

CAN A MARRIED WOMAN IN THE PHILIPPINES EN- GAGE IN COMMERCE WITHOUT THE CONSENT OF HER HUSBAND?

By MIGUEL TANJANGCO *

I. THE PLACE OF MARRIED WOMAN IN THE LAW

a. *In The Common Law.*

"By marriage," says Blackstone, "the husband and the wife are one person in law. The very being or legal existence of the woman is suspended during marriage, or at least, is incorporated and consolidated into that of the husband, under whose wing, protection, and cover she performs everything; and is therefore called, in our law French, a "feme covert"; is said to be "convert baron" or under the protection and influence of her husband, her baron, or lord; and her condition during marriage is called her "coverture". Upon this principle of a union of person in husband and wife depend almost all the legal rights, duties, and disabilities that either of them acquire by the marriage."¹

b. *In the Civil Law.*

As a result of this underlying philosophy of the law, the married woman can do almost nothing that can be legally efficient and valid without the consent of her husband, either given before or after the act has been performed. The Civil Code of Spain and those of other countries, especially the Latin countries (France, Belgium, Holland, Italy, Portugal, Roumania, Chile, Mexico, Peru, etc.) accept, with more or less variations, the system of marital authorization, according to which the wife cannot act without the consent of the husband, whatever may be the economic regime of the marriage, and even if the regime of separation of property is adopted. It is not that the woman by her marriage loses completely her intellectual powers to discern the prejudicial from the favorable, but it is because the husband is given the obligation of protection, and such obligation cannot be performed unless he is also given the means.² This system of marital authorization was not in any way originated in the Spanish law. It is an old concept. A reading of Roman history will reveal the fact that in early Rome there were legislations by Theodosius and Honorius, prohibiting pa-

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¹ Tiffany, Persons and Domestic Relations, p. 53.

² 1 Manresa, 329-30.

tricians and nobles from engaging in commerce, and the same disability was imposed upon women by a decision of the juriconsult Paulus.³

c. In the Philippines.

Having behind our legal system the legal system of Spain, which was in turn derived largely, if not totally, from the legal system of Rome, we find our laws limiting the personality of the married woman. This limitation is found in diverse provisions of the Civil Code and Code of Commerce. It is likewise found, by virtue of a similar common-law theory respecting the personality of a married woman, in the Code of Civil Procedure. An examination of the pertinent articles of the Civil Code shows that upon marriage, there is imposed upon the husband the obligation to protect the wife, and upon the wife the obligation to obey the husband.⁴ This shows clearly that the husband is made, by express provision of the law, the head of the conjugal home, with an obligation to protect. From this obligation must necessarily be inferred the corresponding authority to make effective the exercise of the obligation imposed. Thus, the wife is obliged to follow the husband wherever he may establish his residence, except that the courts, for just cause, may exempt her from this obligation when the husband goes to foreign countries.⁵ With respect to the property of the conjugal partnership, the law in explicit terms provides that the husband shall be the administrator of the community property.⁶ But more convincing than any other article as to the position that a married woman occupies before the law is article 60 of the Civil Code which provides: "The husband is the representative of the wife. The latter cannot, without his permission, appear in any judicial proceeding in person or by attorney. Nevertheless, she shall not require such permission to defend herself in a criminal proceeding, or to commence an action against her husband or defend herself in any action brought against her by him, or when she has been authorized to become a party to a suit in accordance with the provisions of the law of Civil Procedure." This article of the Civil Code is not in effect now in the Islands, because the operation of articles 42 to 107 of the Civil Code was suspended by a decree of the Governor-General under date of December 29, 1889, which was published in the same month, on

³ Blanco, Derecho Mercantil, vol. I, p. 373.

⁴ Civil Code, art. 57.

⁵ Civil Code, art. 58.

⁶ Civil Code, Art. 59.

the 31st, in the *Gaceta de Manila*. (See *Benedicto v. De la Rama*, 3 Phil. 34.) But similar provisions are found in the Spanish Law of Civil Marriage of 1870, which have been retained in force. This shows how clearly the legislators intended to submerge the personality of the wife under that of the husband. So, she may neither, without the permission of her husband, or a power of attorney from him, acquire property for a good or valuable consideration, alienate her property or contract obligations, except in the cases and with the limitations established by law.⁷ Anything done by the wife in violation of this limitation is void, except that purchases of things which by their nature are to be applied to the ordinary use of the family shall be valid. Purchases of jewels, furniture, and expensive things made without the permission of the husband shall be validated only in case the latter shall have consented to the use and enjoyment of such things by his wife.⁸ These provisions of the Civil Code of Spain limiting the capacity of the married woman indicate that in the civil law the presumption is that the married woman has no capacity and all her acts are void, except in certain specified cases which are excepted for diverse reasons of policy. It was this underlying principle of the civil law which Spain brought to the Philippines and which we have retained to the present time with very slight and insignificant modifications.

The same theory may be said to prevail in the mercantile branch of the law. One thing which will prevent a person from acquiring legal capacity to customarily engage in commerce, even if in possession of all the other requisites of law, is the fact of being subject to marital authority.⁹ So that a married woman, under express provisions of the Code of Commerce, even over 21 years of age, cannot engage in commerce, without the authority of her husband, either contained in a public instrument recorded in the commercial registry,¹⁰ or presumed, if she does engage in commerce with the knowledge of her husband.¹¹ And the husband can freely revoke the permission expressly or impliedly granted the wife to trade, stating the revocation in a public instrument, which shall also be recorded in the mercantile registry, besides being published in the official newspaper of the town, should there be any, or otherwise in that

⁷ Civil Code, Art. 61.

⁸ Civil Code, Art. 62.

⁹ Code of Commerce, Art. 4.

¹⁰ Code of Commerce, Art. 6.

¹¹ *Id.*, Art. 7.

of the province, and announcing it to her correspondents by means of circulars.¹² The policy of limitation in the commercial field cannot be more emphatically declared than in article 9 of the Code of Commerce which provides: "A woman who at the time of contracting marriage is engaged in commerce shall require the permission of her husband to continue the same." This shows that although a woman may be fully capable of habitually engaging in trade, the moment she contracts marriage, her capacity ceases, and so that it may continue, the authorization of the husband, express or implied, is necessary. As succinctly stated by our Supreme Court, "the policy of the law forbids all dealings with a *feme covert*, unless conducted in the manner prescribed by statute."¹³

The above exposition relating to the incapacity of married woman refers to the state of the law prior to the enactment of Act 3922 of the Philippine Legislature. This act amended article 1387 of the Civil Code, which reads "The wife, without the authorization of the husband, cannot alienate, encumber, or mortgage the paraphernal property, or appear in court to litigate with regard to the same unless she has been judicially authorized to do so", so as to read: "The married woman, of age, may alienate, encumber or mortgage or otherwise dispose of her paraphernal property, and appear in court to litigate with regard to the same, without necessity of the permission or presence of the husband." The question now is whether this amendment of article 1387 of the Civil Code has so altered the legal situation as to enable the married woman now to engage habitually in commerce without the authorization of her husband. To properly answer this question, we have to first discuss and discover the scope of the prohibition found in the Code of Commerce upon the capacity of married women to trade.

II. SCOPE OF LIMITATION IN CODE OF COMMERCE

a. *Meaning of "merchant"*.

The Code of Commerce in article 1 provides: "The following are merchants for the purposes of this Code: (1) Those who, having legal capacity to trade, customarily devote themselves thereto; (2) Commercial or industrial associations which are formed in accordance with this Code." This provision defines the word "merchant" for the purposes of the Code. "Merchant" in the ordinary acceptance of the term, is a person who

¹² *Id.*, art. 8.

¹³ *Carratala v. Samson*, 43 Phil. 751.

engages in commerce. And "to engage in commerce" is to buy, sell, and traffic in goods for the purpose of gain. In this ordinary sense of the word, the term "merchant" has a very broad meaning, and applies to all who devote themselves to commercial negotiations or traffic, even if commerce is not their habitual occupation. But in the juridical sense, as may be gathered from the provision of the Code of Commerce quoted above, one cannot be a merchant, even if he has the legal capacity, unless he customarily devotes himself to trade. In the legal acceptation of the word "habituality" is essential. The essential characteristics which distinguish a "merchant", therefore, are: legal capacity to trade, devoting oneself to acts of commerce, and habituality in the exercise of those commercial acts.¹⁴ Thus, a person who customarily engages himself in buying local products to be sent and sold in foreign markets, must be considered a merchant.¹⁵ Can a married woman in the Philippine Islands be considered a merchant, in the legal sense, if she engages habitually in trade without the consent of her husband, either express or implied? It seems from the provisions of the law that she cannot be considered a merchant under such circumstances, because she would be lacking one essential element to make a merchant, namely, legal capacity to trade.

b. *Legal Capacity.*

Article 4 of the Code of Commerce, provides; "Persons possessing the following conditions shall have legal capacity to customarily engage in commerce: (1) Those who have reached the age of 21 years, (2) Those who are not subject to the authority of a father or mother nor to marital authority, (3) Those who have the free disposition of their property. The fact that a woman has complied with one of the requisites of this article, as reaching the age of 21, will not be sufficient to make her a merchant under the Code, even if she performs commercial acts, as the concurrence of the other prescribed requisites are necessary for such qualification.¹⁶ Prior to the passage of Act 3922, a married woman clearly lacked the requisites mentioned in paragraphs 2 and 3 of the article. She could not be a merchant; that is, she could not engage in commerce. It must be borne in mind always, however, that we are treating in this discussion of the capacity to *habitually* engage in commerce, and not merely to perform isolated acts of commerce.

¹⁴ Blanco, *Derecho Mercantil*, vol. I, pp. 372-373.

¹⁵ *Op. Sp. Sup. Ct.*, July 19, 1896.

¹⁶ *Op. Sp. Sup. Ct.*, May 5, 1901.

In order that she may be legally capable to engage habitually in commerce, she must have the authority of her husband, either contained in a public instrument which shall be recorded in the commercial registry,¹⁷ or implied from the fact that she engages in commerce with his knowledge.¹⁸ The law is neither arbitrary nor unjust in thus limiting the capacity of the married woman to engage in trade. This principle, embodied in all legislations, has its fundamental reason in the existing family order. If the husband is the head of the conjugal society, called upon in this character to direct the affairs of the same, and entitled to be followed by the wife for the promotion of the mutual welfare of the family and the attainment of the ends of conjugal life; and if, on the other hand, the woman owes obedience to her husband, it is logical that the latter, taking into account the aptitude of his wife, her mission in the conjugal home, and the special circumstances which they may encounter, should determine if the wife can devote herself to commerce without giving rise to trouble or prejudicing the moral or economic order of the family.¹⁹ This controlling power is logically lodged in the husband, because of the consequences which follow when a woman engages in commerce.

c. Effect of Authorization

When a married woman is authorized to engage in commerce by her husband, always granting that she has the other requisites necessary to qualify her as a merchant, she can perform validly all classes of juridical acts and enter into all classes of contracts necessary to her freely engaging in commerce. For all purposes of commerce, she is considered as a person *sui juris*, having acquired, by her husband's authorization, all the rights and obligations of merchants.²⁰

And in her mercantile transaction, she places within the reach of her creditors, not only her own separate property, but also property belonging to the community partnership. Article 10 of the Code of Commerce provides: "If the woman should be engaged in commerce in the cases mentioned in article 6, 7, and 9, of this Code, her dowry and paraphernal property and all the properties and rights that both spouses may possess in common or in the conjugal partnership, shall be liable for

¹⁷ Code of Commerce, art. 6.

¹⁸ *Id.*, art. 7.

¹⁹ Blanco, *Derecho Mercantil*, vol. I, p. 394.

²⁰ *Id.*, vol. I, p. 400.

the results of her commercial transactions, the wife being able to alienate and mortgage her own private property as well as that owned in common." The separate property of the woman should be responsible, because upon engaging in commerce she administers her property by herself and with entire liberty; and those which both have in the conjugal community or society, because that which shares in the profits should also share in the losses. The law has placed the spouses upon equal footing as merchants, irrespective of their sexes and their standing in the civil law; and since in the exercise of commerce the husband binds his separate property and the wife on her part receives her share in the profits of the traffic, and bears her losses in the *gananciales*, but not in the dowry and paraphernal property, so also when the wife is authorized to engage in commerce, her separate property and that of the conjugal partnership should respond for her transactions.²¹ It may, therefore, be said that because the husband is recognized by the law as the manager of the property of the conjugal partnership, his consent must necessarily be indispensable for the wife's capacity to engage in commerce and thereby hold the conjugal property answerable for the results of her mercantile transactions.

d. Cases Where Consent Is Not Necessary.

There are specific cases however when the law dispenses with the marital consent and allows the married woman to engage in commerce even without the authorization of her husband. Article 11 of the Code of Commerce provides: "A married woman who is over twenty-one years of age, may also engage in commerce in any of the following cases: (1) If she is separated from her husband by reason of a final decree of divorce, (2) If her husband is subject to guardianship, (3) If her husband is absent, his residence unknown, and his return not expected, (4) If her husband is serving a sentence of civil interdiction." It seems clear that in these cases, when the husband is either legally or physically unable to exercise marital authority, it is only logical to assume that the incapacity of the married woman ceases for the time being that such marital authority cannot be exercised. "The Code of 1829 condemned a married woman who has all the aptitude necessary for engaging in commerce to an incapacity to employ her activity in whatever form of industry or commerce in moments when the utility of her work is absolutely necessary, not only for her

²¹ Blanco, *Derecho Mercantil*, vol. 2, p. 401.

own subsistence, but also for that of her children who find themselves deprived of the aid of the head of the family. The new Code (our present Code) supplies this omission and makes reparation of the injury which the old Code occasioned, declaring the married woman as having capacity to engage in commerce, without necessity of marital authorization" in the cases enumerated in article 11.²² In the cases referred to in article 11, only the private property of the wife and that owned in common or of the conjugal partnership which has been acquired through commercial transactions, shall be liable for the results thereof, the wife being able to convey or mortgage either.²³ Thus the wife of the absentee may freely dispose of the property of any class whatsoever which may belong to her, and she can not alienate, encumber, or mortgage the property of her husband nor that of the conjugal partnership, except by virtue of judicial authority.²⁴

III. EFFECT OF ACT NO. 3922.

It seems evident from the state of the law as discussed above that in no case can a married woman legally engage in commerce without the authorization of the husband, except in those cases when such authorization cannot be legally granted. With this state of the law, Act No. 3922 was passed, declaring: "The married woman, of age, may alienate, encumber or mortgage or otherwise dispose of her paraphernal property, and appear in court to litigate with regard to the same, without necessity of the permission or presence of the husband." Did this enactment of the Philippine Legislature effect such a change in the standing of a married woman before the law as to dispense also with the authorization of her husband if she desires to habitually engage in commerce? I do not think that Act 3922 can have such an effect.

a. *Amendment Limited in Scope.*

Before the passage of this Act, the wife, without the authorization of the husband cannot alienate, encumber or mortgage the paraphernal property, or appear in court to litigate with regard to the same, unless she has been judicially authorized to do so.²⁵ To dispose of her paraphernal property,

²² Blanco, Derecho Mercantil, vol. 2, p. 406.

²³ Code of Commerce, art. 12.

²⁴ Espiritu, Code of Commerce, p. 7.

²⁵ Civil Code, Art. 1387.

she needed a special power from her husband.²⁶ Neither could she bind herself, without the permission or authorization of her husband, except in the cases and within the limitations established by the law.²⁷ The incapacity to which the article which was amended referred was simply with respect to the power of *disposing paraphernal* property and litigating with respect to the same and no other. The amendment, therefore, when correctly construed, authorizes nothing more than that which was formerly prohibited by article 1387 prior to its amendment. The amendment cannot be logically given a broader meaning than this, because there is nothing in the amendment which would show the intention of the legislature to make the scope of the amended article broader than what it was originally. The authority given by the amendment is not even broad enough to enable her to alienate, encumber, mortgage, or dispose of her unappraised dowry property, for which she needs the authorization of her husband under the express terms of article 1361 of the Civil Code. In other words the authority given by Act 3922 is clearly limited only to the subject dealt with; namely, the authority to dispose of and litigate with respect to the paraphernal property. So that aside from being able to dispose of her separate property without marital consent, the wife is still under the former incapacity and as yet cannot contract in all cases. She has not become a person *sui juris* for all purposes. The fact that she can now dispose of her separate property without the authorization of her husband does not place her in a position of equal footing with him. Act 3922 for instance, has not repealed the third paragraph of article 1263 of the Civil Code which reads: "The following persons cannot give consent: (3) Married women, in the cases provided by law." Under this provision of the law, a surety bond in an election contest executed by the wife without the consent of her husband was held to be defective.²⁸ This is still the state of the incapacity of the married woman, with the single exception of dispositions of her paraphernal property and litigating with respect to the same.

Since the scope of Act 3922 is necessarily limited by the scope of article 1387 of the Civil Code in its original form, it is but logical to say that the articles of the Code of Commerce with respect to the incapacity of a married woman to engage

²⁶ Mercado v. Tan Lingco, 27 Phil. 319.

²⁷ Carratala v. Samson, 43 Phil. 751.

²⁸ Lucero v. De Guzman, 45 Phil. 852.

in trade still remain unmodified in their essential provisions. It is undeniable that with respect to isolated acts of commerce, in which only the separate property of the wife is involved, it may be said that she is fully capable. But to habitually engage in commerce and be a "merchant" in the juridical sense, she would still require the consent, express or implied, of her husband. The amendment of article 1387 of the Civil Code by Act 3922 has only in a slight degree modified the standing of a married woman in the commercial law, but not to the extent of enabling her to engage in trade without marital authorization.

Article 4 of the Code of Commerce provides:

"ART. 4. Persons possessing the following conditions shall have legal capacity to customarily engage in commerce:

1. Those who have reached the age of twenty-one years.
2. Those who are not subject to the authority of a father or mother nor to marital authority.
3. Those who have the free disposition of their property."

Under this provision, a married woman could not have legal capacity to trade for two reasons: (1) she was under marital authority, and (2) she did not have the free disposition of her property, inasmuch as under article 1387, before its amendment, she could not dispose of her separate property without the consent of her husband. The effect of the amendment, therefore, is only to abolish the second reason for her incapacity to engage in trade, by giving her a free disposition of her property. But the abolition of the second reason for incapacity leaves the first reason fully untouched. She does not cease to be under marital authority, and therefore, she can never have legal capacity to engage in trade without marital authorization.

It must always be remembered that the underlying philosophy of the law is that a married woman has no personality except in the cases expressly recognized by law. Limitation is presumed, and the grant of authority must be clearly expressed by the law. Unless the legislature expressly authorizes a married woman to engage in trade without marital authorization, she cannot do so. The provisions of law granting certain rights to married women, with or without the authorization of the husband, are enabling in nature;²⁹ which means, that the law always takes for granted that a married woman has a limited

²⁹ Scott v. Litten, 91 Ala. 623, 8 So. 783.

personality, and an abolition of any incapacity, like the incapacity to engage in trade, must be expressly made. She must be expressly enabled or given capacity to do any particular act. The power which is expressly forbidden by law cannot be given by mere presumption.³⁰

The construction given by courts in the United States to statutes similar in nature and provisions to those of Act 3922 show also that the scope of the authorization they give is limited. Under the statutes of Louisiana, a married woman could not contract without the consent of her husband, until 1916. There was also a legal provision to the effect that a married woman could not mortgage or pledge her separate property for a debt of her husband. When in 1916, married women were allowed to enter into contracts without marital consent, a case came up in which the Supreme Court of Louisiana laid down the following ruling: "Act 94 of the Acts of 1916, providing that a wife may sue and be sued to the same extent and in the same manner as though she were a *feme sole*, did not repeal the provisions of the Civil Code declaring a married woman incapable of mortgaging or pledging her separate property for a debt of her husband, and merely permits a married woman to do without the authorization of the husband what she was theretofore capable of doing only with his authorization."³¹ Following the same line of reasoning, Act 3922 merely permits a married woman to do without the authorization of the husband what she was, prior to its enactment not capable of doing under article 1387 (which was the only article amended) without his authorization. It cannot be construed to repeal the prohibition contained in the Code of Commerce, which is entirely a different and separate matter.

In another case, the Supreme Court of the United States said: "The 729th section of the Revised Statutes of the District of Columbia gives a married woman power to contract, to sue and be sued in her own name in all matters having relation to her sole and separate property. *No other power to contract is given to her.*"³²

In Idaho, where the laws permitted a married woman to contract, and to sue and be sued in her own name in relation to her paraphernal property, but required that certain formalities be complied with in order that she may be recognized as

³⁰ *Gavieres v. Adm. of Peña*, 13 Phil. 449.

³¹ *Lorio v. Gladvey*, 147 La. 930, 86 So. 368.

³² *Seitz v. Mitchell*, 94 U. S. 580, L. ed. 179.

a sole trader, the Supreme Court of the State, in an action by a married woman who had not complied with the formalities required for sole traders, said: "She might, and we think could, recover in this action for any damages to her separate property without a proper allegation in her complaint; but she cannot prove damage to a business which she was not legally authorized to conduct."³³ In my opinion a parallel situation now obtains in the Philippines; that is, a married woman may be able to litigate with respect to her paraphernal property, but still must comply with the Code of Commerce (regarding husband's consent) to be recognized in court as a merchant and be able to take advantage of the provisions of the law on merchants and commercial transactions.

In the Philippine Islands, the Supreme Court has laid down the rule that "even if the wife is carrying on a private business with the presumed authority of her husband, such presumption will not authorize her in mortgaging the property used in such private business."³⁴ Following a similar line of argument, it can be said that the converse of the proposition is true; namely, that even if the wife is authorized to alienate, encumber, or mortgage her paraphernal property, such authorization will not authorize her in engaging in business without marital consent, as long as she is under marital authority.

This conclusion is supported by the very reason we have stated for requiring marital consent. Since the responsibility of the husband for directing the affairs of the family is not taken away from him by Act 3922, there is no reason why his authority of determining when his wife should or should not engage in trade should be taken away from him by a mere inference which is not even clear or convincing. A glance over the laws of California will indicate the reason why in some states of the Union a married woman is allowed to trade in her own name. In that state, a married woman may become a sole trader by the judgment of the superior court of the county in which she has resided for six months next preceding the application.³⁵ But in order that she may be adjudged a sole trader it is necessary to file the proper application, verified under oath, and setting forth: (1) That the application is made in good faith to enable her to support herself, or herself and others upon her, giving their names and relations, (2) The fact

³³ McDonald v. Rozen, 8 Idaho, 69 Pac. 125.

³⁴ Gavieres v. Adm. of Peña, 13 Phil. 449.

³⁵ California, C. C. P., Sec. 1811.

of insufficient support from her husband and the causes thereof, if known, (3) Any other grounds of application which are good causes for a divorce, with a reason why a divorce is not sought, and (4) The nature of the business proposed to be conducted, and the capital to be invested therein, and the sources from which it is derived.³⁶

In the state of Kentucky, it has been held that were in a suit under Gen. St. Ky. ch. 52, Art. 2, sec. 6, by the wife against her husband, for judgment empowering her to use and convey her own property free from claims of his debts, and to contract, sue, and trade as a single woman, it appears that the plaintiff lives on her own land and is competent to manage her affairs, that she and her husband have been separated for two years, that she supports herself, and that the creditors, if there be any, will not be prejudiced by the judgment, then it is proper for the court to grant the relief prayed for—to allow her to act as if a single woman.³⁷

From these it may be deduced that a married woman is allowed by statute in the states of the Union to trade as if single only because of necessity, that is, upon grounds which show that the husband does not, or cannot, exercise marital authority, or is incapable of giving support to the family. It is only logical that this should be. In the Philippines, the same rule substantially prevails. Here, a married woman can engage in commerce without marital authorization (1) If she is separated from her husband by reason of a final decree of divorce, (2) If her husband is subject to guardianship, (3) If her husband is absent, his residence unknown, and his return not expected, and (4) If her husband is serving a sentence of civil interdiction. In all these cases the marital authority is more or less suspended by special circumstances, and the woman is considered is not being under marital incapacity. Reasons of policy and necessity require that in such cases the married woman who is otherwise capable be allowed to engage in commerce. But in the absence of these special circumstances and when the marital authority of the husband can be fully and completely exercised, it seems very obvious that such want of authority must be the final judge as to when to allow the wife to engage in commerce.

³⁶ California, C. C. P., Sec. 1817.

³⁷ Azbill v. Azbill, 92 Ky. 154, 17 S. W. 284.

b. *Law on Conjugal Property Unchanged.*

Aside from the fact that Act 3922 has left marital authority still subsisting, it has left untouched the present concept of community property. The provisions of our law respecting conjugal property is another great barrier to the wife's engaging in commerce without the consent of her husband. It would do well to study the provisions of the statutes of the American states giving married woman the power to engage in trade, in relation to conjugal property, and compare them with our laws.

In California, all the property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, *with the rents, issue, and profits thereof*, is her separate property, the wife may, without the consent of her husband, convey her separate property.³⁸ The earnings of the wife are not liable for the debts of the husband.³⁹ And when she has been adjudged a sole trader, she becomes entitled to carry on the business specified in her own name, and the property, revenues, and credits so by her invested, and the profits thereof, belong *exclusively* to her, and are not liable for any debts of her husband.⁴⁰

In Pennsylvania, under the Act of June 3, 1887, providing that a married woman may carry on a business as if she were a *feme sole*, a married woman, who leases a farm and carries it on as her own business in her own right, is *entitled to the proceeds* of the farm, and the *profits* arising from the sale of such proceeds, as against the creditors of the husband, without regard as to whether she procured such lease on the credit of the separate estate or not.⁴¹

In Washington, the property and pecuniary rights of a married woman at the time of her marriage, or afterwards acquired by gift, devise, or inheritance, shall not be subject to the debts or contracts of her husband, and she may manage, sell, convey, or devise the same by will to the same extent and in the same manner that her husband can property belonging to him.⁴² The property, either real or personal, acquired by any married woman *during coverture*, by her own labor, shall

³⁸ California, Civil Code, sec. 162.

³⁹ California, Civil Code, sec. 168.

⁴⁰ California, Code of Civil Procedure, sec. 1819.

⁴¹ *Wayne v. Lewis*, 16 Atl. 862.

⁴² Statutes of Washington, sec. 2992. Cited in *Elliot v. Hawley*, 34 Wash. 585, 76 Pac. 93.

be liable for the debts, contracts or liabilities of her husband, but shall, in all respects be subject to the same exceptions and liabilities as property owned at the time of her marriage or afterwards acquired by gift, inheritance, or devise.⁴³

Under the Married Woman's Act in New Jersey, a married woman may embark her own money and capital in any separate business or trade, may make valid contracts respecting the same, may employ agents in carrying on such business or trade, and may avail herself of their skill and ability to make it successful. She may employ her husband as such agent, and make use of his business ability, experience, and energy to the same purpose. *Earnings* upon or increase of her capital in such business or trade, though in part due to the services rendered by her husband, will still belong to her, and will not be liable to be seized by the husband's creditors as his property.⁴⁴

It is evident from the laws of the states mentioned that the earnings and profits of a married woman engaged in trade become her sole and separate property. The husband has no interest in them. Under our law, however, the situation is entirely different. By virtue of the conjugal partnership the earnings or profits obtained by either spouse during the marriage belong to the husband and wife, share and share alike, upon its dissolution.⁴⁵ The fruits of the paraphernal property form part of the assets of the conjugal partnership, and are subject to the payment of the debts and expenses of the household.⁴⁶ The profits, therefore, that may arise from a married woman's engaging in commerce, legally belong to the conjugal partnership in which the husband has a legal interest and of which he is the administrator. They become liable for the payment of the expenses of the married couple. The husband's creditor may bring his action, not, as a general rule, against the paraphernal property, but against the fruits and income of such property of the wife.⁴⁷ And even for the recovery of damages for the use of an article which is paraphernal property of the wife, such as a ship, the husband has a direct interest in such damages and is a necessary party.⁴⁸ Property acquired

⁴³ Statutes of Washington, sec. 2993. Cited in *Elliot v. Hawley*, 34 Wash. 585, 76 Pac. 93.

⁴⁴ *Taylor v. Wands*, 55 N. J. E. 491, 37 Atl. 315.

⁴⁵ Civil Code, Article 1392.

⁴⁶ Civil Code, Article 1385.

⁴⁷ *Javier v. Osmeña*, 34 Phil. 336.

⁴⁸ *Bismorte v. Aldecoa*, 17 Phil. 480.

by the spouses during marriage pertains to the conjugal partnership regardless of the form in which the title is taken, and the fact that a composition title to the property is taken in the name of one of the spouses only, whether husband or wife, does not change the character of the property.⁴⁹

In view of this state of our law with respect to conjugal partnership property, as distinguished from the law on the same subject in states where married women are given freedom to engage in commerce, it seems clear that the husband will always have a direct interest in the commercial transactions of his wife, even if the capital in the enterprise be nothing more than her paraphernal property. She will have the power to alienate, encumber, or mortgage such paraphernal property, or litigate with respect to the same, but with respect to the profits or losses that will be incident to her engaging in commerce, the husband has an immediate interest. He has an interest in the profits because the profits form part of the conjugal property, to an equal share of which he is entitled upon the dissolution of the marriage. He has an interest in the losses, because the conjugal partnership property of which he is the administrator, becomes liable for the commercial transactions of the wife; hence, the husband's share in the conjugal property also suffers in the losses. Under these circumstances he must be entitled to determine when and how his wife should engage in commerce.

c. Commercial Law Not Changed.

The state of the law has not been changed by Act 3922 in so far as marital authorization is required to enable a married woman to engage in commerce. The provisions of the Code of Commerce in this matter are still in full force and effect. That a married woman in the Philippines may be able to legally engage in commerce, she must comply with such provisions: she must have the authorization, express or implied, of her husband. If such authorization is not granted, her acts in engaging in commerce would be without legal effect.

In Alabama, where the Code of 1886, section 2435, provided that a wife should be liable for debts contracted by her with the consent of her husband, and section 2350 provided that she might, with the consent of her husband, expressed in writing and filed in the office of the probate judge, enter into and pursue any lawful business, it was held: That where no such

⁴⁹ *Guinguing v. Abuton*, 48 Phil. 144.

consent was given, her acknowledgment of liability was without legal efficacy.⁵⁰

In North Carolina, where the Code, section 1827, provides that a married woman, to become a free trader, shall with her husband, sign a writing, stating that she with her husband's consent, testified by his signature thereto, enters herself as a free trader, which writing shall be filed with the register of deeds, such married woman cannot execute a conveyance of property in the exercise of trade without such consent of her husband. The conveyance made would be void.⁵¹

In Massachusetts, the failure of a married woman doing business on her separate account to comply with the formalities of the statutes prevents her from acquiring absolute ownership over the profits from such business, and the profits so accruing may be attached for her husband's debts.⁵²

Following the same principles, when a married woman engages in commerce without her husband's consent, in the Philippines, her acts would be without legal effect.

An interesting case is that of *Kuster v. Dickinson* (45 Fed. 91), from which I quote pertinent parts of the opinion: "The position taken by the plaintiffs is this: That the business of these two stores is conducted by the defendant debtors, the husbands of the married women, each one as the agent of his wife. It is contended that a married woman, under the law of South Carolina, cannot engage in trade; she cannot, therefore, authorize another as her agent to do so. The husband, thus holding himself out as such agent for one not competent to appoint an agent, is in the position of one acting for an undisclosed principal, and is himself personally liable on all contracts for the purchase of goods, and so the owner of the goods purchased, which are liable for his debts.

"Can a married woman in South Carolina engage in trade?

"Article 14, section 8 of the Constitution declares: 'The real and personal property of a married woman, held at the time of her marriage, or that which she may acquire thereafter, either by gift, grant, inheritance, devise, or otherwise, shall not be subject to levy and sale for her husband's debts, but shall be held as her separate property, and may be bequeathed, devised, or alienated by her the same as if she were unmarried.'

⁵⁰ *Horton v. Hill*, 138 Ala. 625, 36 So. 465.

⁵¹ *Williams v. Walker*, 111 N. C. 604, 16 S. E. 706.

⁵² *Snow v. Sheldon*, 126 Mass. 332, 30 Am. Rep. 684.

"In 1887, the legislature of South Carolina declared that all the earnings and income of a married woman shall be her own separate estate, and shall be governed by the same provisions of law as apply to her separate estate.

"In 1870, the legislature gave to married women unlimited power to contract. But in 1882, this was amended so as to read as follows: 'A married woman shall have the right to purchase any species of property in her own name, and to take proper legal conveyances therefor, and to contract, and to be contracted with, *as to her separate property*, in the same manner as if she were unmarried.'

"A married woman cannot directly or indirectly make herself or her separate estate liable for the debts, contracts, or engagements of her husband, or of any other person.

"She can bind herself by contracts made by herself for the preservation, maintenance, improvement, or productive development of her separate estate, and may constitute her husband, or anyone else, her agent in her behalf. So a married woman can, with a view to enlarge or increase her separate property, buy other property, and create a lien on that already owned by her; or, if she have no separate property, can create it by borrowing money for that purpose.

"If money can be borrowed, so may goods be borrowed. If a married woman can lay out money on her separate estate for the purpose of producing crops and selling them, she can purchase property and sell it for the purpose of profit. If she buys a stock of goods on credit, either to add to or to create a separate estate, it becomes 'at once a part of her separate estate, and her contract to pay for it is an enforceable contract against her.' If she can acquire property by this way, she has all the rights of ownership over it, and can sell it how and when she pleases, and can authorize anyone to do so. If she devotes her time and skill and intelligence in effecting such sales, under the act of 1887, her earnings are her separate property.

"There is nothing in the constitution or statutes, or in the decisions of the Supreme Court of South Carolina which forbids a married woman from engaging in trade by herself." The conclusion, therefore, was that from the freedom of a married woman to contract may be implied her freedom to engage in trade.

This decision would be perhaps controlling on the subject being discussed if there had been no specific provisions in the

Code of Commerce denying the right to engage in commerce without marital authorization to married women in the Philippines. The above quoted opinion bases its reasoning upon the premise that a married woman may, if she has no capital of her own, borrow money, and the money thus borrowed to constitute her capital in business would be her own separate property. This cannot be done in the Philippines, because the married woman in such case, not having separate property, cannot borrow. Her contract of loan, without the consent of her husband, would be void. Then, again, in the decision cited, it is clear that in South Carolina the profits derived by a married woman from her separate business and the products of her separate estate belong exclusively to her. As already said, such profits and products, in the Philippines, would belong to the conjugal partnership, in which the husband has a direct interest. And thirdly, "there is nothing in the constitution or statutes, or in the decisions of the Supreme Court of South Carolina which forbids a married woman from engaging in trade by herself." This last paragraph in the quoted opinion destroys its force as a persuasive authority for the Philippines; we have express provisions in the Code of Commerce denying the right to engage in commerce to married women without the authorization of their husbands.

IV. CONCLUSION

A married woman, therefore, cannot be a merchant, as understood in the Code of Commerce, without the permission of her husband that she engage in commerce. Because of this incapacity, she cannot have her name registered in the mercantile registry, which is kept by the Bureau of Commerce and Industry.⁵³ And if she is not registered, she cannot request the registration of any document in the mercantile registry, nor take advantage of its legal effects.⁵⁴ And third parties assume the risk in every case that he knowingly deals with her.⁵⁵

a. *Recommendation*

It seems that this legal situation has become antiquated and behind the times. The Philippine Legislature has already started the wave towards granting married women greater rights. Act 3922 has already given her freedom to dispose of her paraphernal property without the consent of her husband.

⁵³ Code of Commerce, article 16.

⁵⁴ *Id.*, article 18.

⁵⁵ *Carratala v. Samson*, 43 Phil. 751.

I think it would be a progressive step if we modify our laws so as to give to the married woman who possessess paraphernal property the right to engage in trade without the consent of her husband, and to give her also the exclusive ownership of the profits and earnings from such paraphernal property or business conducted with respect to the paraphernal property. This would give the married woman entire freedom in the disposition of her paraphernal property, and encourage her in engaging in trade for the purpose of profit. It need not be feared that the conjugal harmony might be destroyed by such an innovation, because as long as the spouses remain husband and wife, and the harmonious relations subsist between them, the advise of one will count with the other, in an extralegal way. But if one party is convinced that her engaging in trade, with her paraphernal property as her capital, will result in profit, increase her estate, and thereby benefit her children, who are also her husband's children, the husband should not be given the power to prevent her from doing whatever she may think best with respect to her separate property.

In closing, I would like to quote a provision from the statutes of Louisiana which may serve as models for our Legislature in giving greater civil rights to married women. I refer to the Acts of 1928, No. 283, which provide:

"Sec. 1.—All married women, including non-residents, so far as they may be affected by the laws of this state, shall be and are hereby fully emancipated from all the disabilities and relieved from all incapacities to which, as such, they are now subject, and they are hereby empowered to make contracts of all kinds, or to assume or stipulate for obligations of all kinds, in any form or manner now permitted, or which may hereafter be permitted by law, for any person, married or unmarried, of either sex, and in no case shall any act, contract, or obligations of a married woman, require for the validity or effectiveness thereof, the authority of her husband or of the judge.

"Sec. 2.—Married women shall have capacity to institute or defend suits, or otherwise appear in judicial proceedings, and to stand in judgment, without the authority of their husbands, or of the judge."

The purpose of this statute was to abolish the authority of husbands over married women, in respect to contracts and obligations and to appearance in judicial proceedings.⁵⁰ It may not be too early for the Philippines to make the same change.

⁵⁰ Youngblood v. Daily Tribune, 15 La. App. 379, 131 So. 604.