An Appraisal of the Louisiana Law of Partnership: A Comparative Law Focus on Source Materials and Underlying Practices (Part One)

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A COMPARATIVE LAW FOCUS ON SOURCE MATERIALS AND UNDERLYING PRACTICES*

(PART I)

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Preface

This article examines the Louisiana law of partnership, a branch of the state’s law which is thought on the whole to have remained “civilian,” with the aim to determine (1) whether this branch of Louisiana law, purely verbal differences being disregarded, is materially different from the corresponding segment of Anglo-American law; and (2) whether the Louisiana law of partnership, in those respects in which it does differ, is superior or inferior to the law of other states.

The discussion of these two questions is subdivided into four sections. The first section traces historically the development of the Louisiana law of partnership and, by analyzing the authorities cited by counsel and by the courts, attempts to arrive at the respective influences of civil and common law on that development and to determine the extent to which Louisiana courts have taken rules of partnership law directly from Anglo-American sources. In the subsequent sections of this article three basic phases of partnership law are selected for detailed examination; those three phases include most of the fundamental partnership doctrines. The second section compares the scope of the partnership concept in Louisiana with that in Anglo-American jurisdictions, examines the respective tests which have been used to determine when a partnership exists, and attempts to determine whether the facts essential to create a partnership in Louisiana are the same as the factual requisites in Anglo-American jurisdictions. The third section investigates the juridical nature of the Louisiana part-

* The substance of this article was submitted in partial fulfillment of the requirements for an advanced degree in law at Yale Law School.
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ship and attempts to determine whether the entity view, which the Louisiana courts have adopted from the French commentators, has resulted in underlying practices basically different from those prevailing in Anglo-American jurisdictions. Finally, the fourth part scrutinizes the various kinds of partnerships discussed in the Louisiana Civil Code and in the Louisiana jurisprudence and compares them with conceptual and functional equivalents in Anglo-American law to determine whether the Louisiana devices also prevail in Anglo-American jurisdictions, and whether the Louisiana classifications and the varying rules applied to each class serve any useful purpose. Throughout this article an effort is made to cut through terminology and to view the law as it actually functions.

A comparative treatment of the Louisiana law of partnership is difficult. Approximately one thousand Louisiana decisions have considered questions of partnership law; these cases extend from 1815 to the present time. No jurisprudence could be more confusing or more irreconcilable. The development of consistent jurisprudence has been hindered rather than assisted by the partnership articles of the Civil Code.¹ In the first place, many of these codal provisions are vague and confusing; in particular the definitions of the various kinds of partnerships are imprecise and contradictory. In the second place, the codal provisions were drafted in 1825 in substantially their present form and were intended to apply to ordinary partnerships (roughly equivalent to the non-commercial partnerships of Anglo-American law); clearly these provisions are not now, and long have not been, adequate to regulate business practices in the rapidly changing American economy. Louisiana courts and Louisiana lawyers, faced with these deficiencies in their statutory law, at various times have examined rules and reasoning from a variety of sources—some Spanish, some French, and some Anglo-American.

Though the results attained by the courts in particular decisions involving partnership law usually have been equitable, the courts have not reconciled the reasoning on which their decisions are based or laid down a consistent system of rules for the future guidance of the legal profession. In many instances,

counsel have argued, and the courts have decided, questions of partnership law as if they were of first impression when in reality the identical points had been adjudicated in prior decisions. Further, many of the cases dealing with partnership law were decided between 1825 and 1860. To evaluate these early cases is extremely difficult in view of the great political, social, and economic changes which have occurred in Louisiana since the Civil War. Legal writers have rendered but little assistance in clarifying Louisiana's partnership law. Extra-judicial materials discussing Louisiana partnership law are brief and deal with problems narrow in scope. In all, probably less than fifteen pages of text material relating to the Louisiana partnership have been written. Each year the disorder in this field of Louisiana law has become more bewildering.

SECTION I. INFILTRATION: A CHRONICLE OF STRIFE BETWEEN LEGAL SYSTEMS

The Louisiana law of partnership, perhaps even more than other phases of Louisiana law, is a legacy of a legal "melting pot." From La Salle's exploration of the Mississippi River until 1769 Louisiana was governed by the laws of France. In that year, seven years after the cession to Spain, French laws and legal institutions were abolished and those of Spain established. French rule returned in 1800, but the French did not retain possession long enough to re-establish French legal institutions. In 1804, the year after Louisiana was transferred to the United States, the Superior Court of Louisiana (organized under congressional authority) held that the laws in force were the Spanish laws which had been introduced into the province in 1769 by its Captain General, Don Alexander O'Reilly.

When Louisiana was ceded to the United States, pioneers from the United States—strong men eager to maintain the con-


3. 1 Louisiana Legal Archives, Foreword, A Republication of the Projet of the Civil Code of Louisiana of 1825 (1937) v.
tinuity of their culture—began to migrate into Louisiana. Among the pioneers who flocked into the new American territory were American lawyers trained in the common law of England and armed with the books of Blackstone, the Constitution of the United States, and shortly afterward the works of Kent and Story.\(^4\)

The impatient, forceful pioneer lawyers encountered a "foreign" legal system, composed of a confusing and contradictory mass of authoritative materials, most of which were unobtainable and practically all of which were written in Spanish or French. The American lawyers were bewildered and frustrated. Soon after Louisiana became a territory of the United States, they attempted to install the common law of England as the basic legal pattern of the new territory.\(^5\) The attempt was largely unsuccessful.

The Creole population of the state, particularly members of the bar in the influential City of New Orleans, vigorously opposed the introduction of Anglo-American law. L. Moreau-Lislet and Pierre Derbigny, both of whom had been educated in France, were among the most active in the fight against the importation of common law. Due to the efforts of those who wished to retain the civil law, a provision was incorporated in the Louisiana Constitution of 1812 which prohibited the legislature from adopting any system or code of laws by general reference;\(^6\) and further to insure the retention of the civil law, jurisconsults were appointed by the Legislative Council and the House of Representatives of the Territory of Orleans to draft a civil code based on the laws then in effect in the territory.\(^7\)

The jurisconsults appointed did not base their code on the

\(^4\) "The Louisiana Purchase . . . brought the territory of Orleans and the commercially important City of New Orleans under the sovereignty of the United States, resulting in a great influx of 'Yankee' entrepreneurs, not few or unimportant among whom were lawyers and business men seeking their fortunes." Morrison, The Need for a Revision of the Louisiana Civil Code (1937) 11 Tulane L. Rev. 213, 225.

\(^5\) 1 Louisiana Legal Archives, loc. cit. supra note 3. See also Tucker, Source Books of Louisiana Law (1932) 6 Tulane L. Rev. 280, 280-281.

\(^6\) La. Const. (1812) Art. IV, § 11: "The existing laws in this Territory, when this Constitution goes into effect, shall continue in force until altered or abolished by the Legislature; Provided, however, That the Legislature shall never adopt any system or code of laws by a general reference to the said system or code, but in all cases shall specify the several provisions of the laws it may enact." Very similar provisions have been incorporated into subsequent Louisiana constitutions. La. Const. (1845) Art. 120; La. Const. (1852) Art. 117; La. Const. (1864) Art. 120; La. Const. (1868) Art. 116; La. Const. (1879) Art. 51; La. Const. (1898) Art. 33; La. Const. (1913) Art. 33; La. Const. of 1921, Art. III, § 18.

\(^7\) 1 Louisiana Legal Archives, op. cit. supra note 3, at vi.
Spanish law then in force in Louisiana but instead took as a model the civil law of France. They drafted the code in French; but prior to its consideration by the general assembly, translators also prepared an English version. In 1808 the general assembly adopted the new code. On the sources of the Code of 1808, Benjamin Wall Dart commented:

“This Code preserved for us the fundamentals of the Civil Law. It is commonly said that it is a copy of a projet of the Code Napoleon. This is technically correct but the Digest also embodied changes and modifications to suit the condition of the time and the people, including principles of French and Spanish law made familiar in Louisiana during the Colonial regime.”

But the adoption of the Code of 1808 did not determine conclusively which system of law was to prevail in Louisiana. The fact that the Code of 1808 was modeled on a projet of the Code Napoleon of course led to the examination of French authorities. Yet, the Code of 1808, as mentioned by Benjamin Wall Dart, also contained principles of Spanish law; and Cottin v. Cottin, decided in 1817, encouraged a resort to Spanish authorities by declaring that the Code of 1808 had only abrogated those parts of the Spanish law in force at the time of its adoption which were expressly repealed by the code or which were incompatible with its provisions.

A way also was open for the consideration of Anglo-American authorities, at least with respect to problems involving commercial partnerships. Article 61, page 400, of the Code of 1808 stipulated that the provisions of the title of the code devoted to partnerships applied to commercial partnerships, “in as much only as they do not contain any thing contrary to the laws and usages of commerce.” The Louisiana Supreme Court finally declared

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8. Tucker, supra note 5, at 282.
10. For a number of opinions as to the source of the Code of 1808, see Tucker, supra note 5, at 283-284.
11. 5 Mart. (O.S.) 93 (La. 1817). “It must not be lost sight of, that our civil code is a digest of the civil laws, which were in force in this country, when it was adopted; that those laws must be considered as untouched, wherever the alterations and amendments, introduced in the digest, do not reach them; and that such parts of those laws only are repealed, as are either contrary to, or incompatible with the provisions of the code.” Id. at 94.
12. French text (which under the Code of 1808 controlled in case of conflict with the English translation): “Les dispositions du présent titre ne s'appliquent aux sociétés de commerce, que dans les points qui n'ont rien de contraire aux lois et usages du commerce.”
that the phrase "laws and usages of commerce" in that article meant the laws and usages prevailing in other states of the union, unless such laws and usages conflicted with the positive legislation of Spain or were in derogation of locally prevailing Louisiana usages.\(^1\)

The clash in Louisiana, after the Code of 1808 was adopted, between the French, Spanish, and Anglo-American systems of law is revealed vividly by an examination of the authorities cited by counsel and the courts in partnership cases. In the first Louisiana case involving a partnership problem, *Kemper v. Smith*,\(^1\) decided in 1815, the court cited one French authority and one Spanish authority. Counsel in the case—one of whom was Edward Livingston, a native of New York, who had had considerable practice in the common law before coming to Louisiana\(^5\)—cited in their briefs four French authorities, one Spanish, and seven Anglo-American.\(^6\) In a rehearing of the same case the following year,\(^7\) counsel referred the court to fifteen French works, three works on Spanish law, two Roman authorities, five Anglo-American authorities, one Louisiana decision, and three articles of the Louisiana Code. The French authorities cited by counsel on the two hearings of the case were predominantly the works of Pothier. The Spanish work most heavily relied on was the *Código de las Siete Partidas*,\(^18\) usually referred to and cited in Louisiana as the "Partidas." The Anglo-American authorities cited were Blackstone, Anglo-American treatises on contracts and equity, and partnership cases from other American states. Apparently no partnership treatise written in English was available at that time.

The reports of cases involving questions of partnership law decided subsequent to *Kemper v. Smith* but prior to the drafting of the Civil Code of 1825 reveal little concerning the respective influences of Spanish, French, and Anglo-American authorities on the decisions of the courts. The court considered partnership questions in seventeen of the cases reported for that period. Characteristic of the early Louisiana decisions, little authority was

\(^{13}\) McDonald v. Millaudon, 5 La. 403, 408 (1833).
\(^{14}\) 3 Mart. (O.S.) 622 (La. 1815).
\(^{15}\) 1 Louisiana Legal Archives, op. cit. supra note 3, at vii.
\(^{16}\) In counting the number of authorities in briefs of counsel and in opinions of the courts, each reference to an authority is considered as a separate citation as long as the reference occurs in a different part of a brief or opinion. Reference at a single point in a brief or opinion to different sections of the same authority is counted as one citation.
\(^{17}\) Smith v. Kemper, 4 Mart. (O.S.) 409 (La. 1816).
\(^{18}\) Code of Seven Parts.
cited.\textsuperscript{19} In eight of these cases no authority at all was cited; in the other nine opinions the citation totals were: five French, three Spanish, two Anglo-American, six prior Louisiana decisions, and five articles of the Louisiana Code.

Unfortunately, briefs of counsel in these partnership cases are not reported. An examination of the names of counsel listed as arguing the cases indicate that a majority were of Irish, Scotch, or English extraction. Probably most of them did not possess French and Spanish law books\textsuperscript{20} and could not have read such materials had they been available. Anglo-American cases and texts likely were cited to the courts in considerable number but did not find their way into judicial opinions. The failure of the Louisiana Supreme Court to cite more Anglo-American authorities may be attributable in part to the domination of the court during this period by Francois-Xavier Martin, a staunch proponent of the civil law of France.

The confusion resulting from the virtual revival of Spanish law by \textit{Cottin v. Cottin}\textsuperscript{21} induced the general assembly on March 14, 1822, to appoint L. Moreau-Lislet, Edward Livingston, and Pierre Derbigny to revamp the Code of 1808. These men did not confine themselves to the legislative mandate; instead they drafted an entirely new code. The result of their efforts, the Louisiana Civil Code of 1825, was based in part on a projet of the Code Napoleon\textsuperscript{22} and in part on the writings of the French legal scholars Pothier, Domat, and Toullier.\textsuperscript{23} Like the Code of 1808, the Code of 1825 originally was prepared in French. Even today, the French text of those articles of the Code of 1825, which have been carried over into the present Louisiana Civil Code, will prevail in case of conflict over the English translations now incorporated in the Civil Code.\textsuperscript{24}

\textsuperscript{19} Perhaps the early failure of the court to cite authority indicates that it was not at that time influenced by the Anglo-American notion of stare decisis.

\textsuperscript{20} The scarcity of foreign legal materials is noted in Preface, 1 Mart. (O.S.) iii.

\textsuperscript{21} 5 Mart.(O.S.) 93 (La. 1817), discussed supra p. 311.

\textsuperscript{22} "As the French Civil Code was then at the height of its influence with two decades of experience as proof of its claim to perfection as a professional instrument it was but natural that a traditionless, quasi-civilian bar, faced with a strange and disorganized mass of foreign source material, should turn to the Code Civil for inspiration regardless of legislative instructions." Morrison, supra note 4, at 227.

In certain instances the Louisiana Civil Code of 1825 followed recommendations appearing in a projet of the Code Napoleon. 3 Louisiana Legal Archives, Foreword, Compiled Edition of the Civil Codes of Louisiana (1940) xiii.

\textsuperscript{23} Tucker, supra note 5, at 289.

\textsuperscript{24} Egerton v. The Third Municipality of New Orleans, 1 La. Ann. 435, 437
The adoption of the Code of 1825 did not by any means eliminate the influence of other legal systems on the development of the Louisiana law of partnership, nor did it prevent counsel from citing or the courts from considering Spanish, French, and Anglo-American authorities. The period between 1825 and 1860 was one of much partnership litigation. The partnership during those years was the predominant business device for the conduct of both large and small commercial enterprises. At least as many partnership cases were decided in Louisiana during those thirty-five years as during any other equal period of time. Many of the cases established "new" law. The broad, general provisions of the code clearly were not adequate to govern the fast-growing businesses and rapidly-changing commercial practices of an American state. Louisiana courts and Louisiana lawyers, encumbered by codal provisions inadequate to meet the growing complexities of commercial life, were faced with the necessity of developing supplementary legal principles or of borrowing them from other jurisdictions. The natural course of action for busy courts and lawyers was to resort to other legal systems.

The hoary Roman law of course could not contribute to the solution of the problems which confronted the Louisiana courts; consequently Roman works were not cited to any appreciable extent by either counsel or court. Counsel cited Roman authorities only six times between 1825 and 1862 and the court cited such works only eight times. Even in these few instances, apparently no real reliance was placed on those authorities; they were used as indicia of scholarship to embellish the briefs and opinions. Soon after the adoption of the Code of 1825, Spanish principles and authorities also ceased to play any considerable part in the development of the Louisiana law of partnership. In the ten years immediately following the enactment of the Code of 1825, Spanish authorities in a few instances were utilized by the courts; but, in those instances, the legal relations involved (though not litigated until after the adoption of the Code of 1825) arose while the Code of 1808 was still in effect.

In Morgan v. His Creditors, decided in 1830, the question was whether a separate creditor was entitled to a preference with respect to the separate assets of his debtor over the claims of
creditors of a firm in which the debtor was a member. The separate creditor had two claims, one created in 1824 prior to the effective date of the Code of 1825 and the other created in 1825 subsequent to the effective date of the code. The court, relying primarily on Spanish authorities, held that under the Code of 1808 the creditor was entitled to a priority with respect to the claim created in 1824; but that he was not entitled to a preference on the claim created in 1825, the Code of 1825 having changed the pre-existing law. The court determined that under the Code of 1825 partnership creditors had a preference on partnership assets but individual creditors did not have a preference on individual assets—a unique rule which prevails even today in Louisiana, though it is contrary to Roman, Spanish, French, and Anglo-American laws.

The Louisiana Supreme Court, in 1830, in _Louisiana Bank v. Kenner's Succession_, also made extensive use of Spanish legal materials in holding that a stipulation in the articles of partnership was inoperative which bound the heirs of a deceased partner to continue the partnership and to assume responsibility for contracts made in the partnership name. Counsel also cited Spanish authorities to the court in 1831, in _Bauduc's Syndic v. Laurent_, and again in 1834, in _Flower v. Millaudon_, but apparently the action of the court was not affected by those authorities. Never again were Spanish legal materials to have any appreciable influence on the development of the Louisiana law of partnership. Only one Spanish authority was cited by the court from 1840 to 1862 in partnership cases, and not a single Spanish authority was cited in the briefs of counsel reported for that period.

The decisions of the Louisiana Supreme Court and the reported briefs of counsel, for the period 1825 through 1862, contain ninety-eight citations to French legal materials on partnership. A greater resort to French authorities might have been expected in view of the close similarity between many partnership articles of the Louisiana Code of 1825 and corresponding

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28. 1 La. 384 (1830).
29. 2 La. 449, 452 (1831).
30. 6 La. 697, 704 (1834).
31. The Spanish authorities cited by counsel in _Bauduc's Syndics v. Laurent_ were listed in the opinion of the court. 2 La. 449, 452 (1831). The briefs were not reported separately.
articles in the Code Napoleon. Perhaps the principal reasons that French legal materials were not used more often were facts already mentioned, the inaccessibility of such materials and the inability of most members of the legal profession to use the French language.

Pothier, whose works were highly regarded in both France and Louisiana, was cited in the Louisiana partnership cases of this period far more frequently than other French authorities. One reason for the popularity of Pothier in Louisiana may have been that some of his works were available in English: Francois-Xavier Martin early translated into English and published Pothier on *Obligations,* and toward the end of the period Owen Davis Tudor, an Englishman, translated Pothier on *Partnership.* Further, as has been mentioned previously, Pothier's writings were utilized to a considerable extent in the drafting of the Code of 1825, and therefore those works were thought to be particularly valuable in construing provisions of that code. Other French commentators cited by the Louisiana courts and lawyers in partnership cases during this period include Toullier, Duranton, Domat, Troplong, Delvincourt, and Pardessus.

Several Louisiana decisions were grounded almost entirely on French authorities. For instance, in *Dick v. Byrne,* when a question arose as to the legal nature of the partnership, counsel referred the court to the conflicting theories set forth in the writings of the French commentators; and the court expressly based its decision on the writings of Toullier, feeling that his view of the nature of the partnership was more "consonant to the positive enactment of the Code." Incidentally, Toullier's theory was that the commercial partnership is an artificial entity separate and distinct from the persons composing it. The court accepted that notion, apparently for the first time; and the concept of the partnership as an entity (the entity idea was extended to ordinary partnerships later) has remained in the law of Louisiana. The "entity theory," which is adhered to by the Louisiana

32. Tucker, supra note 5, at 280, 289. Also William David Evans translated and annotated Pothier on Obligations; his translation was published in Philadelphia in 1839.
34. See p. 313, supra.
35. Rather extensive citation of French authorities can be found in *Findley v. Bredlovene,* Bradford and Robeson, 4 Mart. (N.S.) 105, 110 (1826); *Syndics of Morgan v. Davenport's Heirs,* 3 La. 184, 187, 191 (1831); brief in *Zacharie v. Blandin,* 6 La. 193, 199 (1834); brief in *Petrovic v. Hyde,* 16 La. 223, 226 (1840); brief in *La Chomette v. Thomas,* 1 La. Ann. 120, 121 (1846).
36. 7 Rob. 465 (La. 1844).
37. 7 Rob. 465, 467.
courts, and the "aggregate theory," which prevails in most Anglo-American jurisdictions, will be contrasted in a subsequent part of this article.\textsuperscript{38}

\textit{Marshall v. Lambeth}\textsuperscript{39} is another case in which the Louisiana Supreme Court relied on French legal materials. Counsel in that case cited several Anglo-American authorities to the court, including works of Story and Collyer.\textsuperscript{40} Since a partnership in commendam was involved, however, the court decided to follow the law of France, the "country from whose jurisprudence we have borrowed this kind of contract."\textsuperscript{41}

The years between the adoption of the Code of 1825 and the Civil War witnessed, in spite of the French parentage of the code, a slow but constant and gradually-increasing influx of Anglo-American principles into Louisiana partnership law. From 1825 to 1862 opinions of the Louisiana Supreme Court and reported briefs of counsel cited a total of 202 Anglo-American authorities, a total more than double the number of citations to French authorities. Even in the ten years immediately following the adoption of the code, Anglo-American authorities were cited by court and counsel as often as were French materials; and as early as 1835 at least one of the judges on the Louisiana Supreme Court felt that reliance on Anglo-American treatises was proper in determining partnership questions.\textsuperscript{42} By 1842 Anglo-American authorities definitely had forged ahead of the other extra-Louisiana authorities cited by Louisiana courts, never again to be over-taken.\textsuperscript{43}

The leading Anglo-American works on partnership published in the early part of the nineteenth century found their way into

\begin{itemize}
\item \textsuperscript{38} To be published in the next issue of the Louisiana Law Review.
\item \textsuperscript{39} 7 Rob. 471 (La. 1844).
\item \textsuperscript{40} 7 Rob. 471, 473-474.
\item \textsuperscript{41} 7 Rob. 471, 475.
\item \textsuperscript{42} Mathews, J., in Herman & Son v. Louisiana State Insurance Co., 8 La. 285, 289 (1835), seemed to feel that principles set forth in Collyer's Treatise on Partnership were applicable in Louisiana: "It is laid down as a general rule, by a late writer on partnership, that the signature of one partner, in matters of simple contract, relating to the partnership binds the firm. See Collyer's Treatise on Partnership, page 239."
\item \textsuperscript{43} Extensive citation of Anglo-American authority may be found in the following: Briefs in Herman & Son v. Louisiana State Insurance Co., 8 La. 285, 286 (1835); briefs and opinion in Smith v. Sénécal, 2 Rob. 453, 455, 456 (La. 1842); opinion in Millaudon v. The New Orleans and Carrollton R.R., 3 Rob. 488, 505 (La. 1843); briefs and opinion in Robertson v. De Lizardi, 4 Rob. 300, 310, 314 (La. 1843); opinion in Gridley v. Conner, 2 La. Ann. 87, 90 (1847); briefs in Flower v. Their Creditors, 3 La. Ann. 189, 190 (1848); opinion in Consolidated Bank v. The State of Louisiana, 5 La. Ann. 44 (1850); opinion and dissenting opinion in Hallet v. Desban, 14 La. Ann. 529, 530, 533, 534-535 (1859).
\end{itemize}
Louisiana soon after publication and were much used. Gow's *A Practical Treatise on the Law of Partnership*, the first English edition of which was published in 1823, and the first American edition of which appeared in 1825, was cited by the Louisiana Supreme Court as early as 1827 and was referred to by counsel and court frequently thereafter until about 1850. Another English treatise which became popular in Louisiana was Collyer's *A Practical Treatise on the Law of Partnership*, which was first published in England in 1832. The first American edition appeared in 1834 and by 1835 Collyer had been cited by counsel in Louisiana and by the Louisiana Supreme Court. Kent's *Commentaries on American Law*, which contains a brief chapter on partnership law, was published in 1828, and by 1832 was being cited in partnership litigation in Louisiana. The high regard in which Kent's *Commentaries* was held by the Louisiana Supreme Court is testified to by the fact that the Rules of Court adopted in 1846 required that candidates for admission to the bar read that work.

The first really comprehensive American treatment of partnership law, Story's *Commentaries on the Law of Partnership*, was published in 1841. The very next year counsel and the courts in Louisiana began to make use of that work. Story on *Partnership* was cited again and again in subsequent years, apparently

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45. From the second London edition with notes, and references to American decisions, by Edward D. Ingraham, Philadelphia, A. Small, 1825.
46. Purdy v. Hood, 5 Mart. (N.S.) 626, 629, 630 (1827).
49. London, S. Sweet, Stevens & Sons and A. Maxwell.
52. Offutt v. Breedlove, 4 La. 31, 32 (1832) (only authority cited by court to support decision); brief in Hermann & Son v. Louisiana State Insurance Co., 8 La. 285, 286 (1835); Byrne v. Hooper, 2 Rob. 229, 233 (La. 1842); Harrison v. Poole, 4 Rob. 193, 195 (La. 1843); Robertson v. De Lizardi, 4 Rob. 300, 304, 307, 310 (La. 1843); Hallet v. Desban, 14 La. Ann. 529, 534 (1859).
55. The listing of all briefs and opinions citing Story is impractical. The following are a few: Brief and opinion in Robertson v. De Lizardi, 4 Rob. 300,
furnishing in many cases the primary basis for the court's decision. For instance, in Whipple v. Hill, the court spoke of and treated partners who owned a steamboat as "tenants in common," a common law concept otherwise unknown to Louisiana law. And, in Consolidated Bank v. Louisiana, after hearing arguments of counsel based in part at least on Roman and French authorities, the court adopted as the law of the case paraphrased extracts from Story. Undoubtedly Story exerted a far greater influence than any other Anglo-American authority on the development of the Louisiana law of partnership. Probably, too, the modern Louisiana law of partnership owes more to Story than to Pothier.

The Anglo-American authorities cited between 1825 and 1862 were quite diverse. Watson on Partnership was cited by counsel at least once. Smith's Mercantile Law, apparently highly regarded by the Supreme Court of Louisiana, was referred to by that court in a number of cases. Bell's Commentaries on the Scottish Law, which probably should be considered a civil law authority, was repeatedly cited with approval in Millaudon v. The New Orleans and Carrollton Railroad because, as the court said, Scottish law "sprang from the same fountain with our own." Numerous British cases and cases from other American jurisdictions were cited during this period and extracts were quoted from many of them; United States Supreme Court and New York decisions were especially popular.

A count of authorities cited in the Louisiana jurisprudence between 1825 and 1860, though in some measure indicating the
infiltration by Anglo-American principles, does not depict fully the extent of the contributions made during that period by Anglo-American law to the development of Louisiana's partnership law. In deciding the important, hard-fought cases—the cases in which the law "grew" as distinguished from cases in which the court merely applied well-settled principles—the Louisiana courts almost invariably resorted to Anglo-American authorities for guidance and adopted the solutions suggested by Anglo-American jurists and scholars.

One of the most obvious departures from civil law principles made by the Louisiana Supreme Court in adopting Anglo-American law occurred in Consolidated Bank v. Louisiana. The facts of that case are lengthy and complicated, but for the purpose of this discussion it suffices to state that: the bank's charter of incorporation provided for payment from profits of a "bonus" to the State of Louisiana; the bank, which instead of making profits had suffered losses, sued the state to force it to contribute to the losses. The court apparently felt that because the State of Louisiana received a share of the profits it was in partnership with the bank; yet it so interpreted the bank's charter and the arrangements between the state and the bank as to exempt the state from contribution to losses. In reaching its decision the court discussed Article 2785 of the Louisiana Civil Code of 1825 (Article 2814 of the present Civil Code), which provided:

"A stipulation that one of the contracting parties shall participate in the profits of a partnership, but shall not contribute to losses, is void, both as regards the partners and third persons."

Article 2785 undoubtedly was designed to require each partner to assume some risk of loss. The words of the article seem to have been clear enough; but, if doubt could have existed as to the intention of the redactors, it would have been removed by other articles of the Code of 1825. Further, Article 2785 of the Code of 1825 was a counterpart of the second paragraph of Article 1855 of the Code Napoleon. The French commentators do not question that Article 1855 of the French Code requires

67. 5 La. Ann. 44 (1850).
69. Art. 1855, French Civil Code: "La convention qui donnerait à l'un des associés la totalité des bénéfices, est nulle. "Il en est de même de la stipulation qui affranchirait de tout contribution aux pertes, les sommes ou effets mis dans le fonds de la société par un ou plusieurs des associés."
each of the partners to be responsible to some extent for losses that the firm might suffer. The commentators point out that the second paragraph of Article 1855 is a limitation of contractual freedom and should be construed strictly,\(^{70}\) that therefore it is not essential that each partner be liable to bear in the losses a share proportionate to that which is attributed to him in the gains (for instance, one partner may contract with his associates that he shall receive one-half of the profits but will bear only one-fourth of the losses);\(^{71}\) and that further the part which a partner is to bear in losses need not be in proportion to his contribution to the assets of the firm.\(^{72}\) Yet, under French law, each partner must be bound to contribute in some measure to possible losses.

The Louisiana Supreme Court in *Consolidated Bank v. Louisiana*, in the very teeth of Article 2785 of the Louisiana Civil Code and in disregard of the position of French authorities commenting on the French counterpart of Article 2785, cited with approval the common law rule that the partners by stipulations in the contract may provide that losses shall be borne by one or more of the partners exclusively and that others shall inter se be exempted therefrom.\(^{73}\) Story and Collyer were the authorities on which the court grounded its decision. Article 2785 was virtually read out of the code. At the very least its applicability was restricted to contracts in which the partner exempted from liability does not give his associates a fair equivalent for his immunity;\(^{74}\) and, if extracts from Story and Collyer which the court quotes with relish\(^{75}\) are to be regarded as the law of Louisiana, the article does not have even that restricted operation.


\(^{71}\) 23 Baudry-Lacantinerie et Wahl, loc. cit. supra note 70.

\(^{72}\) Ibid. The difference in the wording of Art. 1855, French Civil Code (supra note 69) and Art. 2785, La. Civil Code of 1825 (Art. 2814, La. Civil Code of 1870) should be carefully noted. Under the interpretation given the French provision, a partner contributing to the firm assets only his own time and industry may be exempted from any other contribution to the losses. The parties may contract that in event the firm suffers losses he will lose his services and no more. Guillouard, loc. cit. supra note 70.

\(^{73}\) 5 La. Ann. 44, 59 (1850).

\(^{74}\) "This argument rests on too broad an assumption, if it takes for granted that, under the spirit and true meaning of the code, a contract between individuals, that one partner should share the profits and be exempt from the losses, would be void under all circumstances. Equality is the spirit of the rule: and we are not prepared to say that such a stipulation would be void, as between the parties, where the exemption was based upon a fair and just equivalent given to his associate, by the partner in whose favor it was stipulated. It would be against reason to brand such a contract as infamous." *Consolidated Bank v. The State of Louisiana*, 5 La. Ann. 44, 58-59 (1850).

\(^{75}\) 5 La. Ann. 44, 59.
"Hallet v. Desban" was another hard-fought case in which the Louisiana Supreme Court relied on Anglo-American authority in reaching its decision. In that case a creditor of a partnership sued the firm's confidential clerk on the theory that the clerk was a partner because he was to receive one-fourth of the profits as compensation for his services. The court held that the clerk was not a partner since he did not share in the profits as a principal. The court cited a total of sixteen Anglo-American authorities and quoted extensively from Story, Kent, Smith on *Mercantile Law*, and from numerous English and American cases. Chief Justice Merrick, dissenting, based his opinion on the earlier English and American rule that a person who shares in the profits of a business is liable as a partner, at least with respect to third persons. He cited seven Anglo-American authorities, including Story and Kent, to support his position.

A tool which the Louisiana Supreme Court used at least twice between 1825 and 1862 to facilitate the introduction of Anglo-American partnership principles was Article 21 of the Code of 1825. That article stated:

"In civil matters, where there is no express law, the Judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

That "equity" as used in this article is not the system of principles known as "equity" in Anglo-American jurisdictions should be manifest from a mere reading of the article, particularly the second sentence. That conclusion is re-enforced by the fact that the Louisiana constitution in effect at the time of the adoption of the Louisiana Civil Code of 1825 prohibited the legislature from adopting any system or code of laws by general reference and required it to specify the various provisions of laws enacted.

Further proof that the redactors of the Code of 1825, when they used the word "equity" in Article 21, did not mean "equity" in the Anglo-American sense is found in the counterpart of Article

78. Grace v. Smith, 2 W. Bl. 998 (1775); Waugh v. Carver, 2 H. Bl. 235 (1793).
79. Other Louisiana cases decided between 1825 and 1862 in which the court relied on Anglo-American authority to a considerable extent include: McDonald v. Millaudon, 5 La. 403 (1833); Hermann & Son v. Louisiana State Insurance Co., 8 La. 285 (1835); Gridley v. Conner, 2 La. Ann. 87 (1847).
80. 1 Louisiana Legal Archives, Foreword, A Republication of the Projet of the Civil Code of Louisiana of 1825 (1937) vi. .
21 in the *Projet du Gouvernement* (1800), which specified what is meant by "equity":

> "Dans les matières civiles, le juge, à défaut de loi précise, est un ministre d'équité. L'équité est le retour à la loi naturelle, ou aux usages reçus dans le silence de la loi positive." ⁸²

Yet, the Louisiana Supreme Court at times utilized Article 21 in partnership cases to justify the adoption of certain equitable principles from Anglo-American law. In *De Lizardi v. Gossett*, a creditor of a partnership sued the "succession" of a deceased partner in commendam for a balance on the amount he had bound himself to contribute to the firm. The creditor's petition showed amounts due other creditors for the firm and the fact that assets available were insufficient to satisfy all creditors. The court made the following disposition of the case:⁸⁵

> "Our laws have not provided for such an emergency; but art. 21 of the Civil Code ordains that, in civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. Commanded to proceed in this cause and to decide it justly, notwithstanding the silence of the law, we consider it safe to resort to proceedings analogous to those by which the courts of the other States have reached the equity of cases of this description, and to make a decree for the general administration of the fund in the hands of the defendant. Story, Equity Pleadings, p. 91-104 and notes."

Thus was decided a case involving a partnership in commendam. No mention was made of the law of France, the "country from whose jurisprudence we have borrowed this kind of contract." ⁸⁶

A use of Article 21 to introduce Anglo-American equity also was made in *Gridley v. Conner*. In that case the court held that it had the power in a suit for the settlement of a partnership to appoint a receiver if such appointment was necessary to effect

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⁸². Translation: "In civil matters, where there is no express law, the judge must act as a minister of equity. Equity is the return to natural law, or to received usages where positive law is silent."
⁸⁵. 1 La. Ann. 138, 139.
⁸⁶. See p. 317, supra.
⁸⁷. 2 La. Ann. 87 (1847). For a case after the enactment of the Civil Code of 1870 which used Article 21 of that code to reach a similar result, see *In re Liquidation of Mitchell-Borne Const. Co.*, 145 La. 379, 82 So. 377 (1919).
the object of the suit. Story on *Partnership* and Article 21 were cited as authority for the holding.\(^88\)

Anglo-American law particularly affected the development of the Louisiana commercial partnership. The redactors of the Civil Code of 1825 expected the legislature to adopt a commercial code, which properly was to control in regard to the commercial partnership;\(^89\) they did not intend for the partnership articles they drafted to govern the commercial partnership.\(^90\) The commercial code had been prepared and was ready for submission to the legislature.\(^91\) Had the proposed commercial code been adopted, a large part of the jurisprudence in the field of partnership might have been preserved for the "civil law," but the code never received legislative approval.\(^92\) Due to their belief that a commercial code would be adopted at or near the same time as the civil code,\(^93\) the redactors of the Civil Code of 1825 did not insert provisions to regulate the commercial partnership.\(^94\) Attorneys in *Thomas v. Myline*\(^95\) pointed out the problems that Louisiana lawyers and courts faced when litigating questions involving commercial partnerships:

"Much difficulty is created by the imperfect state in which our law is left by the Civil Code. We are referred to laws which have never been enacted, and, in the absence of enactment, are sent to seek such laws as we may find."\(^96\)

In their search for authority naturally lawyers and jurists turned to Anglo-American treatises and to partnership decisions from other states.\(^97\)

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\(^88\) 2 La. Ann. 87, 90.
\(^89\) See Kimbel v. Blanc, 8 Mart.(N.S.) 386, 387-388 (1829).
\(^90\) This is shown by the notes of the redactors. 1 Louisiana Legal Archives, op. cit. supra note 80, at 329.
\(^92\) See Kimbel v. Blanc, 8 Mart.(N.S.) 386, 387-388 (1829).
\(^93\) The fact that the Louisiana Civil Code does not include provisions relating to business institutions rightly has been said to be one of its most serious defects. Morrison, *The Need for a Revision of the Louisiana Civil Code* (1937) 11 Tulane L. Rev. 213, 235.
\(^94\) See Art. 2823, La. Civil Code of 1825.
\(^95\) 11 Rob. 349, 382 (La. 1845).
\(^96\) Counsel in *Thomas v. Myline* felt that they had to establish that the law of all jurisdictions supported their client's cause: "We have shown that, under the French law prior to the Code, partners of the firm were its creditors for advances made or risks or obligations entered into for its benefit ... and that writers since that period have laid down as law the same doctrine; that both at law and in equity, in a country in which this subject is perhaps as fully understood, and the interests of parties as carefully guarded as in any upon earth, the principle is recognized; and that the same has been sanctioned by the writers and decisions in this country." 11 Rob. 349, 382.
\(^97\) "As early as 1822, the Supreme Court of Louisiana began its task of
A study of the development of a field of law cannot be divorced from the personality, training, and philosophy of the men who sit on the bench. Strong jurists mold the law along lines they think desirable and thus exert considerable influence on legal development. Two Louisiana jurists who sat on the Louisiana Supreme Court prior to 1850 had marked effects on Louisiana's partnership law. One was Francois-Xavier Martin; the other, Thomas Slidell. Martin's ideas as to the comparative merits of civil law and common law were the very antithesis of Slidell's opinions on the subject. The extensive effect that these men had on the development of Louisiana partnership law justifies a brief survey of their careers and their contributions.

Francois-Xavier Martin, considered by Louisiana's legal scholars as the most distinguished jurist that Louisiana ever had, was a firm believer in the superiority of the civil law which Louisiana had inherited from France. Perhaps the reasons for this strong belief were that he was French, having been born in Marseilles, and that he had been thoroughly indoctrinated in French law. Of all the judges who ever sat on the Louisiana Supreme Court, he was the one best qualified to hear with understanding a legal argument based on French or Spanish authorities. Martin's public career was a long one. He served as one of the judges of the Superior Court of the Territory of Orleans; on the establishment of the state government in 1812, he was selected the first attorney general of the state; in 1815, he was appointed judge of the Supreme Court of Louisiana. He served on the Supreme Court for more than thirty-one years; a considerable part of that time he was presiding judge. Throughout his career Martin fought a valiant, if losing, battle to maintain a close connection between Louisiana law and the law of France. Perhaps Martin's most vigorous attempt to save Louisiana's civil law occurred in Reynolds v. Swain. In that case Martin interpreted Article 3521 of the Louisiana Civil Code of 1825, which purported to repeal the Roman, Spanish, and French civil laws in force when Louisiana was ceded to the United States, as effecting a repeal only of the laws of those nations which actually had been evolving a commercial law through jurisprudential development, by resorting to the law merchant. The failure of the Legislature in 1824 to adopt a Code of Commerce necessitated a continuance of that policy. Daggett, Dainow, Hebert and McMahon, A Reappraisal Appraised: A Brief for the Civil Law of Louisiana, (1957) 12 Tulane L. Rev. 12, 35. Compare language in Chaffraix and Agar v. Price, Hine and Tupper, 29 La. Ann. 176, 191, 192 (1877). See also Julius S. Cohn & Co. v. Drennan & Hilcoat, 1 La. App. 140, 142 (1924).
incorporated into statutes in Louisiana, and as definitely not repealing unwritten law and the decisions of the courts. But Martin went further. Undoubtedly fearing that the legislature some day might attempt to replace civil law with common law, he attempted to establish that the legislature was without power to repeal the civil law. He argued that civil law had prevailed in Louisiana when it became a United States territory and that the legislature could not abolish the pre-existing law. He questioned the power of the legislature in the following language:

"The repeal spoken of in the code, and in the act of 1828, cannot extend beyond the laws which the legislature itself had enacted; for it is this alone which it may repeal."^9

And again: "It cannot be extended to those unwritten laws which do not derive their authority from the positive institution of any people."^10 Later in the same opinion Martin made a statement the accuracy of which is not borne out by the records now available:

"... it is the daily practice of our courts to resort to the laws of Rome and France, and the commentaries on those laws, for the elucidation of principles applicable to analogous cases."^11

Apparently the only partnership case in which Martin cited an Anglo-American writer with approval was Cutler v. Cochran;^12 in that case he cited Gow.

Thomas Slidell cited Anglo-American authorities freely and seldom resorted to the French writers. He did much to counteract Martin's influence on partnership law. Slidell was born in New York about 1805 and was graduated from Yale College in 1825. While traveling in Spain, he wrote a book entitled A Year in Spain. On his return to the United States he settled in New Orleans and established himself as a lawyer, soon gaining distinction and a lucrative practice.^13 On the reorganization of the supreme court under the Constitution of 1845, he was appointed one of the judges and took his seat on March 19, 1846. He served until 1855, from 1852 as Chief Justice. While on the supreme court, he seemed to specialize in partnership cases; he wrote most of the partnership opinions handed down while he was on the bench. His common law background was reflected in those opin-

100. Ibid.
101. 13 La. 193, 199.
102. 13 La. 482, 485 (1839).
ions. Numerous illustrations of his inclination to cite Anglo-American authorities can be found among Slidell’s partnership opinions. The only partnership case found in which Slidell cited a French authority is *Stewart v. Caldwell & Hickey*; in that case he cited Troplong.

The decisions of the Louisiana Supreme Court were not reported between 1862 and 1865. The judges sitting on the Louisiana Supreme Court in 1865, when the reporting of cases was resumed, apparently were inferior in ability and training. The court was appointed by the “carpet bag” government which had control of the state, and contained no judge who had been on the court in 1862. The relatively poor judges on the court and the unsettled conditions in the state left their marks on the partnership jurisprudence. The decisions between 1865 and 1870 were sterile: they were poorly reasoned; they cited but few authorities; and in large part they were re-litigations of questions which had been settled by the Louisiana Supreme Court prior to the Civil War. In the thirty-nine partnership cases decided between 1865 and 1870 inclusive, the Louisiana Supreme Court cited forty-seven Louisiana cases, twelve articles of Louisiana codes, seven Anglo-American authorities, and no French, Spanish, or Roman works.

Anglo-American law made one significant contribution in this otherwise uneventful period to the development of Louisiana partnership law. In *Grieff & Byrnes v. Boudousquie & Fortier*, decided in 1866, the Louisiana Supreme Court firmly established in Louisiana law the concept of partnership by estoppel or “holding out,” a notion which still prevails in Louisiana as well as in common law jurisdictions. In that case a license for a business was taken out by defendant Fortier and the business conducted in his name. Goods were bought from the plaintiff in the name of Boudousquie. Fortier contended that Boudousquie conducted the business on his own account. In holding Fortier liable for the goods, the court stated:  

“If one lends his name as a partner, or suffers his name to

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105. 9 La. Ann. 419, 421 (1854).
be used in the business, he is responsible to third persons as a partner, for he may induce third persons to give that credit to the firm or establishment which otherwise it would not receive, nor, perhaps, deserve. This doctrine is founded in the enlarged principles of natural law and justice."

To support the quoted principles the court cited three Anglo-American authorities and one prior Louisiana case.\(^\text{108}\) The Louisiana case cited was the very early case of *Richardson v. Debuys & Longer*,\(^\text{109}\) which inter alia held (but without discussion or citation of authority) that one who holds himself out as a partner in a commercial firm is responsible as such.\(^\text{110}\)

To incorporate changes necessitated by the outcome of the Civil War, the Louisiana Legislature in 1868 ordered a revision of the civil code.\(^\text{111}\) A projet was compiled in 1869 by John Ray of the Monroe Bar, and with minor modifications it was adopted by the legislature in 1870. The principal differences between the Code of 1825 and the Code of 1870 were: (1) articles relating to slavery were not contained in the new code; and (2) legislation passed subsequent to 1825 which was amendatory of the old code or which related to matters regulated by it was integrated into the new code.\(^\text{112}\) Since the title of the Code of 1825 on partnership did not mention slavery and since no legislation had been passed affecting partnership law, the partnership articles of the Code of 1870 differed little from those of the Code of 1825.\(^\text{113}\) The only substantial change made was that Articles 2798, 2803, and 2823 of the Code of 1825, which contained references to the Code of Commerce the redactors of the Code of 1825 had expected the legislature to adopt, were redrafted to eliminate mention of a commercial code.\(^\text{114}\)

Since the partnership articles of the Code of 1825 were incorporated into the Code of 1870 substantially without change, the efficacy of the jurisprudence created between 1825 and 1870 was not impaired by the adoption of the latter code. In subsequent litigation, Louisiana courts did not question the authoritativeness of partnership cases decided prior to the adoption of the new code. The conclusion is inescapable that the adoption of the Civil

\(^{108}\) Ibid.

\(^{109}\) 4 Mart.(N.S.) 127 (La. 1826).

\(^{110}\) 4 Mart.(N.S.) 127, 130.

\(^{111}\) Tucker, supra note 5, at 294.

\(^{112}\) Id. at 295.


\(^{114}\) See Arts. 2827, 2832, 2852, La. Civil Code of 1870.
Code of 1870 did not erase the inroads which Anglo-American law previously had made in Louisiana's partnership law.

The influence of Anglo-American authorities on the partnership law of Louisiana actually increased after 1870. Between 1870 and 1900, the Supreme Court of Louisiana on points of partnership law cited Anglo-American authorities 443 times, but French works only 67 times. The continued growth in the influence of Anglo-American law is explained by the influx during the Reconstruction period of persons from common law states, the attainment of political and judicial influence by lawyers educated in common law states, the inability of most of the judges on the court to hear with understanding arguments based on French and Spanish authorities, and finally the needs of an expanding economy in which commercial practices were changing and business organizations increasing in size.

Two cases, *Chaffraix & Agar v. Price, Hine & Tupper*¹¹⁵ and *Chaffraix & Agar v. John B. Lafitte & Company*,¹¹⁶ decided by the Louisiana Supreme Court in 1877 and 1878 respectively, illustrate the extent to which the court was considering Anglo-American authorities. These two cases, which arose out of the same transactions, were probably the most hard-fought cases involving questions of partnership law which the Louisiana Supreme Court was called upon to decide between 1870 and 1900. The best legal talent in Louisiana and eminent counsel from other states argued these cases with marked ability. A total of ten judges (the personnel of the five-judge supreme court changed between the original hearing and the rehearing in *Chaffraix & Agar v. Price, Hine & Tupper*) passed on the partnership questions presented in the two cases. Four dissenting opinions and one concurring opinion were written.¹¹⁷

The facts and holdings of these important cases will be considered in detail in the next section;¹¹⁸ for present purposes an examination of the authorities resorted to by the court suffices. In the original opinion in *Chaffraix & Agar v. Price, Hine & Tupper*, the court cited one Louisiana code article, one French authority (Bedaride), and two authorities on Roman law; the dissenting judges did not cite authority. In the opinion delivered on rehear-

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¹¹⁸. See p. 352 et seq., infra.
ing in the case, the court cited one Louisiana code article, one Louisiana case, six French authorities, and nineteen Anglo-American authorities, including Story, Parsons, and numerous English and American cases. The court indicated that it was aware of its reliance on Anglo-American authorities, that in fact it consciously resorted to those authorities in preference to French works. For instance, a syllabus written by the court states:

“In the interpretation of commercial contracts, this court will be largely influenced, and guided, by the law merchant of the United States, and the constructions of that law made by the Supreme Court of the United States.”

And, in its opinion on the rehearing, the court referred with approval to the decision in McDonald v. Millaudon, stating:

“In Millaudon’s case, this court settled conclusively that the laws and usages of commerce to which reference is to be had by our tribunals in interpreting commercial contracts are those sanctioned by the law merchant of the United States, and explained and adjudicated by the Supreme Court.”

The court neglected to point out that the phrase “laws and usages of commerce” properly was discussed in McDonald v. Millaudon because that phrase was used in the Civil Code of 1808, but that the Civil Code of 1870 does not refer to “laws and usages of commerce.”

In Chaffraix & Agar v. John B. Lafitte & Company, the majority opinion cited seven sections of the Louisiana Civil Code, one prior Louisiana case, one French authority (Troplong), and fifty-three Anglo-American authorities, including Gow, Collyer, Lindley, Story, and Parsons. Judge Marr, who wrote the majority opinion, tried to maintain the fiction that he was following civil law principles (not an infrequent practice of Louisiana jurists). He stated boastfully:

“. . . finally it [the rule of Waugh v. Carver] was declared

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not to be the law of England, and the plain, natural, just, common-sense rule recognized, by which the real intentions and the contracts of parties are restored to that supremacy which they have always maintained in the civil law, and in the kindred systems which have sprung from that noble parentage."

An inquiry is pertinent as to why the judge found it necessary to cite fifty-three Anglo-American authorities and examine them at length. His decision was in accord with the more recent and better reasoned of those authorities. To avoid the impression that he was swayed by them is difficult. The dissenting judges, at least, felt that Judge Marr had departed from the pre-existing Louisiana rule and had borrowed from Anglo-American law.127

Numerous other cases between 1870 and 1900 demonstrate the decisive part Anglo-American authorities played in the development of Louisiana partnership law.128 Of the eight partnership cases litigated in 1881 Anglo-American authorities guided the court in the decision of the four most important and hotly contested suits.129 Further, in the eight cases, the total of Anglo-American authorities cited by the court far exceeded (eighty to fifty-six) the number of citations to all other types of authority, including Louisiana decisions and code articles.

Carter Brothers & Company v. Galloway & Burns,130 decided in 1884, illustrates the tendency of the Louisiana Supreme Court to cite Anglo-American authority to support a rule of law even

127. Egan, J.: "It is both wise and well to borrow light from the enlightened and progressive jurisprudence of other States and countries when our own law is silent, or the jurisprudence of our own State either unformed or uncertain. We are, however, not at liberty to do so where neither is the case. . . ." 30 La. Ann. 631, 643 (1878).

Spencer, J.: "I say advisedly we are not at liberty to go outside of our own law if it affords a solution. . . . We are therefore no longer at liberty to subordinate the provisions of the Civil Code to the laws and usages of commerce. These 'laws and usages' are rules of decision for us now only when and to the extent that the Civil Code is silent." 30 La. Ann. 631, 651.


though ample Louisiana authority for the proposition existed. In that case the court used decisions from other states to support the rule that the assets of a partnership cannot be applied to the claims of a partner's separate creditors to the prejudice of partnership creditors. 131 Abundant Louisiana authority for that point was available. Cases such as Carter Brothers & Company v. Galloway & Burns suggest that many Louisiana lawyers and judges may have been more familiar with Anglo-American law than they were with the jurisprudence of Louisiana.

The only partnership case decided by the Louisiana Supreme Court between 1870 and 1900 in which French works seem to have exerted a greater influence on the court than Anglo-American authorities was E. J. Hart & Company v. Anger & Nicol. 132 In that case the court refused to give effect to a clause in a contract of partnership that on the death of a partner the survivor would have an option to continue the partnership. The brief of the losing counsel 133 cites five Louisiana cases, one section of the Louisiana Civil Code, one Roman work, twelve French authorities, and forty Anglo-American authorities. The court in writing its opinion cited two French works but no Anglo-American authority.

By 1900 the development of Louisiana's partnership law was practically complete. After that time the litigation of partnership problems decreased considerably; most of the partnership cases that have come before the courts since then have involved factual questions or have been suits for accounting or for settlements and liquidations. 134 The decrease in the number of partnership cases can be explained on two grounds: (1) most partnership problems had been considered by the state supreme court by 1900 and rules dealing with the problems had become firmly settled; (2) the increase in the number of corporations resulted in a substantial decrease in the number of enterprises doing business as partnerships and therefore a decrease in the number of persons litigating partnership questions.

The most important contribution that Anglo-American law made to the partnership law of Louisiana after 1900 was the

131. 36 La. Ann. 473, 476. Ample Louisiana authority to support the holding could have been found. See, for instance, Art. 2823, La. Civil Code of 1870; Flower v. Their Creditors, 3 La. Ann. 189 (1849).
133. 35 La. Ann. 341, 342.
134. Illustrative of this type of case are Richard v. Mouton, 106 La. 435, 30 So. 894 (1901); Stark v. Howcott, 118 La. 489, 43 So. 61 (1907); Riser v. Riser, 140 La. 1090, 74 So. 563 (1917).
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concept "joint adventure." In the last twenty years, Louisiana courts frequently have resorted to that concept. The Louisiana Supreme Court has acknowledged quite frankly both that the joint adventure was developed by the courts of other states and that it has found recognition in Louisiana. In most cases in which the courts have used the term "joint adventure"—namely, where the venture contemplated buying personal property ("movables" in Louisiana legal terminology) for resale—"special commercial partnership," a civilian term recognized by the Louisiana Civil Code, was applicable to the legal relations under examination and might have been used. The adoption of the "joint adventure" concept and the use of that term instead of "special commercial partnership" where the latter term would be appropriate raises the possibility that even Louisiana's distinctive terminology slowly is being supplanted. Little doubt can exist that Louisiana lawyers and courts of an earlier era would have used "special commercial partnership" to refer to what is now known as a "joint adventure" for the purchase and sale of personal property. For instance, in Ward v. Brandt, decided in 1822, counsel for plaintiff (apparently Edward Livingston, who played such an important role in the early development of Louisiana law) in his argument stated:

"The special partnership (société anonyme ou inconnue) . . .
is that by which two or more persons do agree to become partners in a certain speculation, (dans une certaine négociation) to be made by one of the partners in his own name simply.'

No argument is necessary to show that this relates to a particular operation of commerce."'

Though Louisiana cases on partnership law amount to a jurisprudence of considerable size, the Louisiana courts, to fill in hiatuses in the Louisiana jurisprudence or to solve some new


136. "Joint adventure, as a legal concept, is of comparatively recent origin, and is the creature of American courts. 33 C. J. p. 841. The concept has received some recognition in this state." Daily States Pub. Co. v. Uhalt, 169 La. 893, 901, 126 So. 228, 231 (1930).


139. 11 Mart.(O.S.) 331 (1822).

140. 11 Mart.(O.S.) 331, 404. See also Norris' Heirs v. Ogden's Ex's, 11 Mart.(O.S.) 455, 459-460 (La. 1822).
problem, occasionally still find that resort to Anglo-American authorities is advantageous. *Corpus Juris*,¹⁴¹ *Ruling Case Law*,¹⁴² *American Law Reports*,¹⁴³ and cases from other states¹⁴⁴ are utilized by Louisiana courts today just as were Kent, Story, and Parsons in earlier times, though perhaps less frequently. In Quintero v. Caffery,¹⁴⁵ the court adopted Anglo-American rules with respect to details in the settlement of partnership affairs. When faced in J. P. Barnett Company v. Ludeau¹⁴⁶ with a question which had been litigated many times with conflicting results in other states of the union—whether a corporation can enter into a partnership—the Louisiana court cited thirteen cases from other jurisdictions and held that “the pecuniary results of a partnership between a corporation and an individual” are subject to the protection of the courts.¹⁴⁷

Louisiana courts at times still use Article 21 of the Civil Code¹⁴⁸ as a vehicle to import principles of the Anglo-American system of equity. In *In re Liquidation of Mitchell-Borne Construction Company*,¹⁴⁹ decided in 1919, and in *Sklar v. Kahle*,¹⁵⁰ decided in 1940, the courts cited Article 21 as authority for holding that Louisiana courts have power to appoint receivers for insolvent partnerships.

The courts have not been the only agencies through which Anglo-American partnership law has been imported into Louisiana. The legislature on several occasions has adopted statutes from common law states which have altered Louisiana’s partnership law. First, the legislature enacted an “Assumed Name” statute;¹⁵¹ it forbids the use of an assumed or fictitious name by a person or a firm unless a certificate showing who is represented by the fictitious name is filed with the clerk of court (registrar of conveyances in the City of New Orleans) of the parish in which the business is conducted. The wording of the Louisiana statute is

¹⁴³. See West v. Ray, 210 La. 25, 28, 26 So. (2d) 221, 222 (1946).
¹⁴⁵. 160 La. 1054, 108 So. 87 (1926).
¹⁴⁶. 171 La. 21, 129 So. 655 (1930).
¹⁴⁷. 171 La. 21, 25, 129 So. 655, 657.
¹⁴⁸. For a discussion of an earlier use of Article 21 for the same purpose, see p. 322 et seq., supra.
¹⁴⁹. 145 La. 379, 390, 82 So. 377, 381 (1919).
¹⁵⁰. 196 La. 137, 143, 198 So. 883, 885 (1940).
¹⁵¹. La. Act 64 of 1918 as amended [Dart's Stats. (1939) §§ 6503-6507].
quite similar to that of corresponding statutes in other states.\textsuperscript{152} Second, Louisiana has a "Partnership Name" statute,\textsuperscript{153} modeled after New York legislation,\textsuperscript{154} which forbids the use of the name of a person not actually interested in the firm, or the use of the term "& Co." unless it represents an actual partner or partners. Numerous other states have "Partnership Name" statutes which are almost identical with the Louisiana legislation.\textsuperscript{155} These two statutes represent only minor importations from Anglo-American states; but their enactment furnishes a precedent for a type of "borrowing" which in the future well may become more frequent.\textsuperscript{156}

Legislation which had a more significant effect on the Louisiana partnership was that introducing into Louisiana law an Anglo-American business device, the corporation. The presence of the corporation in Louisiana at an early period greatly restricted the development of Louisiana partnership law. The courts in France, working with the eighteenth century French codes, apparently have had no particular difficulty in adapting French codal law to the changing requirements of commerce. In all probability, Louisiana's law would not have followed the French development in any event. But certainly, the availability of the private corporation, which so amply satisfied many commercial needs, rendered less probable a partnership development in Louisiana along the French lines.

The Louisiana Civil Code of 1808 contained a section on corporations,\textsuperscript{157} but that section contemplated municipal corporations, ecclesiastical corporations, "companies for the advancement of commerce and agriculture," literary societies, colleges and universities, and other companies the objects of which were "the promotion of some public advantage."\textsuperscript{158} Undoubtedly the redactors of the Code of 1808 did not intend to authorize the formation of private corporations as they are known today; and

\textsuperscript{152} A discussion of "Assumed Name" statutes may be found in Uhlmann v. Kin Daw, 97 Ore. 681, 193 Pac. 435, 436-437 (1920).
\textsuperscript{153} La. Rev. Stats. of 1870, §§ 2668, 2669 [Dart's Stats. (1939) §§ 6495-6496]. See also La. Act 248 of 1918 [Dart's Stats. (1939) §§ 6497-6502].
\textsuperscript{156} Worthy of note is the fact that at least one Louisiana partnership form is identical with a popular form used by Anglo-American lawyers. Cf. White, A Notarial Guide and Book of Forms for the Use of Notaries, Clerks of Court and Lawyers (5 ed.) 497-498, Form No. 137; Jones, Annotated Legal Forms (8 ed. by Stansbury) 1809-1811.
\textsuperscript{157} Arts. 1-22, pp. 86-93.
\textsuperscript{158} Arts. 3, 5, p. 86, La. Civil Code of 1808.
apparently no attempt was made to form private corporations pursuant to the Code of 1808. The only Louisiana case decided between 1808 and 1825 which involved a private corporation or the law of private corporations was Williamson v. Smoot. As might be expected, this first case involved the privilege of a corporation formed in another state to participate in litigation before Louisiana courts. The trial judge refused to permit a foreign corporation to intervene in litigation he was hearing. On appeal, the Louisiana Supreme Court held that "corporations of other states may sue in Louisiana."

Articles relating to the private corporation were inserted in the Civil Code of 1825. For a number of years after the adoption of that code, however, few private corporations were formed. Perhaps, at that early period, a considerable portion of the state's legal profession, imbued with an enthusiasm to maintain the purity of the "civil law," looked upon the corporation as a "common law" infiltration and for that reason discouraged the use of the corporate contrivance. By about 1835, however, an appreciable number of private corporations, mostly banks and steamboat or navigation concerns, were doing business in Louisiana; and by 1850 a considerable number of incorporated railroad companies and insurance companies were operating in Louisiana.

After 1875 the number of corporations in Louisiana increased rapidly; the corporate device was utilized by somewhat smaller businesses. An incorporated "gas light" company and an incorporated "coach" company were involved in litigation in 1883. Statistics are not available on the respective numbers of partnerships and corporations doing business in Louisiana during the last quarter of the nineteenth century; but it is noteworthy that the Louisiana Supreme Court during the years 1880-1885 inclusive decided thirty cases involving corporation law and only twenty-six cases involving partnership law. Thus, it seems probable that by 1885 a large portion, if not the major portion, of Louisiana's commercial enterprises were incorporated. No

159. 7 Mart.(O.S.) 31 (1819).
161. A Louisiana act of 1855 provided: "No corporation shall engage in mercantile or agricultural business, nor in commission, brokerage, stock jobbing, exchange or banking business of any kind." Yet at that time many incorporated banks seem to have been operating. See Graham v. Hendricks, 22 La. Ann. 523, 524 (1870).
question can exist that since 1900 the larger and more important enterprises in Louisiana have been conducted by corporations.

The Louisiana law of partnership, due to the utilization of the corporate device by the large commercial enterprises, did not have an opportunity to keep pace in conceptual development with its French parent. And as the paths of Louisiana and French partnership law have grown farther apart, it has become more and more probable that Louisiana lawyers and courts in the future will never again resort to French legal materials to solve partnership problems.

This section of the article has traced the struggle between civil law and Anglo-American law in the field of Louisiana partnership. In brief, the following facts were noted. Louisiana courts early began to consider Anglo-American authorities in partnership cases. The attempts of proponents of civil law to stem the importation of common law through the enactment of civilian codes failed. The broad, general codal provisions, at least those relating to the partnership, were not adequate to regulate commercial relations in a modern American economy. Anglo-American law—not French law—supplied the deficiencies. Many Louisiana lawyers could not use the French language; French legal materials were scarce; treatises and cases written in English were more readily available. Less and less frequently did lawyers and the courts cite French works; more and more often they resorted to Anglo-American authorities, particularly Story, to supplement the codal provisions. Most of the important decisions in Louisiana between 1825 and 1900 actually were grounded on Anglo-American authorities. The legislature contributed to the importation of Anglo-American law by introducing the private corporation into Louisiana and thus carving out of the domain of the partnership many business relations which in France would be subject to the partnership device.

Section 2. Requisites of the Partnership Relation: An Analysis of Louisiana and Anglo-American Law

Anglo-American courts for years have attempted to define more sharply the line of demarcation between partnership and other relations in which the efforts of individuals or legally recognized units are combined and directed toward a mutual benefit. A surprising number of cases have been litigated even in the last
few years\textsuperscript{163} to determine whether the partnership relation existed in particular fact situations. This considerable jurisprudence has not succeeded in isolating the minimum factual elements necessary to create a partnership or in evolving satisfactory tests to distinguish the partnership from other relations. This section examines the Louisiana legislation and jurisprudence and compares that law with Anglo-American law to determine (1) whether Louisiana legislators and jurists have been more successful than their Anglo-American colleagues in defining the partnership; (2) whether Louisiana courts have developed their own tests for determining when the partnership relation is created or have borrowed partnership tests from Anglo-American jurisdictions; and (3) whether the partnership concepts in Louisiana law and in Anglo-American law are conterminous, whether the factual requisites of the partnership relation are the same in the two legal systems.

The partnership definition in the Louisiana Civil Code has been of little assistance to the courts in ascertaining what contracts or associations create the partnership relation. Like many other definitions contained in the Louisiana Civil Code,\textsuperscript{164} the partnership definition is imprecise and too inclusive. That definition, set forth in Article 2801, describes the partnership as

\textit{... a synallagmatic and commutative contract made between two or more persons for the mutual participation in the profits which may accrue from property, credit, skill or industry, furnished in determined proportions by the parties.}\textsuperscript{165}

The definition undoubtedly is of French origin;\textsuperscript{166} yet it is not substantially different from some of the earlier Anglo-American definitions.\textsuperscript{167} Many of the earlier Anglo-American definitions,
for instance, described partnership as a contract rather than as the relation or association resulting therefrom. The Louisiana Supreme Court as far back as 1848 commented on the similarity of the Louisiana definition to those prevailing at that time in French law and at common law.

A translation of the Louisiana definition into common law terminology discloses that it contains nothing to differentiate the Louisiana partnership from its Anglo-American counterpart. The word "synallagmatic" used in the definition is a civil law term applied to a contract creative of binding obligations on all parties to the contract. Contracts are commutative if "what is done, given or promised by one party, is considered as equivalent to or a consideration for what is done, given, or promised by the other." To use the most nearly descriptive common law terminology, an agreement is both synallagmatic and commutative if there is a mutuality of obligation and if the undertakings of the parties are supported by consideration.

The Louisiana definition of partnership, like Anglo-American definitions, does not isolate the factual components of the partnership or enumerate factual combinations which will create a partnership. In Louisiana, as in most other states, the courts in their attempts to decide whether a person is a partner must resort to a confusing and contradictory mass of jurisprudence. No really satisfactory statement can be found either in Louisiana or in common law jurisdictions as to the relative weights to be attached to certain factual elements: a person's sharing in the profits, his undertaking to bear part of possible losses, his ownership of assets in the business, his power to control the business, his

proportions." 3 Kent, Commentaries on American Law (14 ed. 1896) 19. For other definitions of partnership, see 1 Lindley, A Treatise on the Law of Partnership (4 ed. by Ewell, 1881) 2-4.


170. A synallagmatic contract is a contract "by which each of the contracting parties binds himself to the other." 3 Bouvier Law Dictionary (Rawle's Third Rev.) 3215, as quoted in State ex rel. Waterman v. J. S. Waterman & Co., 178 La. 340, 351, 151 So. 422, 426 (1933); Sheridan v. Le Quire, 15 So.(2d) 118, 121 (La. App. 1943).

171. Art. 1768, La. Civil Code of 1870. A commutative contract is "one in which each of the contracting parties gives and receives an equivalent." See Sheridan v. Le Quire, 15 So.(2d) 118, 121 (La. App. 1943). See also Art. 1104, French Civil Code: "Il est commutatif lorsque chacune des parties s'engage à donner, ou à faire une chose qui est regardée comme l'équivalent de ce qu'on lui donne, ou de ce qu'on fait pour elle."
actual participation in management and policy formulation. The difficulties are multiplied by the occurrence in particular situations of these factual elements in varying degrees and combinations.

In Anglo-American law, that each partner must share in the profits is an unquestioned essential of partnership. That principle also is firmly intrenched in Louisiana. The profit-sharing requirement in Louisiana law is incorporated in the Louisiana Civil Code and is admittedly French in origin. Yet the scope of the requirement seems to be the same as in Anglo-American jurisdictions. Although the parties must intend to make profits and to share them, the profits do not actually have to be realized for a partnership to come into existence. And each partner need not receive the same share of profits; the proportion which each is to receive may be regulated by stipulation in the contract.
No case has been found in Louisiana or Anglo-American jurisprudence which indicates whether the proportion of the profits that a person receives is significant in determining whether he is a partner. One comparatively early Louisiana case, Maginnis v. Crosby, held that a contract pursuant to which one party was to receive only two-seventeenths of the profits created the partnership relation; but the court did not indicate how small a share of the profits a person might receive and still be a partner. Some weight perhaps should be given the percentage of profits a person receives in determining whether he is a partner; but none of the tests of partnership to be discussed hereafter have considered that factor.

A myriad of Anglo-American decisions emphasize loss-bearing between the parties to a contract as an important criterion of partnership. In fact, courts at one time or another in perhaps a majority of American jurisdictions, some within the last few years, have indicated that an undertaking (express or implied) by each member of a firm to share losses is a sine qua non of partnership. Under this view a stipulation that one partner is exempt from losses negatives the existence of a partnership. Text writers and teachers, on the other hand, do not attach the same significance to loss-bearing.

of partnership are considered valid which give a partner a share in the profits up to a certain amount (Guillouard, Traité du contrat de Société (2 ed. 1892) 314, no 237); give a partner a choice between a share in the profits and a fixed annual sum (Cass. 9 juill. 1885, S.881, 477); give one partner a share in the profits only on the happening of a certain event (23 Baudry-Lacantnerie et Wahl, loc. cit. supra note 174); or deprive a managing partner of his part of the profits if the expenditures of the partnership exceed a certain amount (Cass. 16 nov. 1868, S.591, 382).


feel that loss-bearing is an evidentiary rather than an ultimate fact. Many decisions, some in jurisdictions in which other decisions have designated loss-bearing as essential, support the position of the writers by stating that an undertaking by each partner to bear a part of the losses is not essential to partnership; perhaps, however, some of these courts had in mind an express undertaking. A few courts unequivocally state that an express agreement exempting one of the parties from liability for losses will not prevent the formation of a partnership.

An obstacle to the utilization of loss-bearing as one of the indicia of partnership is uncertainty as to what is necessary to constitute an agreement to bear losses. In the absence of an express stipulation by the parties, courts often imply an agreement to share losses from the fact that they are to share profits. Further, even in some of those jurisdictions which deem loss-bearing to be essential, the courts consider a party's risk of his services to the firm a sufficient assumption of liability for losses. A means of circumventing the loss-bearing requirement is illustrated by the Georgia case of Smith v. Hancock. In that case Hancock agreed to furnish Smith, the owner of a peach orchard, money to operate the orchard; in return Smith agreed to pay Hancock one-half of the net profits from the sale of peaches. Losses, if they occurred, were to be borne by Smith. The court held that the agreement created a partnership; that Hancock, since a return on his capital was contingent on the realization of profits, had "an interest in profits and losses" sufficient to satisfy the rule requiring loss-sharing.

A similar approach was taken by a New Jersey court in Fenwick v. Unemployment Compensation Commission. In that case a receptionist in a beauty parlor worked under an agree-
ment which stipulated that she was to receive a salary of $15 a week and a "bonus" of twenty per cent of the net profits, but that she would not be liable as between the "partners" for any debts contracted by the "partnership." The court held that the agreement created a partnership between the receptionist and the proprietor; that the receptionist, since she was to share profits, was "affected by" the losses of the business.

The Louisiana Civil Code, like the jurisprudence of many Anglo-American jurisdictions, seems to endorse the doctrine that loss-sharing is essential to partnership. Article 2813 of the code provides that a participation in the profits of a partnership "carries with it a liability to contribute between the parties to the expenses and losses"; and Article 2814 even more unequivocally states that a "stipulation that one of the parties shall participate in the profits of the partnership but shall not contribute to the losses, is void, both as it regards the partners and third persons." Yet the Louisiana jurisprudence has succeeded in raising a doubt whether an undertaking by all the parties to share losses is always essential to a partnership. Further, Louisiana courts, like Anglo-American courts, do not seem to be entirely clear as to what constitutes an undertaking to bear losses.

In Consolidated Bank v. The State of Louisiana, decided in 1850, the Supreme Court of Louisiana enunciated a qualification to the rule that loss-sharing is indispensable. In that case the State of Louisiana by legislative act had authorized the incorporation of the Consolidated Association of Planters of Louisiana, the act declaring that the state was to be a stockholder in the association to the amount of one million dollars "as a bonus." The court assumed that a partnership had been created between the state and the stockholders of the association but held that the state was not liable for losses of the association. The court stated that an exemption of one of the partners from losses is not void if it is "based upon a fair and just equivalent given to his associates, by the partner in whose favor it was stipulated."

The decision in Consolidated Bank v. The State of Louisiana goes far toward nullifying Articles 2813 and 2814. In most cases in which a contract contains a stipulation exempting one of the parties from liability for possible losses, the other parties to the

192. The rule is also codified in French law. Art. 1855, French Civil Code.
194. 5 La. Ann. 44 (1850).
contract undoubtedly receive what to the parties involved is an "equivalent" for the immunity granted. Perhaps the contributions of the immunized party to the enterprise are considered of greater value than the contributions of the other parties. At any rate, the courts in most circumstances would have difficulty going behind the bargain of the parties to find that a "fair and just equivalent" was not given for the exemption.

That the decision in the Consolidated Bank case is a departure from French law and that the court relied heavily on Anglo-American authority were noted earlier in this discussion. Language in several Louisiana Supreme Court cases, decided subsequent to the Consolidated Bank case, suggest that the supreme court may return to a strict compliance with the codal mandate that loss-sharing is indispensable. On the other hand, the Court of Appeal of Louisiana, for the First Circuit, in a comparatively recent decision, Sheridan v. Le Quire, cited the Consolidated Bank case with approval and grounded its decision on that case.

In Sheridan v. Le Quire the defendant had agreed that for a period of three years he would furnish capital for a cattle-raising venture. The petitioner was to devote his full time and the use of his automobile to supervising the cattle-raising on certain premises of the defendant. Profits were to be divided equally, "subject to a payment by petitioner to the defendant of five percent interest on petitioner's one-half of the profits"; and losses, if any, were to be borne exclusively by defendant. Two months after the parties had entered into the agreement, they quarreled. The petitioner brought suit to recover a reasonable amount for his services, the use of his car, and certain incidental expenses; he alleged that he had been evicted from the property before sufficient time had elapsed to determine whether profits would be realized or losses incurred. The defendant filed an exception of no cause of action, contending that the agreement created a partnership and pointing out that in Louisiana a partner has no cause of action for a specific sum of money until there has been a settlement of the partnership. The district court sustained the exception. The court of appeal, in affirming the district court, answered a contention that the stipulation against loss-sharing

196. See p. 320, supra.
198. 15 So.(2d) 118, 121-122 (La. App. 1943).
199. 15 So.(2d) 118, 120-121. In many Anglo-American jurisdictions the general rule is that one partner cannot bring suit against another prior to a settlement. In that regard therefore Louisiana law is not unique.
prevented the creation of a partnership by pointing out that the same argument had been made unsuccessfully in *Consolidated Bank v. The State of Louisiana*. The court added however that the stipulation imposing the risk of loss entirely on defendant referred to money losses and that the petitioner risked losing the value of his time, his skill, and the use of his automobile.\(^\text{200}\)

In a Louisiana Supreme Court case, *In re Liquidation of Mitchell-Borne Construction Company*,\(^\text{201}\) three parties to a contract were to furnish "working capital" to perform certain construction. The other party, who was to receive an equal share of the profits, was to contribute his time and experience but no money or property. According to the testimony, he was not to be responsible for losses. The assets devoted to the venture were reduced by losses. In determining upon whom the losses were to fall, the court assumed that a stipulation exempting one of the parties from losses would have been void,\(^\text{202}\) but treated the agreement as one in which three parties had agreed to risk their money and the other party his time and experience.\(^\text{203}\) The court stated that on the dissolution of the enterprise the parties should be reimbursed "as nearly as possible out of the common assets, in the proportions and forms which they contributed in the beginning." Apparently the court meant that the party who contributed his services would not recover anything. The result in this case is in accord with that reached in Anglo-American jurisdictions.\(^\text{204}\)

French authority also supports the decision in *In re Liquidation of Mitchell-Borne Construction Company*. The second paragraph of Article 1855 of the French Civil Code, the counterpart of Article 2814 of the Louisiana Civil Code, has been interpreted to permit the parties to stipulate that a partner who has contributed his services to the firm will be exempt from further contribution to the losses.\(^\text{205}\)

Anglo-American courts usually hold that the sharing of both profits and losses by the parties to a contract is not sufficient to create a partnership;\(^\text{206}\) in other words, profit-sharing plus loss-

\(^{200}\) \(15\) So.(2d) 118, 122. As further support for its decision the court stated that the parties "intended" to create a partnership and pointed out that in two instances the petitioner himself had so designated the contract. \(201\) 145 La. 379, 82 So. 377 (1919).

\(^{201}\) See also Murrell v. Murrell and Fuller, 33 La. Ann. 1238, 1241 (1881).


\(^{203}\) Magness v. Cox, 278 S.W. 1070 (Mo. App. 1926).

\(^{204}\) Guilleour, Traité du Contrat de Société (2 ed. 1898) 318, n° 241.

sharing is not a conclusive test of partnership. Similarly, the Louisiana courts in at least three cases have held that a partnership did not result from an agreement by the parties to share both profits and losses of an enterprise. On the other hand, some support exists in Louisiana for the proposition that an agreement to share both profits and losses creates a partnership by operation of law. In J. P. Barnett Co. v. Ludeau, plaintiff and defendant agreed “to be equal partners, sharing equally in the profits or in the losses” in buying and selling cotton during a certain season. The venture was to be financed and entirely conducted by the plaintiff. The business suffered losses and plaintiff sued to recover half of them. The defendant contended, among other things, that the agreement was an “aleatory contract,” unenforceable under Louisiana law. The court held that the contract was enforceable and strongly intimated that it created a partnership.

An argument can be made that the Louisiana partnership, as defined by Article 2801, differs in at least one respect from the Anglo-American partnership. Article 2801 can be interpreted to require each partner to contribute to the assets of the firm—to bring into the firm something susceptible of being valued—since that article refers to a participation in the profits which “may accrue from property, credit, skill or industry, furnished in determined proportions by the parties.” The French authorities lend support to this argument. If Louisiana had followed French law, each partner would be required to contribute to the original assets of the firm. In French law the contract of partnership is said to be a contract à titre onéreux, that is, one which subjects each of the parties to give or to do a certain thing. A contract of partnership is void in France if it purports to exempt one of the prospective partners from contributing to the partnership stock. Nullity results where a stated contribu-

142 Va. 107, 128 S.E. 528 (1925); Walker, Mosby & Calvert v. Burgess, 153 Va. 779, 151 S.E. 165 (1930).
208. 171 La. 21, 129 So. 655 (1930).
209. 171 La. 21, 24, 129 So. 655, 655-656.
tion is “fictitious” as well as where a dispensation from contributing is incorporated into written articles of partnership. In France the contribution of the partner may be in the form of money or other goods, or services; but it must be susceptible of pecuniary evaluation. Considerable doubt exists under French law whether the furnishing of “credit” is of itself a sufficient contribution.

Early Louisiana law followed its French parent in considering the contract of partnership a contract à titre onéreux. The Civil Code of 1808 provided that each partner’s bringing, or binding himself to bring, into the firm something susceptible of being valued was of the essence of the partnership contract. The redactors of the Civil Code of 1825, perhaps influenced by Anglo-American authorities, seem to have departed deliberately from French law and from the early Louisiana law. Article 2780 of the Code of 1825 provided:

“Property, credit, skill and industry being the sources from which the profits of a partnership may be drawn, each of the partners may furnish either or all of these in such proportions as they may mutually agree.” (Italics supplied.)

This article, unchanged, was later incorporated into the Civil Code of 1870 as Article 2809. The corresponding article of the French Civil Code is mandatory in that it requires each partner to contribute to firm assets. J. P. Barnett Company v. Ludeau furnishes additional authority that a partnership may be formed even though one partner does not contribute or bind himself to contribute to the assets of the firm.

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211. Ibid.
212. 11 Huc, Commentaire Théorique et Pratique de Code Civil (1898) 31, n° 20.
214. 11 Huc, op. cit. supra note 212, at 31-32, n° 21.
215. La. Civil Code of 1808, Art. 3(1), p. 388, provided: “It is of the essence of said contract; 1st. That every partner should bring or bind himself to bring into the partnership something which is susceptible of being valued, whether it be money or any other kind of goods, or his industry.”
216. The redactors of the Code of 1825 did not leave a written record of their reasons for the change.
218. 171 La. 21, 129 So. 655 (1930), discussed p. 346 supra.
219. But see Graham Paper Co. v. Lewis, 1 La. App. 317, 320 (1923), where Judge Porter, speaking for the court, stated: “One of the essential elements of partnership is the mutual contribution of capital by all the parties. It is true that capital may consist of services to be performed, but in the case just referred to, the defendant was to receive, presumably, full compensation for his services out of the profits, and could not be said to furnish any part of the capital.”
Anglo-American influence on the evolution of Louisiana partnership law is made evident by tracing the various partnership "tests" from their origin in Anglo-American jurisdictions through their introduction into Louisiana law, and to their repudiation in Anglo-American jurisdictions and in Louisiana. Such a study reveals that the sundry tests and theories, after becoming prevalent in Anglo-American jurisdictions, infiltrated into Louisiana partnership law; and that each test soon after it was modified or repudiated by Anglo-American jurisdictions suffered a similar fate in Louisiana. The following paragraphs examine in detail the development of each test and its adoption and use by the Louisiana courts.

The rule long prevailed in Anglo-American jurisdictions that any participation in the profits by a person imposed liability on him as a partner at least as to third persons. The reasoning which supported the rule was that a person who shares in the profits of an enterprise takes from creditors part of the fund which secures their claims. Also, the courts were inclined to apply the maxim that "he who partakes the advantage ought to bear the loss."

Louisiana courts also at one time applied the rule that profit-sharing alone was a conclusive test of partnership. In an early Louisiana case, Dennistoun v. Debuys, decided in 1827, the firm of Debuys & Longer had advanced $8,000 to Dupuy "to aid him in his business," the "interest on this money to be determined by the profits." The court held that Debuys and Longer were partners of Dupuy and permitted the plaintiff to recover against them for goods sold to Dupuy. Apparently Debuys and Longer did not participate in the conduct of the business.

In McDonald v. Millaudon plaintiff sued to recover for merchandise delivered to the firm of W. & D. Flower, alleging that the defendant was a dormant partner in the firm. It appeared that defendant had contracted to advance the firm $20,000, the firm to pay defendant ten per cent per annum interest (the maximum legal rate) and one-third of the firm's profits. Counsel for plaintiff, relying almost entirely on Anglo-American authority, argued that defendant's sharing in the profits rendered him liable to the firm creditors. The court noted that in other states partici-
pation in the profits imposed partnership liability, and recognized that in those states the

"... profits of the business create a fund which all who contract with the partnership have a right to look to for payment; and that it is a fraud on those who deal with it, for any to abstract that fund, and at the same time escape from responsibility from those contracts by which the fund was created."^{224}

Impressed particularly by a decision of the United States Supreme Court,^{225} the court held defendant liable. To reach its decision, the court concluded, as will be recalled from a previous discussion,^{226} that the Civil Code of 1808 incorporated the "law and usages of commerce" of the other states into the Louisiana law of commercial partnerships, unless those laws and usages conflicted with the positive legislation of Spain or were in opposition to local Louisiana usages.

The rule that profit-sharing created partnership liability prevailed in Anglo-American jurisdictions for almost a hundred years, but it was criticized by text writers, followed only reluctantly by the courts, and in many instances defeated by exceptions.^{227} The reason behind the rule was assailed. It was pointed out that in determining profits an allowance had to be made for debts; that creditors neither can, nor do, rely on net profits for payment;^{228} that profits are surpluses left after creditors are paid; and, further, that creditors can resort for payment of their claims against the firm to all the assets of the firm and of the individual partners.

The corrosive effect of criticism on the rule is manifest in early Louisiana cases. The Louisiana courts made clear that the rule did not apply between the parties to an alleged partnership contract, at least not in situations where an employee's compensation or a creditor's return on his investment was based on profits.

In *Bulloc v. Pailhos*,^{229} decided in 1829, plaintiff entrusted

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224. 5 La. 403, 406.
225. 5 La. 403, 409.
226. See p. 311, supra.
229. 8 Mart.(N.S.) 172 (La. 1829). See also Cline v. Caldwell, 4 La. 137, 139-140 (1832) (An actor does not become a partner merely because he receives from a theater owner a part of the profits each night he puts on a performance.)
merchandise to defendant and sent him to Mexico to sell it. Defendant was to receive as his compensation half of the profits realized from the sale of the goods. Plaintiff brought suit to compel defendant to render an account. The court, without discussing the profit-sharing rule, held that the defendant was an agent, not a partner, and that the plaintiff was entitled to recover for the goods sold without final partnership settlement.

In *St. Victor v. Daubert*, decided in 1836, the plaintiff and his partner established a store and engaged defendant to manage it at a salary of $50 a month. Defendant further was to receive one-fourth of the profits. Plaintiff afterward purchased the interest of his partner and, finding the store unprofitable, closed it. Defendant, who was charged with the collection of debts, withheld a considerable sum, asserting that he was privileged to retain it until plaintiff accounted to him for his share of the profits. In permitting the plaintiff to recover the money, the court held that the employee's receipt of a share of the profits as compensation did not make him a partner of his employer in such a sense as to compel the employer to sue for a settlement of partnership affairs.

Subsequent Louisiana cases firmly established the principle that as between the parties "an employee, agent, factor or servant" does not become a partner merely because he shares profits. The authorities relied on by the Louisiana courts in these cases were predominantly Anglo-American treatises and decisions. The very wording of the rule used in the Louisiana decisions tracked the language of Anglo-American authorities.

The Louisiana Supreme Court also at an early date held that a creditor's sharing in the profits of a business in lieu of interest on a loan or in addition to interest does not make him a partner.

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230. 9 La. 314 (1836).
In *Flower v. Millaudon*,\(^{233}\) decided in 1834, Millaudon agreed to furnish the firm of W. & D. Flower $20,000 for a period of three years to pay its obligations. The members of the firm agreed to form a new partnership with the same firm name. The new firm was to pay Millaudon interest at ten per cent on the money advanced and one-third of the profits realized. The court stated that Millaudon's participation in the profits might render him liable to third persons dealing with the firm but would not make him a partner of the other parties to the contract or liable to them for losses suffered by the firm.\(^{234}\)

The Louisiana decisions in *Bulloc v. Pailhos*, *St. Victor v. Daubert*, and *Flower v. Millaudon* merely adopted limitations on the profit-sharing rule already established in Anglo-American jurisdictions. None of those cases involved creditors or other third parties. In fact, in *St. Victor v. Daubert*\(^{235}\) and in *Flower v. Millaudon*\(^{236}\) the court expressly reserved from decision the question of whether profit-participation created liability to firm creditors. The rule that profit-sharing created liability to creditors survived a while longer in Louisiana. It was followed as late as 1843 in *Robertson v. De Lizardi*.\(^{237}\) In that case plaintiff, on the theory that the defendant and Mackenzie & Company were buying cotton as partners, sought to hold defendant on two bills of exchange drawn by Mackenzie & Company. The court, relying almost entirely on Anglo-American authority, particularly Story and Kent, held that the parties were partners since they had agreed to a mutual participation in the profits of the enterprise.

In *Cox v. Hickman*,\(^{238}\) decided in 1860, the House of Lords, on re-examining profit-sharing as a determinant of partnership liability, of course disapproved the proposition that participation in the profits of a business does of itself by operation of law create liability to third parties for partnership losses. Language used in the opinions in *Cox v. Hickman* was the basis of what came to be known as the "mutual agency" test. Lord Cranworth, for instance, in speaking of the liability of a partner for firm debts, stated:

"But the real ground of the liability is, that the trade has been

\(^{233}\) 6 La. 697 (1834).

\(^{234}\) 6 La. 697, 706.

\(^{235}\) 9 La. 314, 317 (1836).

\(^{236}\) 6 La. 697, 706 (1834).

\(^{237}\) 4 Rob. 300 (La. 1843). "... and he who shares in the profits of a partnership is responsible for its debts, although his name be not in the firm." The Bank of Tennessee v. McKeage, 11 Rob. 130, 136 (La. 1845).

\(^{238}\) 8 H.L. Cas. 268 (1860).
It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other; namely, the fact that the trade has been carried on on his behalf, i.e., that he stood in the relation of principal towards the persons acting ostensibly as the traders.

Perhaps Lord Cranworth meant that partners carry on the business as co-owners; that to be a partner a person must share in the profits as a principal, as one having a proprietary interest in the enterprise. Many subsequent decisions, however, at least in this country, laid down as the test of partnership existence a determination whether the relations between the parties were those of mutual principals and agents.241

The year before the decision of Cox v. Hickman, the Louisiana Supreme Court in Hallet v. Desban 242 indicated that it was disposed to depart from the profit-sharing test and to accept a test based on agency principles.243 But not until 1877, in the bitterly contested case of Chaffraix & Agar v. Price, Hine & Tupper, 244 did the Louisiana Supreme Court unequivocally reject the profit-sharing test. In that case A, a non-resident firm, had agreed to furnish B, a resident firm, funds to purchase a certain amount of molasses to be selected by C, another resident firm. B was privileged to check against A's account, but the understanding was that B would gain possession of the molasses before paying for it. A was to receive one-half of profits realized on the venture, B and C one-fourth each; losses were to be borne in the same ratio. C purchased molasses from plaintiff and delivered it to B, who paid C for it on delivery. Plaintiff, when C did not pay him, brought suit against C and sequestered the molasses. A intervened, claiming the molasses. Plaintiff sought to sustain the sequestration on the theory that A, B, and C were partners in the venture. The court held that A, B, and C were not partners and dissolved the sequestration. In its opinion on rehearing, the court reviewed the English cases and examined the Anglo-

239. 8 H.L. Cas. 268, 306.
240. See U.P.A. § 6(1).
244. 29 La. Ann. 176 (1877).
American treatises on partnership, including Story and Parsons, and on the basis of those authorities repudiated the profit-sharing test. Again the court seemed to feel that a test based on agency principles should be substituted.\footnote{246}

For a number of years after \textit{Cox v. Hickman} the “mutual agency” test enjoyed popularity. By 1891, however, the test was being subjected to withering criticism. That year the United States Supreme Court in \textit{Meehan v. Valentine}\footnote{247} pointed out that “agency results from partnership rather than partnership from agency,” and that the test seems to give a “synonym rather than a definition.”\footnote{248} In the same vein scholars criticized the test as turning “the result into the cause”\footnote{249} and as giving “an effect rather than a test.”\footnote{250} The agency test seemed particularly unsatisfactory in view of an apparent conflict with the partners’ privilege to make one of their number managing partner and thus the sole agent of the firm.\footnote{251} In a few American jurisdictions, and in comparatively recent decisions,\footnote{252} the courts continue to give “lip service” to the “mutual agency” test; but that test, even from an abstract legalistic angle, is no longer a factor in the decisions of most American courts. Louisiana courts have shown no inclination to utilize the “mutual agency” test since the decision in \textit{Chaffraix \& Agar v. Price, Hine \& Tupper}.\footnote{253}

In 1857, three years before \textit{Cox v. Hickman}, a suggestion was made in the Tennessee case of \textit{Polk v. Buchanan}\footnote{254} that partnership contracts like other agreements should be given effect according to the manifest intentions of the parties. And not long after \textit{Cox v. Hickman}, Sir Montague Smith in the English case of \textit{Mollwo v. The Court of Wards}\footnote{255} declared that the existence of the partnership relation depends on the intention of the contracting parties. The “intention” test soon attained general acceptance. Under the “intention” test a court, for any of various unexpressed reasons but of course “in accordance with the intentions of the parties,” can decide that a partnership either does

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\footnote{246. 29 La. Ann. 176, 192.}
\footnote{247. 145 U.S. 611, 12 S.Ct. 972 (1892).}
\footnote{248. 145 U.S. 611, 622, 12 S.Ct. 972, 974.}
\footnote{249. Mechem, Elements of the Law of Partnership (2 ed. 1920) 87, § 96.}
\footnote{250. (1910) 10 Col. L. Rev. 174-175.}
\footnote{252. Goubeaux v. Krickenberger, 126 Ohio St. 302, 155 N.E. 201, 205 (1933); Preston v. State Industrial Accident Comm., 149 P.(2d) 957, 961 (Ore. 1944).}
\footnote{253. 5 Sneed. (Tenn.) 721, 727-728 (1857).}
\footnote{254. L.R. 4 P.C. 419, 435 (1872).}
or does not exist. Further, by its nature the test is not an exclusive one: courts can and do use it along with other tests. 255

After the "mutual agency" test was repudiated by most courts, the "intention" test was utilized even more frequently to adorn judicial opinions. 256 Today it is the most widely accepted of the partnership tests. 257 The jurisprudence is replete with multiform statements of the test: "The main test of whether or not a partnership exists is the intention of the parties to create a partnership"; 258 "The question of the existence of a partnership between the parties thereto depends primarily upon the intention of the parties ascertained from the terms of the agreement and from the surrounding circumstances"; 259 "The test of partnership, then, is to be found in the intent of the parties themselves, as shown by the contract which they make." 260

The "intention" test is just as extensively used in Louisiana as in most Anglo-American jurisdictions. The Louisiana courts utilized Article 2805 of the Civil Code, which emphasizes the consensual nature of the partnership relation, as a vehicle to facilitate the introduction of the test into Louisiana. 261 The Louisiana Supreme Court adopted the test for the first time in 1878 in Chaffraix & Agar v. John B. Lafitte & Co. 262 The case grew out of the same factual situation which led to Chaffraix & Agar v. Price, Hine & Tupper. 263 The court once more elaborately reviewed the Anglo-American authorities, emphasizing Mollwo v. The Court of Wards 264 and Story on Partnership, 265 and again it held that a partnership had not been created. But the court apparently had discarded the "mutual agency" test, for it stated that the "true, final, satisfactory, conclusive" test of whether a partnership exists is to be found in the answer to the question:

256. Mason v. Sieglitz, 22 Colo. 320, 44 Pac. 588 (1896); Webster v. Clark, 34 Fla. 637, 16 So. 601, 604 (1894); Grinton v. Strong, 148 Ill. 587, 36 N.E. 559, 562 (1893); Mackie v. Mott, 146 Mo. 230, 47 S.W. 897 (1898).
257. Authorities listed in Note (1942) 137 A.L.R. 6, 97-98.
261. Art. 2805, La. Civil Code of 1870: "Partnership must be created by the consent of the parties." There is no corresponding article in the present French Civil Code. A similar article appeared in Projet du Gouvernement (1800) Bk. III, Tit. XIV, Art. 2, Par. 2. 3 Louisiana Legal Archives, Compiled Edition of the Civil Codes of Louisiana (1942) 1533.
"What was the real meaning and intention of the parties, as expressed in their contract, whether verbal or written?"\textsuperscript{266} Repeatedly in subsequent years Louisiana courts have stated that the intentions of the parties determine whether a partnership exists.\textsuperscript{267}

Though the courts continue to give vocal support to the "intention" test, a firmly established line of decisions, both in Louisiana and in Anglo-American jurisdictions, holds that a partnership can be created even though the parties did not foresee or intend to create the effects which emanate from the partnership relation.\textsuperscript{268} In fact, the courts often have recognized that a partnership can be created even though the parties unquestionably desire to avoid partnership liabilities and expressly declare that their contract is not to create a partnership.\textsuperscript{269} To reconcile this line of cases with the "intention" test is not an easy task.

Two different approaches have been taken where the expressed intention of the parties is inconsistent with the incidents and obligations which normally would result from their contract. In Pennsylvania, the expressed intentions of the parties apparently prevail, regardless of variance between the incidents they indicate are to flow from the contract and the typical and characteristic incidents of the contract actually made.\textsuperscript{270} The "intention" test in this jurisdiction is carried to its logical conclusion. Where the parties expressly declare that they do not intend to create a partnership, further inquiry is unnecessary; they are not

\textsuperscript{266} Ibid.

\textsuperscript{267} Leonard v. Sparks, 109 La. 543, 548, 33 So. 594, 596 (1903); Daspit v. Sinclair Refining Co., 199 La. 441, 454-455, 6 So.(2d) 341, 345 (1942); Glover v. Mayer, 209 La. 599, 606-607, 25 So.(2d) 242, 244 (1946) and authorities there cited; Williams v. Ralph R. Miller Shows, 15 So.(2d) 249, 253 (La. App. 1943).

\textsuperscript{268} Cooley v. Broad, 29 La. Ann. 345, 29 Am. Rep. 332 (1877); Cameron v. Orleans and Jefferson Ry., 108 La. 83, 99, 32 So. 208, 214 (1901); authorities cited note 269 infra. "When two or more persons make an agreement which the law defines as a partnership, it is a partnership, and the liability of the partners for the partnership debts is determined by the law relating to partnership, even though the parties may not have thought of such consequence." Graham Paper Co. v. Lewis, 159 La. 151, 105 So. 258, 259 (1925).

\textsuperscript{269} Cooley v. Broad, 29 La. Ann. 345, 29 Am. Rep. 332 (1877); Cameron v. Orleans and Jefferson Ry., 108 La. 83, 32 So. 208 (1901); Cudahy Packing Co. v. Hibou, 92 Miss. 234, 46 So. 73 (1908). "True, intent must be gathered from the acts of the parties, and not from an unlawful desire to avoid liability; that is to say, the parties may intend to avoid liability, and may fail to do so because their acts and their contract establish a status from which liability as a partner follows." In re Hoyne, 277 Ped. 665, 674 (1922).

\textsuperscript{270} Kaufman v. Kaufman, 222 Pa. 58, 70 Atl. 956, 959 (1908). Cf. Canton Bridge Co. v. City of Eaton Rapids, 107 Mich. 613, 65 N.W. 761 (1895) (The express intention prevails unless "so at variance and so inconsistent with their engagement as to be irreconcilable.").
partners, at least among themselves, even though their agreement has all the characteristics of a contract of partnership. On one occasion the Louisiana Supreme Court seems to have taken the same position. In Halliday v. Bridewell the court said:

"It would be perfectly competent for parties to form a contract with each other, which, ordinarily, would constitute a partnership and produce all the effects of partnership, and yet to stipulate with each other that it should not produce such effects; and such stipulation, as between themselves, would be valid."

And perhaps the Pennsylvania court and the Louisiana court in Halliday v. Bridewell were right. Why should not the parties, as among themselves, be allowed great contractual freedom in modifying the rules which ordinarily apply to the partnership contract?

The text writers and many courts, however, purport to harmonize the "intention" test with decisions holding that a partnership can be created contrary to the expressed intentions of the parties. They emphasize the legal intention, the intention implied in law, as distinguished from the expressed or declared intention. The parties to a contract, in spite of their expressions to the contrary, are said to intend in law to create the relation which the contract expresses; they are presumed, so to speak, to intend the legal consequences of their acts. Many Louisiana cases, seemingly in conflict with the language of Halliday v. Bridewell, but certainly in accord with most Anglo-American authorities, hold that the partnership relation follows, regardless of the expressed intention of the parties, if the acts of the parties satisfy all of the legal conditions necessary to create a partnership. That the Louisiana courts use the same technique as other American courts is amply shown by the language of the court in Amacker v. Kent:

274. Note (1942) 137 A.L.R. 6, 103-109, and authorities there listed; Mechem, Elements of the Law of Partnership (2 ed. 1920) 64, § 72.
276. Mechem, loc. cit. supra note 274.
278. 144 La. 545, 553, 80 So. 717, 720 (1919).
"Where the question of partnership vel non is to be determined, between the parties to the contract, the main inquiry is to be directed to the ascertainment of their real intention. If it be found that they have agreed upon all those matters which, in law, constitute a contract of partnership, it must be presumed that they intended that contract. If, on the other hand, some essential element of that contract is omitted, it is not a contract of partnership, no matter what it may be called." (Italics supplied.)

The use of the "intention" test by a court, as has been indicated previously, does not preclude a resort to other tests. Anglo-American courts frequently utilize other tests, sometimes a number of them, to determine, as they say, the "real" intentions of the parties; and, as might be expected, Louisiana courts sometimes use that method to arrive at the intentions of the parties.

The "intention" test, as applied both in Louisiana and in Anglo-American jurisdictions, is valueless. The meaning of a court is far from clear when it states that "the parties must intend to create a partnership." Sometimes the court means no more than that partnership is a consensual relation, that a person cannot be forced against his will to enter into such a relation. Undoubtedly, however, a court usually means something more, though exactly what is dubious. Courts invariably neglect to specify what the parties must intend. They do not enumerate the operative facts essential to a partnership or state exactly what relationships the parties must intend to assume in order to become partners. The courts themselves cannot agree on the factual elements characteristic of the partnership relation; yet they purport to base their decisions on a test which assumes that the contracting parties know what a partnership is. That the "intention" test is unsatisfactory is further demonstrated by the fact that courts using it either in Louisiana or in Anglo-American jurisdictions usually have to proceed to other criteria to ascertain the "real" intentions of the parties.

279. P. 353, supra.
283. See Amacker v. Kent, 144 La. 545, 80 So. 717 (1919); Daspit v. Sinclair Refining Co., 199 La. 441, 6 So.(2d) 341 (1942).
Courts often use certain vague, epithetical phrases as if they were partnership criteria, or at least descriptive of partnership attributes. For instance, one court states that a fundamental test of the existence of a partnership is "community of interest between parties in the business"; another that partnership involves "community of interests in the common enterprise"; a third that a partnership "connotes a community of interest."

Other courts make similar remarks. Language of this nature first appeared in partnership literature when jurists and legal scholars were attempting by subtle distinctions to circumvent the profit-sharing rule of Waugh v. Carver. The same phrases passed from one opinion to another and now abound in the jurisprudence though the rule which engendered them long since has ceased to exist.

These ambiguous statements are verbal legerdemain; they delude and befuddle rather than clarify. They certainly fail to isolate the factual essentials of a partnership. In fact, these phrases are as hazy as the word "partnership" itself. In an attempt to give them more definite meanings, courts often try to define "community of interest." Unfortunately the definitions do not harmonize. Some courts say that the

"... community of interest between the parties must be of such a nature that it makes each member a coprincipal and an agent of all the members in the business with joint authority or right in administration, control, or disposal of the business or its property."

These courts are really letting the old "mutual agency" test slip in through the back door. Other courts qualify "community of interest" to "community of interest in the property," "community of interest in the capital stock," "community of interest in the common enterprise and a community of interest therein.

287. See (1910) 10 Col. L. Rev. 174.
in the profits,” 291 or “community of interest in the profits and losses.”292 Another group of courts utilize several of these phrases as partnership tests; quite frequently the primary tests of partnership are listed as293 (1) a community of interest in profits and losses, (2) a community of interest in the capital employed, and (3) a community of power in administration.

Because of the great variety of connotations which attach to “community of interest,” the use of that term without further elaboration does not promote clarity of thought. And, even if the phrase is defined or explained, it probably does not convey any idea which could not be communicated more accurately by other language.

The Louisiana courts also use much vague and unserviceable language. The Louisiana Supreme Court, for instance, quoting Anglo-American authority, approved the statement that “a community of profits is the criterion by which to determine a contract of partnership.”294 Apparently the court felt that a “community of profits” existed if the parties sharing profits were entitled to accountings.295 But each partner is entitled to an accounting! Thus to assert that a community of profits is the criterion of partnership is to say little more than that partnership is the criterion of partnership. The Louisiana Supreme Court has stated also on several occasions that “a community of goods and a proprietary interest therein” is essential to partnership.296 The court could not have meant that the partners had to be co-owners of property used in the partnership business; often property used in the firm business is owned by only one partner and its use only devoted to partnership purposes.

Since World War I the influence of “control” as a determinant of partnership gradually has increased.297 Prior to World

291. Guthrie v. Foster, 256 Ky. 753, 76 S.W. (2d) 927, 929 (1934); Webster v. Clark, 34 Fla. 637, 16 So. 601, 604 (1894); Kamm & Schellinger Co. v. Likes, 93 Ind. App. 598, 179 N.E. 23, 25 (1931).
War I lawyers did not consider control of significance in determining when a person acquired the status of a partner or became subject to partnership liability. And many, probably most, courts still base the partnership relation on abstract legalistic doctrines without establishing whether the persons burdened with the duties and liabilities of that relation have a voice in the control of the enterprise. Yet, an ever increasing number of courts, perhaps feeling that the business losses should fall on entrepreneurs and that control is an incident to proprietorship, regard the presence or absence of control (at least in certain types of cases) as a determining factor in the imposition of partnership liability.298

The "control" test originated in cases distinguishing the partnership from the business trust and probably still is used most extensively in cases of that character; but some courts now utilize that test to distinguish partnership contracts from other contracts which contemplate profit-sharing.299

In 1929 William O. Douglas,300 suggested an approach for the imposition of partnership liability301 based on variations in the allocation of control; this approach apparently received the approval of legal scholars. A number of paragraphs, though perhaps they stray from the central theme of this paper, are devoted to a discussion of Douglas' ideas and an inquiry as to whether those ideas have affected the thinking of the courts.

Douglas suggested that the entrepreneur theory of liability—a theory developed originally in the field of agency—be modified and applied to partnership cases. Under the entrepreneur

298. Goldwater v. Oltman, 210 Cal. 408, 292 Pac. 624 (1930); Williams v. Inhabitants of Milton, 215 Mass. 1, 102 N.E. 355 (1913); Frost v. Thompson, 219 Mass. 360, 106 N.E. 1009 (1914). Control now plays a large part in determining when a partnership exists for taxation purposes. Commissioner of Internal Revenue v. Tower, 327 U.S. 280, 66 S.Ct. 532 (1946). Yet the United States Supreme Court made it clear that a person might be considered a partner for tax purposes even though he did not have a right to control. The court said: "If she either invests capital originating with her or substantially contributes to the control and management of the business, or otherwise performs vital additional services, or does all of these things she may be a partner as contemplated by Internal Revenue Code." 327 U.S. 280, 290, 66 S.Ct. 532, 537.


300. Then Professor of Law at Yale Law School; now Associate Justice of the United States Supreme Court.

theory, to determine whether persons who have associated themselves together are in fact co-enterprisers, the following "earmark facts" are important: (1) control, that is, the ability to formulate and execute policies; (2) ownership of the property used in carrying on the enterprise; (3) profit-sharing; (4) loss-sharing. The presence of at least three of these earmarks, in addition to an agreement to associate, is necessary to constitute the parties co-enterprisers. Douglas felt that the entrepreneur theory adequately squared the decisions as to what factual variations will create a partnership, but he advocated certain refinements of the theory. 302

Douglas' ideas in brief were: the capacity of individuals to absorb losses allocated to them is the premise from which the entrepreneur theory proceeds; such capacity is measured by the ability to distribute the cost items of the business among customers who enjoy the services of the business and who therefore should pay for them; those persons having ability to manipulate the profit differential, that is, the differential between cost and selling price, are in the best position to act as effective risk distributors. Douglas further reasoned that all types of control are not significant in risk distribution, that the only types of control relevant to risk distribution are the rights to fix prices and the rights to determine the various cost items; but that those two rights or, to be precise, the rights to fix substantially the price and to determine substantially the cost items, are each a sine qua non to effective risk distribution; and that partnership liability should be imposed only on those persons who can exercise both those types of control. As to profit-sharing Douglas said: 303

"Profit sharing would not be essential. That is not to say that sharing profits as such would never be a sine qua non. If the right to determine costs did not include the right to make the liability in question a cost item, and to get reimbursement from the assets, profit sharing in the strict sense would be a sine qua non. For it would provide the channel for reimbursement."

To sum up, Justice Douglas felt that loss-sharing, ownership of the property used in the business, and many types of control are not relevant in determining whether partnership liability should be imposed. Even profit-sharing is not essential. The only essen-

302. Id. at 723-724.
303. Id. at 735.
tials are the rights substantially to determine cost items and substantially to fix prices.

Douglas' ideas have not had any noticeable effect on the thinking of courts either in Louisiana or in other states. During the two decades which have elapsed since Douglas advanced his theories, apparently not a single decision involving the imposition of partnership liability has been influenced by them. And if doctrine be disregarded and attention directed solely to the facts of the cases, still many decisions since 1929 cannot be explained by Douglas' theories.\textsuperscript{304}

Most courts, as has been mentioned,\textsuperscript{305} still base partnership liability on abstract legalistic doctrines and do not consider the distribution of control at all.\textsuperscript{306} Two Louisiana decisions\textsuperscript{307} are among the many recent cases which have failed to give consideration to the allocation of control in imposing partnership liability. The courts in these two Louisiana cases based their decisions on the "intention" test.\textsuperscript{308} Ironically enough, the Louisiana courts were seeking guidance in an unserviceable Anglo-American doctrine when by resorting to the French authorities they could have aligned themselves with the more progressive of the American jurisdictions. The French commentators emphasize the importance of a right to control the business. They point out that a person, to be a partner, must participate on a certain footing of equality, that he must have that right of ultimate control and that right to criticize which are characteristic of the entrepreneur.\textsuperscript{309}

Some of the courts which in their opinions rely on legalistic doctrines perhaps are influenced subconsciously by the allocation of control, but the facts recorded in the opinions do not state expressly in whom control was vested. It may be that in many of these cases a reasonable implication exists as to where the

\textsuperscript{305} P. 356 et seq., supra.
\textsuperscript{306} See authorities cited supra note 304.
\textsuperscript{308} 209 La. 599, 605-607, 25 So.(2d) 242, 244; 15 So.(2d) 118, 122.
right to control rested, and that many decisions can be reconciled with the control test by reading between the lines of the facts actually stated to discover whether control was present or absent. Yet, if the decisions really do hinge on control, it seems desirable that the courts specify what control the alleged partner has and whether or not they feel that such control is sufficient to justify the imposition of partnership liability.

Douglas, it will be recalled, disected control. He stated that the right to control, other than the right to control price and cost items, is irrelevant; thus he indicated that he meant by "right to control the cost items" something considerably less than the right to control the enterprise as a whole. He must have meant, at most, the right to determine if, when, and perhaps where and from whom, raw materials, labor and capital would be procured, and the respective quantities in which those items would be obtained and the prices which would be paid for them.

Even the cases which emphasize control do not dissect it and discard as extraneous to partnership liability all control except control of the price and control of the cost items. This failure to follow Douglas appears justified. From a realistic point of view, control of the cost items can be said to comprehend complete control of the business since the management of any aspect of the business may influence the cost of the product; yet, as has been seen, Douglas did not use the phrase in that broad sense.

A major function of the entrepreneur is to attain efficiency in the operating processes of the business. He is responsible for the installation and enforcement of system and order so that work will flow through the plant without waste of materials, time, or effort. Clearly the operating efficiency of a business in part determines the profit differential. If the entrepreneur is to distribute risks, the income from the sale of the services of the business must exceed cost items other than those risks. The availability of funds to defray the cost of insuring against risks depends on efficient operation.

310. P. 360, supra.
312. "Ownership involves control. It is impossible to state that this or that power makes the man who possesses it an owner or co-owner of a business." Lewis, The Uniform Partnership Act (1915) 29 Harv. L. Rev. 158, 167-168. Probably the most notable of the cases which do dissect control to any extent are Southern Can Co. v. Hartlove, 152 Md. 303, 136 Atl. 624 (1927); San Joaquin Light & Power Corp. v. Costaloupes, 90 Cal. App. 322, 274 Pac. 84 (1929).
Efficiency is a complex management process which involves the balancing of various factors, including cost items, method, timing, quality, quantity, and the condition of the market. The right to formulate policies with respect to: the assembly of men, materials, money and machinery; the organizational pattern, that is, the segregation and grouping of the many activities involved in a business operation; the scheduling of production; and the marketing of the products—all are important. The courts properly have refused to accept Douglas' theory that the right to control cost items and the right to control the selling price are the only types of control relevant to the manipulation of the profit differential.

Possession of the power to distribute risk does seem a proper basis for determining upon whom partnership liability should be imposed. And those persons who have the right to control the business, to formulate its policies, are the ones who are able to distribute the risk and perhaps by careful management to reduce the risk. A proper method, it is submitted, for a court to follow in determining whether to impose partnership liability on a person would be to examine all elements of control he is privileged to exercise, and to ascertain as a matter of fact whether he is in a position effectively to distribute risk.

Since both Louisiana and Anglo-American courts could utilize the "control" test profitably, why do so many ignore control and base their decisions on abstract legalistic doctrines? Perhaps the answer is to be found in the difficulty which usually exists in determining who actually has the right to control. Often agreements do not stipulate who is to have the policy-making powers. To determine who has the right to control, the courts frequently would have to resort to vague understandings arising out of the parties' past dealings or founded on the personalities and socio-economic status of the parties.

The problem is complicated by the numerous variations, both in kind and extent, to which rights to participate in management are subject. Further, most rights to participate in the control of a business, considered separately, are consistent both with the partnership relation and with relations resulting from other contracts such as the contract of loan and the contract of employment. A right to direct employees, for instance, does not in Lou-

313. In Gaspar v. Buchingham, 116 Mont. 236, 153 P.(2d) 892 (1944), the court held two brothers to be partners in a livestock business though the older brother definitely was the stronger personality and plainly was the leader who exercised ultimate control over the business.
Louisiana or elsewhere distinguish a partner from a supervisory employee. \(314\) A Louisiana case, *Cavill v. Harries*, \(315\) is illustrative. The plaintiff claimed to be a partner in a painting and wallpapering business operated by defendant. The latter asserted that plaintiff was merely clerk and bookkeeper. One of the plaintiff's witnesses, who had worked in the business as an “outside” man, testified that plaintiff had directed him as to the jobs on which to work. The court considered this testimony of little value, feeling that it was consistent equally with the existence of a partnership or an employment. \(316\)

Anglo-American courts and Louisiana courts alike are reluctant to impose partnership liability on a person merely because, in addition to sharing in the profits, he participates in the control of the enterprise, particularly if he has loaned money to the business and purports to exercise control to protect his investment. Still, a person can secure all the advantages of a partner, including a partner’s authority, but escape partnership liability by masquerading as a creditor of the business.

*Martin v. Peyton* \(317\) is an illustration of the extensive control which some Anglo-American courts permit a profit-sharing creditor to assume without imposing on him partnership liability. In that case the firm of K. N. & K., finding itself in financial difficulty, borrowed $2,500,000 worth of liquid securities. The lenders in return for the loan were to receive forty per cent of the firm’s profits. To protect the lenders against loss, K. N. & K. turned over to them a large number of securities, speculative in nature, which could not be used as collateral for bank loans. Trustees, representing the lenders, were to be kept informed of all transactions affecting the securities loaned to K. N. & K.; and the trustees were vested with certain powers to make substitutions among the latter securities. The management of the firm was conferred on Hall, a member of the firm and an intimate acquaintance of the lenders. Each member of the firm was to place his resignation in the hands of Hall. If at any time Hall and the trustees agreed that a resignation should be accepted, that member would retire from the firm. The trustees were to be kept advised as to the conduct of the business and consulted on important matters. They were privileged to inspect the firm.

\(314\) See *Hill Cattle Corp. v. Killorn*, 79 Mont. 327, 256 Pac. 497 (1927).

\(315\) 170 La. 85, 127 So. 373 (1930).

\(316\) 170 La. 85, 87, 127 So. 373, 374.

books and were empowered to veto any business they considered speculative or injurious. As further security each member of the firm assigned to the trustees his interest in the firm. Finally, the lenders were granted an option to enter the firm at a later date by buying fifty per cent or less of the interests of all or any of the members at a stated price. The plaintiffs claimed that the lenders became partners in the firm.

The court refused to impose partnership liability, holding that the control vested in the lenders was insufficient to create partnership. The court felt that the stipulations for control were properly inserted to protect the lenders. Yet through their trustees they had extensive control over the business, and to consider Hall the agent of the lenders in his conduct of the business would not be unrealistic. The lenders enjoyed the advantages of partners but assumed no risks. The "option" to buy into the business clearly was not necessary to protect the investment. Its only function was to permit the lenders to avoid partnership liability and yet be able to participate for an indefinite time in firm profits if the firm should weather its difficulties and thereafter prosper.

The Louisiana Supreme Court in Greend v. Kummel manifested similar reluctance to impose a partner-status on a creditor. In that case the creditor "assumed control and general superintendence of the business and establishment, and performed many acts of apparent ownership." Nevertheless, the court held that the creditor had not become a partner. It termed the control exercised by the creditor "acts of administration" and stated that he was permitted to assume "the superintendence and principal management of the business" because the owners had confidence in his ability.

Courts utilizing a "control" test must distinguish situations in which a person sharing profits does not have sufficient control to be a partner from situations in which a partner has delegated his right to control. The proposition is as well established in Louisiana as elsewhere that the partners may designate one of their number as managing partner with exclusive authority to conduct the business. This type of delegation of authority

320. Ibid.
at least does not preclude partnership. Those who have ultimate control but delegate to an agent their right to control should be held to be partners. Yet the line between a partner who has delegated his right to manage and a person who shares profits but does not have a right of control often is a thin one.

Both Louisiana and Anglo-American courts use the various partnership tests for a dual purpose: (1) to ascertain whether the partnership relation has been created inter se, and (2) to determine whether partnership liability should be imposed with respect to third persons. Since their repudiation of the profit-sharing rule of Waugh v. Carver, Anglo-American courts generally have held that persons who are not partners as to each other are not partners as to third persons. Yet they recognize one important exception to that rule. Where a person has represented himself as a partner, they consider him a "partner by estoppel" and impose liability to third persons as if he were a partner. The rule is equally well established in Louisiana that "holding oneself out" as a partner will result in partnership liability to third persons. No significant differences are apparent between the Louisiana and Anglo-American notions of partnership by estoppel or "holding out." In both systems the manifestations constituting the holding out must be those of the person upon whom liability is sought to be imposed, or must have been made with his consent. Other than in partnership by "holding out," neither the Louisiana nor the Anglo-American courts make a distinction between the tests used in cases where the existence of a partnership between the parties is in issue and cases in which third persons seek to impose partnership liability on parties to an alleged partnership relation.

Yet, the fact that the same tests are applied both when the issue involves the relations of the parties inter se and when it involves liability to third persons is one of the prime causes of

324. Similarly, profit-sharers who have a right to control but fail to exercise it should not escape partner-status.
325. U.P.A. § 7(1).
the unsatisfactory tests of partnership. Entirely different considerations should govern the two types of cases. As between the parties themselves no reason exists why they should not be permitted complete contractual freedom to vary the relations which usually are attributed to the partnership. For instance, if parties enter into a contract pursuant to which a business is to be conducted and the contract contains some stipulations which ordinarily are associated with a partnership and other stipulations which customarily are inserted in a contract of employment, all of the stipulations should, if possible, be given effect. Perhaps a court in a suit between the parties, rather than trying to determine whether for all purposes a partnership exists, should attempt to ascertain what relations the parties intended to create with respect to the specific question at issue. In contests solely between the parties to a contract the allocation of control should not be particularly significant in ascertaining other relations, especially when the parties have undertaken to stipulate in regard to those other relations. On the other hand, when the question before the court is whether the parties to the contract or one of them is liable to third persons, an entirely different approach should be taken. Assuming that it is socially desirable for each business to pay its own way, liability for the obligations of the business should be imposed on those who are in the best position—whether the courts choose to call them partners or not—to apportion the costs of conducting the business among the customers. The persons best able to apportion the costs are of course those with control. Therefore, control should be highly important in determining which persons are to be responsible to third parties for the obligations of the business.

This section has established that the Louisiana definition of partnership contains no stipulation that differentiates the Louisiana partnership from the Anglo-American partnership; that Louisiana courts have utilized the same partnership tests known to Anglo-American courts; that, with the possible exception of the "control" test, every Anglo-American partnership test infiltrated into Louisiana law and at one time or another was used by the Louisiana courts; that the same unserviceable, epithetical phrases are to be found both in Louisiana and in Anglo-American jurisprudence relating to partnership existence and partnership liability; that the fact that Louisiana courts have not availed themselves of the control test does not differentiate Louisiana partnership law from that of most Anglo-American jurisdictions because, like the Louisiana courts, the courts in a great majority
of the other jurisdictions still base partnership existence on abstract legalistic doctrines and give little or no consideration to the allocation of control; that not a single court, in Louisiana or elsewhere, has been influenced noticeably by the theories of William O. Douglas; that the concept of partnership by estoppel or "holding out" is known to Louisiana as well as to Anglo-American law; and, finally, that the various partnership tests have functioned so unsatisfactorily in both Louisiana and Anglo-American law that the whole problem of partnership status and partnership liability should be re-examined.

*(To be concluded)*