of saving federal income taxes for the better endowed citizenry and preventing an exodus to nearby Texas, a community property state, where the individual returns of husband and wife under a tax theory of the latter's vested interest saved wealthy spouses large sums in surcharges. Whatever the cause, the birth of a new adherent must arouse pride and interest in the hearts of the habitual believers and root stock members, though the philosophically minded may think upon this environmental sport as being a queer kinsman to the descendants from marauding tribes whose uninvolved idea of justice and doubtless very real desire for domestic tranquillity moved them to recognize the right of the fighting wife to part of the spoils of war.

Whether Oklahoma's new statute will be adjudged good, bad, or indifferent for the citizenry in general, aside from tax savings, remains to be seen. Its conformations to and divergencies from the old pattern, with possible advantages or disadvantages, are the subject of this discussion.

The act provides for a written election by husband and wife of the community property regime and will operate only as to those spouses who so elect. In this wise, the system follows the German, rather than the French and Spanish doctrine. The latter two states and those deriving from them provide for community property as the legal regime, operative by virtue of the act of entering a valid marriage; and the regime must be contracted against if the parties do not desire it.

This Oklahoma "election" provision is an excellent one, at

6. Letters received from C. C. Childers, Secretary of State, State of Oklahoma, Oklahoma City, dated December 7, 1939; Julien C. Monnet, Dean, School of Law, the University of Oklahoma, Norman, dated December 4, 1939; Charles W. Hamilton, Assistant Trust Officer, The National Bank of Commerce, Houston, Texas, dated December 8, 1939.
least for initiating the regime in new territory, as it gives informed persons an immediate opportunity to avail themselves of the benefits of the device and yet does not force it upon those who have no knowledge of it or whose convictions are opposed. Under the general run of Spanish and French adherents in the United States, the right to contract against the system, or to modify it to individual purposes must be exercised before marriage. In the United States, at least, the minds of those about to contract marriage do not appear to center upon property laws with as much interest before, as they do after, the ceremony.

After the choice has been made, Oklahoma appears to allow no room for mind-changing, as the act provides that the regime of community will then continue during the life of the marriage. However, the Oklahoma act, in a subsequent paragraph, cures the apparent defect of this section by permitting the free transfer of property between the spouses. Since third persons are well protected by recordation, there would appear to be no good reason why spouses should not be permitted to readjust their property affairs, if it should appear to them that their financial and family interests would be served by the change. One of the defects of the Louisiana system is the inability to contract after marriage or to reestablish the community after dissolution by a judgment for separation of bed and board; though by reconciliation of the spouses, the marriage and its attendant property rights remain undisturbed in every other respect. In France the community may be reestablished under the latter situation.

The recordation provision of the new act is particularly valuable. It requires that one copy of the written instrument indicating election of the system by the spouses must be filed in the county of the residence of the signers, and another must appear

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12. McKay, op. cit. supra note 1, at 213.
17. Comment (1939) 1 LOUISIANA LAW REVIEW 422.
record in the office of the Secretary of State. Both of these offices are required to keep and properly index records for this purpose. There should be every possible protection for third parties through this device, which relieves the situation of all domicile and land location questions, simplifies the task of record searching for all interested persons, resident or non-resident, and certainly minimizes the ordinary risks incurred. Central registration systems for mortgages of migratory chattels are in use in Oregon, California, Idaho, and Nevada, and the idea of extension of use of the device appears sound.\footnote{20}

Evidently anticipating many “elections” of the system by the citizens of Oklahoma, the Secretary of State requested the Attorney General,\footnote{21} before the act went into effect, to prepare a form “...in order to aid persons desiring to file said written elections, in easily, properly and uniformly preparing and executing the same in conformity with the provisions of [the act] ... and in order that said written elections might be promptly, properly and uniformly recorded in a permanent record book ... on pages thereof printed in conformity with said blank form.”\footnote{22}

In accordance with this request, the Attorney General prepared the following form:

\begin{quote}
**WRITTEN ELECTION TO COME UNDER THE TERMS OF THE OKLAHOMA COMMUNITY PROPERTY LAW**\footnote{23}  

We, ........................................ and ........................................
husband and wife, who reside in ................... County,  
Oklahoma, and whose post office address is .................................  

(Set forth post office address in full)  
do hereby state that we desire to avail ourselves of House Bill No. 565 of the Seventeenth Legislature of the State of Oklahoma, same being the Oklahoma Community Property Law, and to have said law apply to us and to our property from and after the first day of the next month subsequent to the filing of
\end{quote}
duplicate originals hereof, one in the office of the county clerk of the county of our residence and the other in the office of the Secretary of State.

In Witness Whereof, we have hereunto set our hands on this, the ......................... day of ........................., 19........

.................................

State of Oklahoma SS
County of....................... 

Before me, ........................., a Notary Public, in and for the said county and state, on this ......................... day of ........................., 19........, personally appeared
................................. and ........................., husband and wife, to me known to be the identical persons who executed the within and foregoing instrument, and each for themselves acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and seal the day and year last above written.

.................................
Notary Public

My commission expires ........................., 19........

Before the form was issued or the law in effect, however, an election was tendered the Secretary of State, and he asked the Attorney General for an opinion in regard to his duty in filing the instrument and was advised that it was within his official discretion to do so, even though the instrument did not "in substance" set forth the data required by the act and was signed before the effective date of the act. The Attorney General also stated that he did not consider it necessary for the Secretary of State to insist that persons use the official form prepared by him, though he felt confident that cooperation would follow upon the furnishing of the form.24 The fact that the premature election was upon a printed form further indicates the expectancy of many elections.

The simple and businesslike methods used by these officers will certainly facilitate the use of the system and will tend to establish an early confidence in it. The lack of proper facilities for the recordation of marriage contracts in Louisiana has doubt-

24. See page 3 of letter referred to in note 21, supra.
less been at least one of the incidents of its lack of use in that state.\textsuperscript{25} The recordation of chattel mortgages on automobiles, with the Secretary of State, as well as in the county of the resident, has been so successful in the states using that system that this broader application is an interesting and valuable development, which might well inspire emulation.\textsuperscript{26}

The third and fourth sections of the Oklahoma act are identical, except for the fact that Section 3 deals with the separate property of the husband, while Section 4 deals with the separate property of the wife. These sections provide that “all property owned or claimed” before the effective date of the election of the system will be the separate property of the one owning or claiming. The word “claimed” seems troublesome. It might only refer to rights not yet fixed between a spouse and any third party, or it might refer to claims of spouses, the one against the other. It bodes trouble for the time of settlement of a community at dissolution by death or divorce, as it may present the need for evidence which would be difficult to get, both because of its nature and the lapse of time. Neither this section nor any other appears to contemplate a declaration at the time of election as to what is to be separate and community property; though neither is there any prohibition against what might be but an inventory which in after years would greatly facilitate a settlement between spouses or heirs. This device is in use in some sections of Louisiana and has proved to be a very practical aid. These inventories are labelled marriage contracts—somewhat of a misnomer, as the real elements of the marriage contract are seldom present; however, the use is unquestionable.\textsuperscript{27} Again, the lack of a settlement provision in Oklahoma at the inception of the system by election would preclude the wife from sharing in her husband’s accumulations throughout a long period of married life; and, after adoption of the system, wife or husband might be robbed of such protection as the common law devices previously afforded. If a dissolution of the marriage and consequent termination of the community should occur before additional assets which would fall under the community property act were accumulated, this might prove to be very serious in many cases.

The provision for separate property acquired after the elec-

\textsuperscript{25} Daggett, op. cit. supra note 16, at 114, c. XVIII, The Marriage Contract.
\textsuperscript{26} See note 20, supra.
\textsuperscript{27} Daggett, op. cit. supra note 16, at 113.
tion presents several interesting items. Gifts of the husband's or wife's interest in the community are listed. This might easily cure the difficulty noted above, if the individual was willing, of course; if not, the legal protection of the one without property remains precarious. An unscrupulous, penurious, or careless spouse with means might well leave the other without protection from either the newly elected civilian institution or the benefit of common law safeguards. This contingency is well guarded against in the civil law by the so-called "marital portion" provision. If one spouse dies, leaving the other "relatively" poor, the latter may demand the marital portion in the nature of a forced share of separate property, common property, or both, so that his or her financial station may not too abruptly descend. This has proved to be a salutary principle and is often resorted to for relief.

The new act speaks also of separate property vesting after the election "by division of community." This clause suggests a voluntary division, as legal dissolution occurs only by absolute divorce or death. The civilian idea does not comprehend this possibility. A division by a legal dissolution may occur by virtue of a judgment for separation of bed and board or by a successful suit for separation of property. The latter action is available only to the wife, however, and then only if the husband's financial situation becomes precarious.

Devise and descent are also means of acquiring separate property after election of the system in Oklahoma. This is common to all community states, though the civil law provision adds that if gifts, inter vivos or mortis causa, are made jointly to the spouses, the property is then community; this apparently would not be the case under the Oklahoma statute, but the property would be joint, which obviously is not the same thing.

Provision for increase of lands individually owned as being

separate property is made. The corresponding civilian rule is stated more cumbersomely, and the meaning is not necessarily the equivalent. The separate property of one spouse in Oklahoma is not liable for debts or torts of the other, either before or after election, "except as may be permitted by law as to his or her property prior to the enactment of" the new act.

Section 5 provides that "all property or moneys received as compensation for personal injuries, sustained either by the husband or the wife shall be the separate property of the person sustaining such injuries."

Oklahoma is indeed to be congratulated on these three sections, which treat the two spouses exactly alike. A new start naturally has a great advantage over an old base, upon which it is sometimes different to quickly graft changes which become necessary because of difficult social and economic conditions. In Louisiana the income from the husband's separate property falls into the community, while that of the wife's does not, unless her separate estate is under the sole administration of the husband. Again, while compensation for personal injury to the wife falls into her separate estate, this is not true of the husband, unless he is living separate and apart from his wife with cause sufficient upon which to ground judgment for separation. Not only does this throw the rights of the spouses out of balance, but it is against the best interests of the family and society; for in order for the husband to claim compensation as his separate property, he would be required to make the same type of proof necessary in a separation suit—matter which he doubtless did not care to put of public record, or he would already have asked for separation.

The wife's earnings, under rather clear Louisiana statutory language, belong to the wife's separate estate; but in order to prevent another item of unbalance, the court has declared them community property.

Under the civil law, the husband has never been responsible for his wife's torts, as the idea of individual rights and responsibility has always characterized the civilian philosophy, and the merger doctrine of the common law was never accepted in any aspect. A rather unsatisfactory situation is now present in Louisiana, however, arising out of the use of automobiles. The so-called family car doctrine is not accepted in Louisiana, so that victims of the careless driving of married women without property are left with a vacant right, except for the suggested possibility that if the married woman was about the business of the community, the latter could be held on that theory. This presents other complications, in that the theory of the wife's agency has been repudiated hitherto by the court, so far as dealing with the community is concerned. The idea of agency for the purchase of necessities, for example, has been upheld on the general, and not necessarily community, doctrine of the husband's responsibility for his wife's support.

When is the wife about the business of the community? It has been held that she is not so acting when attending a style show in a neighboring city, even though the accident occurred while she was en route to a restaurant for her midday meal. This eating was an incident to the style show attendance, her own personal business, and not a part of the husband's or the community business. In this, the first Louisiana Supreme Court case in point, was found the intimation that had this wife been about the community business, the community would have been liable. Another case raising the problem reached the Supreme Court the following year. The wife was held not to have been about the community business while collecting and transporting groceries furnished by others in connection with a charitable project upon which an organization to which she belonged was engaged. Stress was laid upon the fact that the husband had previously expressed

47. Matulich v. Crockett, 184 So. 748 (La. App. 1938).
disapproval of this activity, an element which in an ordinary agency case would not have carried much weight in and under similar circumstances. The court stated:

"We are not prepared to say, nor do we hold, that a wife engaged upon a charitable mission is not the agent of the community as we feel that the dispensing of alms may, under ordinary circumstances, be considered as part of the functions of community life. But, here, it is shown that Mr. Crockett had nothing whatsoever to do with the benevolent work performed by his wife as a member of the Victory Girls and that he had many times expressed his disapproval of her avid interest in that society."48

In a third case49 the circuit court of appeals held that the wife was not acting as the agent of either the husband or the community when visiting the husband's mother, who was ill, as she had delivered to the mother nothing that was purchased with community funds, and had used the car against the husband's expressed injunction.

Third persons, as well as the wife, suffer by the court's refusal to recognize and apply the tools furnished by the legislature and designed to gear the law of husband and wife to an order of society changed economically, socially, and mechanically from the era when all outside activities could be handled by the husband. Physical control without legal responsibility has always been regarded as a dangerous situation, for society, as well as for the individual. Had the married women in these three cases outlined above been "gainfully employed without the home"—their "gains" being community property—and had they been about the procurement of these gains, would the community have been liable? Could the community have been sued for the act of the wife as agent, recalling that she cannot sue?

Again, if the acts of Louisiana are to be interpreted as not having changed the old law prohibiting suits between husband and wife, just what is the managing husband with full control of community to do, short of committing murder or mayhem, when his wife refuses to turn over valuable personal property of the community to him? This question has already demanded the attention of the practicing lawyer, if not the courts.

48. Id. at 750.
The Oklahoma provisions regarding mutual freedom of separate property from individual debts contracted by the other spouse are similar to those of Louisiana.\(^5\)

The provision of Section 6 of the Oklahoma act that all property not specifically designated in the preceding sections as being separate will fall into the community is usual. The provision in the same section that all community property “shall be vested” as an “undivided one-half interest” in husband and wife is clear and takes care of the income tax situation, toward which the entire act apparently was largely directed.

This “vesting” has more elements of reality than does that of Louisiana, however, where the property appears to be vested for taxation purposes only; as neither the wife nor her creditors have any rights in it or against it during the existence of the community.\(^6\)

The control provisions of Section 6 of the Oklahoma act are particularly desirable and stand out for commendation when compared with Louisiana law.\(^7\)

“The wife shall have the management and control and may dispose of that portion of the community property consisting of her earnings, all rents, interest, dividends, incomes and other profits for her separate estate and all other community property the title to which stands in her name.”\(^8\)

In Louisiana, as previously stated, the income from the wife’s separate estate is her separate property when she is administering her estate, which she may do, even through an agent; and that agent may be her husband.

However, by judicial decree, if not legislation, her earnings are community property and, hence, are under the full power and control of her husband. They may be disposed of, even given away, by the husband; they are liable for his debts, as well as those of the community; and they are not liable for the claims of her creditors. The most anomalous situation of all is that the wife

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\(^7\) Daggett, Is Joint Control of Community Property Possible? (1936) 10 Tulane L. Rev. 589.

is not permitted to sue to protect her own contract (which she is entirely free to make) because of the fact that "her earnings when carrying on a business, trade, occupation or industry separate from her husband" have been held to be community property. Here we have a situation for which there is no parallel: A person, sui juris in every respect, who needs no authorization to contract, must call a stranger to the contract to protect it. Again, the Oklahoma statute takes care of another situation which is subject to criticism in Louisiana. The new act states, as quoted above, that "the wife shall have the management and control and may dispose... of all... community property the title to which stands in her name." A Louisiana act of 1912 provides that "when the title to community property stands in the name of the wife, it cannot be mortgaged or sold by the husband without her written authority or consent." This negative, rather than affirmative, move toward giving the wife a form of control over property in which she has a barren, "presently vested" interest has been further limited by judicial decisions declaring that the wife cannot deal with this property without the husband's consent. The court has ignored the implications of this act by holding further that if community property stands in the joint names of husband and wife, the husband, as "head and master of the community," may deal as he sees fit with the property without the consent of the wife.

Thus, it is apparent that such feeble attempts as have been made legislatively to provide for some control of portions of the community property by the wife have been emasculated by the court, which, at the same time, however, interpreted the legislative edict regarding the character of earnings, et cetera, in favor of the community.

The trend against the wife's participation is not only contrary to the civilian ideal of individualism of the spouses and to the flow of social, economic, and political lines of thought and action, but, more seriously, is inimical to the best interests of the family. There are at least two reasons for this. First, the robbing

54. See note 42, supra.
55. Daggett, supra note 52, at 598.
56. Note 53, supra.
57. La. Act 170 of 1912.
of the wife of any feeling of financial independence and responsibility, and the discouragement and sense of injustice attendant upon adding funds to an estate in which no legal control or actual present ownership exists causes in most cases a reaction that in no way adds to the tranquillity and stability of the home. In the second place, no legal, honorable, and unsuspicious method is provided whereby a portion of the family earnings can be made safe from creditors or can be handled in a conservative manner against possible depression or financial reverses. When some part of the family income is immune from seizure, one spouse, usually the husband, is set free from worry and may conduct his business with greater boldness, with greater chances for gain, and with favorable results upon family happiness, aside and apart from purely financial aspects. This philosophy has ceased to be a matter of conjecture and has been demonstrated by many social studies. The disintegration of the American family shown by a divorce rate of one to six marriages in the United States has centered the attention of all socially interested groups upon the family as a major social problem, so that emphasis upon the public or social policy of the property question is not idle discussion.

The usual homestead provision is found in the Oklahoma act as a limitation on the husband's control over the community property.

The following provision regarding bank deposits is of interest:

"... any funds on deposit in any bank or banking institution, whether in the name of the husband or the wife, shall be presumed to be the separate property of the party in whose name they stand, regardless of who made the deposit, and unless said bank or banking institution is notified to the contrary, it shall be governed accordingly in honoring checks and orders against such account."

The Louisiana provision is quite different and appears in this language:

"Money or other property deposited in said banks by mar-

60. Jacobs and Angell, A Research in Family Law (1930) 647, citing Miss Hildegarde Kneeland (May, 1929) 143 Annals 38.
61. Ogburn, The Family and its Functions (1933) 1 Recent Social Trends, c. 13; Frank, The Family as Cultural Agent (1940) Living 16.
ried women or minors themselves may be drawn out by them upon their own order or signature without other authoriza-

The court has said in reference to this statute that a deposit to the credit of both husband and wife "was not subject to the un-

conditional control and order of the husband" and, hence, held a mineral lease to have expired for non-payment of rentals, since the husband, lessor of community property, should have alone received the funds from the lessee. The fact that the wife had not touched the funds and that the husband knew they were in the bank made no difference. This decision certainly warned off any payments of this nature to husband and wife jointly and, hence, again reduced any effect of joint control of the community that the banking statute might have had; yet, it certainly does not make separate property of deposits in the individual names.

Under the joint control idea of the Oklahoma statute, creditors are even better protected than are Louisiana creditors under the "husband as head and master" system. Section 7 of the Oklahoma act provides:

"The separate property of the wife and that portion of community property, record title to which is in her name or which is under the management, control and disposition of the wife, shall be subject to debts contracted by the wife arising out of tort, or otherwise, but not to debts or liabilities of the husband. The separate property of the husband and that portion of the community property, record title to which is in his name or which is under the management, control and disposition of the husband shall be subject to debts contracted by the husband or liabilities of the husband arising out of tort or otherwise, but not the debts or liabilities of the wife. The husband and the wife, and each of them, shall be entitled to the exemptions to which they, or either of them, are now entitled under the laws existing prior to the enactment of this Act."

The placement of the conjunction "or" indicates that the wife

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63. La. Act 188 of 1902, § 1(8) [Dart's Stats. (1939) § 639]. In La. Act 45 of 1902, § 3 [Dart's Stats. (1939) § 584], the same provision appears.
64. LeRosen v. North Central Texas Oil Co., 169 La. 973, 126 So. 442 (1930); Clingman v. Devonian Oil Co., 188 La. 310, 177 So. 59 (1937).
65. Ibid.
may also manage and control community property, the title of which is not necessarily in her name; as, for example, a car.

Section 9 provides for full transfer power between the spouses of the community. This makes it possible, without provision for a "marriage contract," for readjustment of property rights between the spouses, for a virtual discarding of the community system, if it is found to be unsatisfactory, or for a re-entrance into it later. In Louisiana the husband may give to his wife what he could give to a stranger. Because of revocation provisions and because of the doctrine of forced heirship, such gifts (as all others, for that matter) are never safe from the possibility of reduction, after death of the donor, at the hands of forced heirs; hence, this manipulation of community property is not very practical or reliable. The full power in Oklahoma to transfer back and forth makes it perfectly possible for spouses to deal with each other and settle or adjust their property rights between themselves, which should go far to stabilize and secure the marriage and, hence, the family. This is accomplished, furthermore, with full protection to creditors by virtue of the following provision:

"No creditor shall have recourse to the community property for the payment of debts or liabilities created by either the husband or the wife, except as provided in Section 7 of this Act; provided, however, that any creditor may satisfy his claim or demand out of the community property which was under the management, control and disposition of the spouse incurring the indebtedness or liability at the time the debt or liability was contracted or created, and which has been subsequently conveyed or transferred to the other spouse and is under the management, control and disposition of said other spouse, without proof that said creditor relied upon said community property in advancing said credit, but without prejudice to the rights of the third party purchasers, incumbrancers, or other creditors or grantees; and provided further, that the husband or wife on paying community debts shall, as between themselves, charge the same against community property."
These provisions for joint control are most progressive and just. They preserve the ideal of the common fund, which those states establishing the wife's earnings as separate property do not do; yet they avoid the unprecedented position of Louisiana, which declares the wife's earnings community property, and at the same time, denies her the supposedly inalienable right of a person sui juris to protect her contract.

Furthermore, the freedom of contract between the spouses, enabling them to adjust property differences between themselves and to anchor a sinking fund in the hands of one spouse for the safety of the family, should financial disaster overtake the more active partner, is an excellent measure to secure both emotional and financial stability for the family—the basic unit of civilization.

In Louisiana, despite the sweeping terms of the so-called married women emancipatory acts, the court has shown the same reactionary attitude instanced above toward the matter of contract between husband and wife, and, while admitting the validity of a joint mineral lease of husband and wife and enforcing it against a third party, refused to make a flat statement regarding the power of husband and wife to contract freely. This attitude is particularly hard to understand, when, even before the wife was freed from the necessity of authorization by the husband, certain contracts were permitted; and the courts of that earlier day allowed the wife to establish an agency relation with her husband in order to preserve the income from her separate estate as her separate property. While it may be debatable that the agency relationship is a true contract, since certain elements, notably that of consideration, are absent, the theory of distinction is academic in a situation of this kind.

Undoubtedly many wealthy couples in Oklahoma will avail themselves of the community property regime, to decrease their taxes, if for no other reason; as the act apparently would not have been passed but for this consideration as a basis for the public demand. It will be most interesting to observe the reaction of those citizens who fall financially below the affected tax bracket. Certainly, it will be some time before the general laity will be sufficiently informed to make an intelligent election, but when knowledge has seeped through, it may well be that spouses will

73. Shell Petroleum Corp. v. Calcasieu Real Estate & Oil Co., 185 La. 751, 170 So. 785 (1936).
avail themselves of the institution for reasons other than tax savings. There is certainly no assurance, however, that families without expectancy of financial advantage will ever elect the system, which in most cases doubtless is foreign to their property traditions.

Section 10 of the Oklahoma act is one part of the new legislation which, in the writer's judgment, is subject to serious criticism.

"In the event of the dissolution of marriage by decree of any court of competent jurisdiction, community property shall be divided between the parties by the court granting the decree, in such proportions as such court, from the facts in the case, shall deem just and equitable, and such division shall be subject to revision on appeal in all respects including the exercise of discretion by the court below."\(^7\)

It has been previously observed that the shares of the spouses are presently vested interests; in fact, this is the acknowledged chief motivation for the passage of the act. It follows that Section 10 may well be declared invalid as a violation of due process. Furthermore, and aside from questions of constitutionality, the section strikes at the root of the fine individualistic qualities of the act and defeats the sense of confidence and justice upon which the spouses should, for the best interests of the family, be able to rely. This section follows the common law dilution of the community property ideal, found in all members of the group of eight in the United States except Louisiana, the most loyal adherent to the original civilian concept.\(^7\) Louisiana, admitting no punitive damages\(^7\) in ordinary contract or tort, admits none in breach of the marriage vows, so far as property laws are concerned.\(^7\) No matter what the marital wrong may have been which resulted in legal dissolution of the community, the property of the community belongs, half and half, to the spouses, guilty or innocent.\(^7\) Oklahoma is to be congratulated on the control provisions which instance a present vested interest in the

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76. Burby, Cases on Community Property (1933) 300n; Daggett, Division of Property upon Dissolution of Marriage (1939) 6 Law and Contemp. Prob. 225; McKay, Community Property (1910) 39 et seq.
78. Daggett, op. cit. supra note 16, at 84 et seq., c. XIV, Settlement Between the Spouses.
79. Ibid.
wife as well as the husband. These provisions are more convincing than is the legal status in Louisiana, where adherence to the theory of the wife's vested interest amounts to little more than lip-service, because neither the wife nor her creditors can exercise any control over the community property until dissolution of the community. Consequently, the Oklahoma provision for property penalty upon divorce appears even more contradictory than in those states which follow the Louisiana provisions for control in the husband alone. Louisiana did not even carry over the Spanish provision for penalizing a wife guilty of adultery by the forfeiture of her share of the community.\(^80\) This fact was heavily stressed in brief of counsel\(^81\) successfully arguing before the United States Supreme Court that the wife in Louisiana had a present vested interest in community property.\(^82\) The only penalty of this nature incorporated into the law of Louisiana through her jurisprudence is in a putative marriage, where the Spanish provision for punishing a bigamous husband by forfeiture of his share of the community in favor of the wife in good faith is enforced.\(^83\) Even admitting, for purposes of argument, that a property penalty for marital wrong is desirable, then the "crime" and its punishment should be defined and not left to the discretion of a judge to determine and administer according to his particular views as to the enormity of the offense or according to his own peculiar ideas of justice. A petty infringer upon the rights of society and the good conduct of the community has more protection than is offered by this statute to the offending spouse.

The failure to distinguish between the emotional side of a marriage and the property rights of the individuals to the contract has already done incalculable harm to the integrity and security of the family, and the carrying forward of a pernicious idea into an otherwise fair and forward-looking piece of legislation is indeed regrettable.

Alimony is a form of property punishment, grounded, however, upon the duty of the husband to support his wife and upon the public policy of preventing her becoming a charge upon the


\(^{81}\) Brief No. 86, filed by Spencer, Gidiere, Phelps & Dunbar, Monroe & Lemann, in case of Bender v. Pfaff on writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, pp. 33, 34.

\(^{82}\) Bender v. Pfaff, 282 U.S. 127, 51 S.Ct. 64, 75 L.Ed. 252 (1930).

\(^{83}\) Daggett, op. cit. supra note 16, at 117, c. XIX, Community as a Civil Effect of a Putative Marriage.
state. It is adjusted to income and need; it does not go to the lengths of disturbing vested property rights, and if carefully awarded, may be justified in proper cases; despite this fact, it is common knowledge that it is one of the bitterest and most hard fought issues in connection with divorce. It is the subject of fraud and connivance; it is in many cases practically impossible to collect. In many instances, it wrecks both financially and emotionally, the second family which one of the parties to the first and unsuccessful union attempts to found.

The alleged unfairness of the awards, the pleas of prejudice, and virtual seduction of the judge have been the subject of both serious and comic literature for decades. With this precedent it is strange that a legal provision, infinitely more disturbing to the sense of justice of the individual spouse, though certainly easier to administer, should be incorporated into the law of a state initiating a new venture in the property law of husband and wife.

Sections 11, 12, 13, and 14 of the Oklahoma act deal with the process of transferring control of community property under the management of one spouse to that of the other in cases where "...the husband or the wife is non compos mentis, or has been convicted of a felony or sentenced to imprisonment for a period of more than one year, ... or whenever the husband or the wife is an habitual drunkard, or for any other reason is incapacitated to manage, control, or dispose of the community. . . ."

This provision in concise form takes care of situations managed by various, separately outlined processes in other community property states. In Louisiana, for example, for insanity and habitual drunkenness, an individual may be interdicted, and a curator appointed. The husband is of right the curator of his wife, and the wife "may be appointed curatrix to her husband, if she has, in other respects, the necessary qualifications." The case of absentees is covered by a special title of the Code, and preference for the curatorship is in the wife if the husband is an absentee. Again, the spouse of an absentee may continue the

84. Symposium on Alimony (1939) 6 Law and Contemp. Prob. 183.
community, if so desired, by preventing the heirs from being put into provisional possession. Power of attorney may be used in general. Since virtually the entire control of the community, except in Oklahoma, is vested in the husband, the incapacity of a wife is relatively unimportant.

The Oklahoma statute provides that the judgment declaring the incapacity of a spouse and transferring control entirely to the other spouse "shall be recorded in the office of the county clerk of the county where any property affected thereby is situated and such judgment when so rendered shall be notice of the facts therein set out." Apparently the recordation machinery in the office of the Secretary of State for filing "elections" will not be used for the purpose of recording these judgments, so it will be necessary to search the county records. Since the control affects both real and personal property, the sites of which are not necessarily the same as the owner's residence or domicile, record searching may not be an easy matter. It is regrettable that the central system was not preserved throughout for the conduct of community affairs.

The final section of the Oklahoma act provides for settlement of the community upon the death of a spouse. "All debts of the community, whether created by the husband or the wife must be paid, and one-half of the residue transferred by the surviving spouse to the administrator or executor of the deceased. "Upon the death of the husband or the wife, the surviving spouse shall administer all community property in the same manner and with the same duties, privileges and authority as are vested in a surviving partner to administer and settle the affairs of a partnership upon the death of the other partner. . . ." This businesslike method of settlement is commendable. The law and jurisprudence of Louisiana are firmly established to the effect that the community property system is not a partnership and that the rules of partnership do not apply. Many of the

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94. Ibid.
difficulties and inequities of administration and settlement might be obviated if partnership law could be applied. The defects of settlement provisions of Oklahoma after dissolution of the community by divorce are even more marked in contrast to the excellent provisions for settlement upon dissolution by death. Under a real vested interest law and a socially conscious attitude toward divorce, the settlement in general should be the same, and in Louisiana it is the same. Certain inequities in this regard, dealing with the matter of the right of the wife to accept the community with benefit of inventory, formerly existing in the law of Louisiana, have been removed by judicial decision and later confirmed by legislative act.

Louisiana very properly makes provision for renunciation or acceptance with benefit of inventory of the community by the wife because she should not be held personally for obligations which she had no voice in making. Under the dual control idea of Oklahoma such a provision is not necessary, even in settlement, because only the residue after all community debts are paid goes to the surviving spouse; and apparently a residue of assets, not obligations, is intended.

The Oklahoma act is more than fair to the spouse who has property, who earns money, or who has a generous partner willing to give a portion of his property to the other. For the idle partner, or one—usually the wife—whose duty it is to be a homekeeper only, not as much power or protection is afforded as by the old civil law.

If the wife has no separate property, does not earn anything outside her home, and receives no gifts from her husband, she has but a barren, "vested" half interest in the community, which might be taken from her upon divorce and which is absolutely in the control of the husband, to give, gamble, or gobble up at his pleasure. The one restriction upon him is in regard to the homestead. Even if the wife has separate property, all income and profit from it except the increase of lands goes into the community, though she may control rents, revenues, et cetera. The act does little for the old fashioned wife, who makes her contribution to the community (and it is an unquestionably valuable and real

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contribution) by attending the home, rearing the children, and assisting her husband in countless ways.

In Louisiana, besides the homestead and so-called "family home" restrictions upon the husband's power of control of the community property, there are limitations on his power to give away community property or to dispose of it with a view to defrauding his wife. These statutes are valuable safeguards, even though the community must have been dissolved or be in contemplation of dissolution in order that the wife may bring an action for actual recovery. The action for a separation of property which may be brought by the wife under certain conditions is a legal avenue of escape from the community regime, when it becomes burdensome to the wife's estate, which Oklahoma does not provide. Mutual agreement is necessary under the new act for any manipulation of the community property, and, if one refuses, there seems to be no legal relief provided.

Any movement for more equitable adjustment of property rights of husband and wife is welcome to those who are interested in the preservation of the family during this stressful period of economic adjustment. The good of the Oklahoma statute certainly outweighs such defects as the new law may be thought to possess. After a few years of trial, if the new property regime gains favor with the people, it will be an easy matter for statutory adjustments to be made as their need is proved. It may be that Congress will wipe out the tax advantages of the community property system now enjoyed, but the ideal of a fair and equitable system of property laws for two people who are working together for the benefit of a family will never die, and Oklahoma is to be congratulated on joining the ranks of these believers, whatever the immediate cause of her initiation.

98. La. Const. of 1921, Art. XI, § 3; Nona Mills Co. v. Swain, 125 La. 233, 51 So. 128 (1910); Jefferson v. Herold, 144 La. 1064, 81 So. 714 (1919). La. Const. of 1898, Art. 246 is practically the same as La. Const. of 1921, Art. XI, § 3, and identical as to the specific clause in question.


101. See Daggett, op. cit. supra note 16, at 23, c. IV, Limitations upon Husband's Powers as Head of Community.

102. Note 33, supra.