The Spanish Community of Gains in 1803: Sociedad de Gananciales

Nina Nichols Pugh
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SOCIEDAD DE GANANCIALES

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Introduction

The publication of the de la Vergne copy of the Digest of 1808 with Moreau Lislet's source notes removes the last shred of doubt that the matrimonial regimes existing in Louisiana at the time of its purchase by the United States were Spanish in origin and nature. This makes it even more imperative to examine the

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This article is the outgrowth of research in matrimonial regimes undertaken for Professor Robert A. Pascal.

[The following abbreviations will be used throughout the footnotes of Mrs. Pugh's article.

ASSO Y MANUEL = ASSO Y MANUEL, INSTITUCIONES DEL DERECHO CIVIL DE CASTILLA (1806)

C. = CODE (Justinian) (Scott ed. 1932)

COMM. = COMMENTARIES

D. = DIGEST OF PANDECTS

DE FUNIAK = DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY (1943)

ESCRICHE, DICCIONARIO = ESCRICHE, DICCIONARIO RAZONADO DE LEGISLACION Y JURISPRUDENCIA (1874)


Gomez = GOMEZ, COMMENTARIUM AD LEGES TAURI (1701)

L. ESTILO = LEYES DE ESTILO

L. TORO = LEYES DE TORO

MANRESA = MANRESA, COMENTARIOS AL CÓDIGO CIVIL ESPAÑOL (5th ed. 1950)

MONTALVO = EL FUERO REAL DE ESPAÑA, GLOSADO POR ALANSO DIAZ DE MONTALVO (1781)

N.R. = NOVISIMA RECOPILACION

NUEVA R. = NUEVA RECOPILACION

PART. = LAS SIETE PARTIDAS

POSADILLA = A. POSADILLA, COMENTARIOS A LAS LEYES DE TORO (1796)

SANCHEZ ROMAN = SANCHEZ ROMAN, ESTUDIOS DE DERECHO CIVIL (1912)]

1. A copy of A Digest of the Civil Laws Now in Force in the Territory of Orleans (1808) containing on interleaves the manuscript source notes of the co-drafter Moreau Lislet was discovered in recent years in the hands of the family of the deceased Charles E. de la Vergne of New Orleans. See Pascal, A Recent Discovery: A Copy of the "Digest of the Civil Laws" of 1808 with marginal source references in Moreau Lislet's hand, 26 LA. L. Rev. 25-27 (1966); Dainow, Moreau Lislet's Notes on Sources of the Louisiana Civil Code of 1808, 19 LA. L. Rev. 43 (1958); Franklin, An Important Document in the History of American Roman and Civil Law: The de la Vergne Manuscript, 33 Tul. L. Rev. 35 (1958); Franklin, Libraries of Edward Livingston and of Moreau Lislet, 15 Tul. L. Rev. 401, 404, n.10 (1941).

The de la Vergne family consented to the reprinting of this copy of the Digest in a limited edition, which soon will be released jointly by the Law Schools of Louisiana State University and Tulane University. On one side of the interleaves Moreau Lislet listed the "actual" sources of the Digest article by article; on the other side he listed section by section citations to various corresponding legislative and doctrinal materials in other civil law systems. The sources given for articles 3.5.63-3.5.85, which are in the Section "Of the Partnership or Community of Acquets and Gains" are almost

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Spanish system of community of gains which Louisiana inherited and still uses in great part today. It is hoped that this article will be helpful to the modern scholar who is interested in learning where the legislature and the judiciary made departures from the original system, so many of which departures have done actual violation to a formerly well-balanced regime. It is also hoped that the proper interpretation may be illumined for some of Louisiana's time-honored, but poorly understood practices in regard to the community of acquets and gains.

I. NATURE AND COMPOSITION OF THE COMMUNITY

Under the Spanish law prevailing at the time that Louisiana was ceded to the United States, a community of gains, or sociedad de gananciales, came into existence with a valid or a putative marriage, unless the parties had contracted previously against such a regime. The actual beginning of the community dated from the time of the cohabitation of the parties, when they were entirely Spanish. There is an occasional reference to Pothier in several articles regarding the acceptance or renunciation of the community by the wife, but even here the references are usually in addition to the Spanish citations. Neither the French Code Civil nor any projet of it, all of which were available to the redactors of the Digest, were cited even once. The de la Vergne volume, therefore, provides convincing proof that the Spanish law was the principal source of Louisiana's community system under the Digest of 1808. The few changes made by the Civil Code of 1825 did not alter the basic pattern of this system.

2. Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 4 & 5; Azevedo, Comm. to same law, nos. 1, 2, 5; Feb. Jul. 1.1.4.1.33; 1.1.4.4.87.
3. Fuero Juzgo, 4, 2, 17; Part. 4.1.12.4; L. Toro 55; Llamas y Molina, Comm. to same law, nos. 8, et seq.; Matienzo Comm. to N.R. 10.4.1, Gloss I, nos. 58, 67.

Apparently the fact that the partners to a marriage in Spain could contract against a regime of community gains prior to marriage was imperfectly understood by the early jurists in Louisiana. Although no specific statement to the effect that there could be no contracting against a community of acquets and gains prior to marriage has been found, discussion in the early cases is in terms of every marriage in Louisiana producing a community of acquets and gains as a natural result of the marriage. This position is urged by the early jurists as a matter of Spanish law. See, e.g., Gale v. Davis's Heirs, 4 Mart.(O.S) 645 (1817); Saul v. His Creditors, 5 Mart.(N.S.) 569 (1827); Cole's Widow v. Executors, 7 Mart.(N.S.). 41, 49-50 (1828); Bryan v. Moore's Heirs, 11 Mart.(O.S.) 26 (1822); Dixon v. Dixon's Heirs, 4 La. 188, 191-93 (1832).

The fact that it seemed necessary to add the phrase “if there be no stipulation to the contrary” to article 2369 of the Code of 1825 (present LA. CIV. CODE art. 2399) suggests that the prior understanding had been to the contrary.

Manresa suggests that contracting against a community of gains prior to marriage was so rare in Spain as to be unimportant in the law. 9 Manresa art. 1320, at 144; contra: 1 de Funjak §§ 135, 136.

4. Fuero Real. 3.3.1; L. Estilo 205; Nueva R. 5.9.2; N.R. 10.4.1; Matienzo, Comm. to same law, Gloss I, nos. 41, et seq.; Azevedo, Comm. to same law, nos. 4 (even if the husband had not carnally known the wife) & 14; Feb. Jul. 1.1.4.1.2. Cf. Sp. Civ. Code art. 1398.
presumed to have begun to work and share together. The community continued, even despite the physical separation of the parties, so long as they intended to maintain a marital union. Since it was the living together which was the basis of the sharing, the community ceased when the spouses began to live separate and apart with no intention of preserving the marriage.

Sharing in community gains by the innocent party continued, however, where there was an enforced separation due to the fault of one of the parties.

In Spanish legal concept the spouses were deemed to have formed a partnership by their marriage, the capital of which was represented by their separate patrimonies and energies. All acquisitions, fruits, profits, and gains of whatever nature, which resulted from the work, industry and skill of either or both of the spouses fell into the common fund to be held between them until the dissolution of their marriage by death or separation of bed and board, at which time the spouses, or the surviving spouse and the heirs of the other, would share equally in the gain realized as well as in debts incurred during the marriage.

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7. Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 56 & 57; Azevedo, Comm. to same law, no. 14.
8. Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 45-55; Azevedo, Comm. to same law, no. 14. See also text accompanying note 220 infra.
9. Matienzo, Comm. to N.R. 10.4.1, Glosses I-III; Azevedo, Comm. to same law, no. 20, et seq.; Matienzo, Comm. to N.R. 10.4.2, Gloss I; Gutierrez, Quaestio CXVIII, no. 5, et seq.; Matienzo, Comm. to N.R. 10.4.8, Gloss I, no. 7. Although most of the above-cited writers speak in terms of a general partnership, Azevedo and Llamas y Molina refer to it as universal. Azevedo, Comm. to N.R. 10.4.4, no. 1; Llamas y Molina, Comm. to N.R. 10.4.8, no. 48. For distinctions between sociedad conyugal and sociedad convencional see Feb. Jul. 1.1.4.4.87. For fundamental character of sociedad de gananciales see 5 CASTAN TOBENAS, DERECHO CML ESPAROL, pt. I, at 196-208, especially 206-08 (1944).
10. FUERO REAL. 3.3.1, 2; NUEVA R. 5.9.2-3, 5; N.R. 10.4.1-2, 5; Feb. Cont. 1.1.22.241; Feb. Jul. 1.1.4.1.1-43. For exceptions which do not fall into the common fund see Feb. Cont. 1.1.22.242-50; Feb. Jul. 1.1.4.2.44-72.

The full import of the sociedad de gananciales as a fund to be held in common and not divided until dissolution of the sociedad is made abundantly clear in the modern Sr. Civ. CODE art. 1392. See also 9 MANRESA art. 1392.

11. See notes 184, 190 infra.
13. FUERO REAL. 3.3.1; NUEVA R. 5.9.2; N.R. 10.4.1; Matienzo, Comm. to N.R. 10.4.6, Gloss II, no. 2; Feb. Jul. 1.1.4.1.4, 6, 38. This was in contrast to the earlier law under which the spouses shared in proportion to the amount of goods they brought into marriage. See FUERO J UZGO. 4.2.17.
and relating to it. In the words of Matienzo the partnership was based on “the fact of their undivided habit of life ordained by both natural and divine law, the fact of the mutual love between husband and wife, which should be encouraged. . .”

**Assets**

Excluded from the sociedad de gananciales were all assets of the spouses at the time of marriage. For the wife this meant all of her separate assets, dotal, paraphernal, and other. For the husband it meant his separate patrimony. Even assets the acquisition of which had been begun before marriage, but not completed until after marriage, remained the separate assets of the spouse initiating the acquisition process, with the right of reimbursement for the purchase price or expense supplied.

A usufruct reunited with the naked ownership of the particular asset after marriage became the separate asset of the naked owner, because its acquisition had been begun prior to marriage. By the same principle an asset which was acquired by prescription during marriage belonged to the community or to one of the spouses, depending upon whether title by prescription had begun to run before marriage or after.

An asset sold by a spouse preceding marriage with the right of repurchase (retractus) became the separate asset of the spouse exercising the right of repurchase after marriage. If the asset had increased in value in the meantime, the separate patrimony enjoyed the profit. If community funds were used for repurchase, the spouse or the heirs of the spouse who had exercised the right owed the other spouse reimbursement for one-half of the funds actually expended.

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14. FUERO REAL, 3.20.14; L. ESTILO 207. See also notes 141-42 infra.
15. Comm. to N.R. 10.4.1; Gloss I, no. 13. See also Feb. Jul. 1.1.4.2.48. 
16. FUERO REAL, 3.3.3.; NUEVA R. 5.9.4, 5; N.R. 10.4.3, 4; L. ESTILO 203; Feb. Jul. 1.1.4.1.4.
17. Gutierrez, Quaestio CXVI, nos. 1 & 2; Azevedo, Comm. to N.R. 10.4.1, nos. 16, 23, 24, Matienzo, Comm. to same law, Gloss I, no. 87.
18. Gutierrez, Quaestio XCVI, no. 2; Azevedo, Comm. to N.R. 10.4.1, no. 16.
19. Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 87-82; Azevedo, Comm. to same law, no. 23; Gutierrez, Quaestio CXVI, no. 1; Feb. Cont. 1.1.22.248; Feb. Jul. 1.1.4.1.9.
All acquisitions by lucrative title, such as legacies, inheritances, or donations to either spouse individually, also were excluded from the common fund, although their fruits were not. Gifts to both spouses, however, fell into the common fund. That portion of remuneratory gifts in excess of the value of the service rendered became the separate asset of the donee.

Just as all assets acquired prior to marriage remained separate, so too all debts incurred by either spouse prior to marriage remained the separate obligations of the spouse incurring them.

Earnings

Since the sociedad de gananciales was built upon the labor and industry of the contracting partners, all earnings, acquisitions, and gains resulting therefrom, or obtained by onerous exchange for things so acquired, became community assets. No distinction was made between the earnings of the husband and wife.
and wife.\textsuperscript{29} If one spouse were richer than the other,\textsuperscript{30} if one spouse had no income at all,\textsuperscript{31} the spouses nevertheless shared equally. The wife was permitted to share in the earnings of her husband, to the extent of one-half, because her services and contributions to the partnership were deemed to be of equal value to his,\textsuperscript{32} whether or not she earned a salary equal to her husband's or offered income from her patrimony equal to his.

As mentioned earlier,\textsuperscript{33} even the fact that the spouses were physically separated did not alter the principle that the wages of either or both of them became community assets to be shared equally; provided that they had once cohabited and still intended to maintain a marital union. If the wife worked outside her home, plying her skill in a profession or trade separate and apart from her husband, or acting as a public merchant, her wages nonetheless became community assets.\textsuperscript{34}

Earnings or gains acquired unlawfully, unjustly, or dishonestly, were not shared between the spouses for the reason that the spouses were presumed to have contracted together for an honest purpose.\textsuperscript{35}

\textbf{Acquisitions}

Everything acquired by either spouse after marriage was presumed to belong to the community of gains until it had been proved to be a separate asset of one of them.\textsuperscript{36} All purchases made after marriage\textsuperscript{37} with community funds\textsuperscript{38} became commu-

\textsuperscript{29} \textit{Fuero Real}. 3.3.3; \textit{Nueva R}. 5.9.4; Llamas y Molina, Comm. to \textit{N.R}. 10.4.6, no. 15.

\textsuperscript{30} Matienzo, Comm. to \textit{N.R}. 10.4.1, Gloss I, no. 8.

\textsuperscript{31} Matienzo, Comm. to \textit{N.R}. 10.4.5, Gloss IX, no. 1; Feb. Jul. 1.1.4.1.3.

\textsuperscript{32} Matienzo, Comm. to \textit{N.R}. 10.4.1, Gloss I, no. 8.

\textsuperscript{33} See text accompanying note 6 supra.

\textsuperscript{34} Gutierrez, \textit{Quaestio CXX}, no. 3.

\textsuperscript{35} Matienzo, Comm. to \textit{N.R}. 10.4.1, Gloss I, nos. 61-64, Azevedo, Comm. to same law, nos. 6 & 7.

\textsuperscript{36} L. Estilo 203; \textit{Nueva R}. 5.9.1; \textit{N.R}. 10.4.; Matienzo, Comm. to same law, Gloss II, nos. 1 & 2; Azevedo, Comm. to same law, no. 1; Llamas y Molina, Comm. to \textit{N.R}. 10.4.6, no. 7; Feb. Jul. 1.1.4.1.4. \textit{Cf. } \textit{Sp. Civ. Code} art. 1407; \textit{La. Civ. Code} art. 2405.

\textsuperscript{37} \textit{Fuero Real}. 3.3.1; \textit{Nueva R}. 5.9.2; \textit{N.R}. 10.4.1 ("\textit{Toda cosa que el marido y muger ganaren o comparen, estando de consumo. . ."}); Matienzo, Comm. to \textit{N.R}. 10.4.1, Gloss II, nos. 1 & 3; Gutierrez, \textit{Quaestio CXVII}, nos. 1 & 3.


\textsuperscript{38} Feb. Jul. 1.1.4.1.6.
Community acquisitions by onerous title, since they resulted ultimately from the labor, industry, and skill of the marital partners.\(^{39}\)

Anything purchased after marriage by one of the spouses using his separate funds could have become either his separate asset,\(^{40}\) or an acquisition of the community by donation.\(^{41}\) Only in certain limited instances, however, was the presumption overcome that the purchase with separate funds was for the common benefit. If an asset were acquired by exact exchange for another asset belonging to the spouse alone,\(^{42}\) it became his separate asset on the principle of real subrogation or substitution.\(^{43}\) Assets acquired with the proceeds from the sale of particular separately owned items also remained separate, if they could be proved to have been a reinvestment and for the benefit of the separate patrimony.\(^{44}\)

There was much debate among the ancient commentators, however, as to the nature and ownership of funds on hand at the time of marriage.\(^{45}\) The majority thought that all acquisitions made with these funds became community assets. Some of these believed that such funds had been brought to the marriage to form a capital for it and therefore should be considered as a donation to the community; whereas others believed that the funds were considered as a loan to the community at the time of marriage to be reimbursed at the time of dissolution. In all probability this controversy represented a question of proof as to whose interests were being served when the cash was expended.

\(^{39}\) Fuero Real. 3.3.1 & 2; Nueva R. 5.9.2, & 3; N.R. 10.4.1 & 2; Azevedo, Comm. to N.R. 10.4.3, no. 1; Llamas y Molina, Comm. to N.R. 10.4.6, nos. 3, 12, & 17. See also Sp. Civ. Code art. 1401(2).

\(^{40}\) Fuero Real. 3.3.2; Nueva R. 5.9.3; N.R. 10.4.2; Feb. Jul. 1.1.4.1.7. Cf. Sp. Civ. Code art. 1396(4); La. Civ. Code art. 2334.

\(^{41}\) Feb. Jul. 1.1.4.1.7.

\(^{42}\) Fuero Real. 3.4.11; Matienzo, Comm. to N.R. 10.4.1, Gloss II, nos. 4 & 6; Azevedo, Comm. to same law, no. 16; Gutierrez, Quaestio CXVII, no. 1; Feb. Jul. 1.1.4.1.7; cf. Sp. Civ. Code art. 1396(3).

\(^{43}\) V Castan Tobenas, Derecho Civil Español, pt. 1, at 212-13 (1954). For a modern discussion of subrogation principle, which has not varied from the ancient, see 9 Manresa 568-70.

\(^{44}\) Matienzo, Comm. to N.R. 10.4.1, Gloss II, nos. 4 & 6; Gutierrez, Quaestio CXVII, no. 1; Feb. Jul. 1.1.4.1.7. See also Fuero Real. 3.4.11.

For acknowledgment of the existence of the Spanish rule in Louisiana (that purchases after marriage with separate funds became community assets), and for exceptions to this rule, see Savenat v. LeBreton, 1 La. 520 (1830), discussed in Hule, Separate Ownership of Specific Property versus Restitution from Community Property in Louisiana, 26 Tul. L. Rev. 427, at 445, 462-63 (1952).

\(^{45}\) Matienzo, Comm. to N.R. 10.4.1, Gloss II, no. 6; Gutierrez, Quaestio CXVII, no. 2. See also Feb. Jul. 1.1.4.1.18.
In general it may be said that the classic principle of acquisition used by the ancient Spanish to determine the nature and ownership of assets was that of acquisition by lucrative or onerous title.\textsuperscript{45} Was the item under consideration acquired by the labor and industry and productive efforts of the spouses or of one of them, or with assets themselves so acquired; or was it acquired by gift, succession, inheritance, or similar device? In ancient Spain it was not the time of the acquisition alone which determined the nature of the item, but also the source of the acquisition.

\textit{Fruits}

Consistent with the assumption that the separate patrimonies of the two spouses formed part of the capital for the marital partnership, the Spanish held that the fruits from both spouses' separate assets fell into the common fund.\textsuperscript{47} Contrary to the provisions of Louisiana law\textsuperscript{48} the fruits of the Spanish wife's \textit{paraphernalia} fell into the community whether she managed them or whether her husband did.\textsuperscript{49} There was no distinction in this respect between the non-dotal assets of the wife and those of her husband under ancient Spanish law.\textsuperscript{50}

"Returns" such as the offspring of slaves, although sometimes distinguished, were analogized to fruits and shared by the spouses.\textsuperscript{51} The "advantage" of a usufruct also became a financial asset, just as in the case of any other fruit.\textsuperscript{52}

If the separate patrimony of a spouse increased in value due to some intrinsic reason quite apart from the industry of the spouses, its enhanced value was not shared by the spouses,\textsuperscript{53} as

\begin{footnotes}
\footnotetext[45]{See ESCRICHE, DICCIONARIO, \textit{Lucrativo} and \textit{Oneroso}. See also Matienzo, Comm. to N.R. 10.4.6, Gloss II, no. 2; Llama y Molina, Comm. to same law, nos. 3, 17; Azevedo, Comm. to 10.4.2, 3, no. 2; ASSo y Manuel, INSTITUTES, 1.7.5.1.}
\footnotetext[47]{FUERO REAL. 3.3.3; NUEVA R. 5.9.4, 5; N.R. 10.4.3, 5. Matienzo, Comm. to N.R. 10.4.3, Glosses I and II, no. 1.}
\footnotetext[48]{LA. CIV. CODE arts. 2386, 2402, 2407.}
\footnotetext[49]{Azevedo, Comm. to N.R. 10.4.3, no. 22.}
\footnotetext[50]{This principle was said by de Funiak to have derived from earlier Visigothic laws and customs of parts of Europe and to have been based upon the idea that, while retaining actual ownership of their separate assets, the partners to a marriage used them unselshfly for the benefit of their mutual undertaking—the marriage. \textit{1 de Funiak § 71}, and text accompanying note 42 supra.}
\footnotetext[51]{Matienzo, Comm. to N.R. 10.4.5, Gloss V, nos. 1 and 2; Azevedo, Comm. to N.R. 10.4.3, nos. 16-19.}
\footnotetext[52]{Matienzo, Comm. to N.R. 10.4.5, Gloss V, no. 3; Azevedo, Comm. to 10.4.3, nos. 19-21; Gutierrez, Quaestio CXVI, no. 4; Feb. Jul. 1.1.4.1.8, 10.}
\footnotetext[53]{Matienzo, Comm. to N.R. 10.4.1, no. 88; Azevedo, Comm. to same law, no. 8; Gutierrez, Quaestio CXVI, no. 1; Feb. Jul. 1.1.4.1.18.}
\end{footnotes}
were the fruits and income from it. If improvements were made on a separate asset with funds derived from the conversion of other separate assets of the same spouse, the enhanced value was not shared by the spouses in that case either. On the other hand where improvements were made, or the value of a spouse’s separate asset enhanced through the expenditure of common funds or through the industry and labor of one or both of the spouses, the community was owed reimbursement by the separate patrimony upon dissolution. The building erected on the separate property became the asset of the spouse owning the land upon which it had been built. The other spouse and his or her heirs were entitled to reimbursement, however, at the rate of one-half the cost of the building rather than one-half the increased value.

Fruits of things acquired during marriage, the ownership of which was not shared by the spouses, such as royal offices, fell into the common fund to be shared between the spouses, just as in the case of notarial or purchased offices (castrenses or quasi-castrenses).

It will be seen readily that, since all fruits and profits of the spouses’ separate patrimonies fell into the common fund, all earnings of either or both spouses, and probably all cash brought into marriage, it was difficult for a separate patrimony under the Spanish regime of community of gains to contain separate

54. Fuero Real. 3.4.11.
55. Fuero Real. 3.4.3. & 9; Azevedo, Comm. to N.R. 10.4.1, no. 8; Comm. to N.R. 10.4.8, no. 4; ASSO Y MANUEL, INSTITUCIONES 1.7.5.2; Feb. Jul. 1.1.4.3.73-75.


57. Azevedo, Comm. to N.R. 10.4.5, no. 4; Feb. Jul. 1.1.4.3.73-74; ASSO Y MANUEL, INSTITUCIONES 1.7.5.2.

Although in accord with ancient Spanish law to the extent that the improvement upon the separate property became the asset of the separate property-holder, Louisiana differs in providing that reimbursement be made to the common fund in proportion to the enhanced value of the asset, rather than by the measure of half its cost. LA. CIV. CODE art. 2408.

58. Nueva R. 5.9.5; N.R. 10.4.5; Matienzo, Comm. to the same law, Glosses I, II, IV, no. 3; Azevedo, Comm. to same law, nos. 1-3, 5; Azevedo, Comm. to N.R. 10.4.3, no. 15; Gutierrez, Quaestio, CXIX, no. 7; Feb. Cont. 1.1.22.244, 249; Feb. Jul. 1.1.4.1.21.

59. Matienzo, Comm. to N.R. 10.4.5, Gloss IV, nos. 1-6, 8; Azevedo, Comm. to same law, nos. 3, 5; Gutierrez, Quaestio CXIX, no. 7; Feb. Cont. 1.1.22.244; Feb. Jul. 1.1.4.1.14-15, 21-22. But see Azevedo, Comm. to N.R. 10.4.3, no. 20.
funds except where derived from the conversion of a particular separate asset into cash, or by inheritance or donation during marriage.

Delicts

Spanish law anciently made provision for compensation for injuries to the person or assets of another to the extent that the person had been injured or the assets damaged or destroyed. Although the husband originally was required to represent his wife in suit for her injuries, from the time of the sixteenth century onward, the wife could sue for her own injuries without the assistance of her husband. The husband continued to sue for losses to the community, however, including losses resulting from injuries to the wife, as will be discussed more fully later.

Compensation for injuries to the partnership, whether for damage to persons or things, fell into the common fund. Damages for injuries to the person or honor of one of the spouses, however, became the separate asset of the injured person, either on the principle of acquisition by lucrative title, since the damages acquired in the injury action were not acquired by the labor and industry of the spouse, or on the principle of real subrogation, inasmuch as the damages could have been considered as given in exchange for the injury. If the injury deprived the partnership of the injured person’s earnings or services, it too was thought to have suffered compensable damage, for which the husband sued in his capacity as head of the community of gains. The expenses of the injury such as the doctor’s bills, medicines, etc., also were considered an expense of the community, properly recoverable by the husband.

Under Spanish law a person was barred by his own fault

60. Part. 7.9.1, 6, 9; 7.15.2, 3, 6-28.
61. L. Toro 55; Llamas y Molina, Comm. on same law, no. 17.
62. See text accompanying note 176 infra.
63. Part. 7.15.2. Asso y Manuel, Instituciones 1.7.5.2.
64. Part. 7.9.6. See also Part. 7.34.22; L. Toro 77, N.R. 5.9.10; Feb. Jul. 1.1.4.2.44-45.
65. Part. 7.15.2.
from recovery for damage to himself. There is nothing to indicate, however, that the fault of one spouse was ever attributed to the other to bar an action for injuries under any “husband and wife are one” theory. There was no obstacle, therefore, to a wife’s suit against her husband for any delict, including that of theft. Damages recovered became her separate asset on principles set forth above. The husband likewise could sue his wife for delicts, but not for theft.

Damages recovered in wrongful death actions, well known to Spanish law and dating back to the Roman law, also would have constituted community assets where recovered for the loss of the husband or wife.

Other

Life insurance, workmen’s compensation, social security benefits, retirement pensions and annuities, investment in corporation stocks and bonds, and other similar developments of modern life either did not exist or were not common in 1803; hence commentary upon them by the ancient Spanish scholars cannot be found.

II. Ownership and Management

Ownership

All Spanish commentators were finally agreed that the husband and wife were co-owners and shared equally in the bienes gananciales (ganancial assets) by operation of law, unless they had agreed to the contrary prior to or at the time of marriage. This means that the Spanish wife under a regime of community of gains had a present, existing, and immediate ownership in

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68. Part. 7.15.8.
70. See notes 168, 171 infra.
71. Part. 7.14.4.
72. Part. 3.2.5; 7.14.4; Feb. Jul. 1.3.1.1.23.
73. Part. 7.15.3, 27. See also discussion of Roman and Spanish texts (import misunderstood) in briefs of counsel, Hermann v. New Orleans & C. Ry., 11 La. Ann. 5 (1856).
74. D. 9.2.11 (slaves); D. 9.3.5.4, 5; See also Voet, Commentarius ad Pandectas, 9.3.4 (1778).
75. For life annuities and annual pensions, considered to be in the nature of donations, see Llamas y Molina, Comm. to N.R. 10.4.10, nos. 25 & 26. No. 27 immediately following would seem to imply that a pension to which a spouse had contributed during his or her working years might be considered bienes gananciales, since it was a product of their labor acquired while they were married. Cf. Asso y Manuel, Instituciones, 1.7.5.2.
one-half of the *gananciales* which vested *ipso iure* at the moment the assets were acquired and even without delivery.\(^7\)

Whereas the wife owned\(^7\) equally with her husband, he, as "business manager"\(^7\) of the partnership, actually administered the community of gains. For this reason the husband of ancient Spain and the *sociedad* were identical in the eyes of all third persons, even as they are today in Spain.\(^7\) In the Spanish concept the wife "had" (Spanish "*ayan*" from the Latin "*habere*") the *gananciales* in the sense of owning and possessing them; but she did not "hold" (Spanish "*tiene*" from the Latin "*tenere*") them. The husband, who was said "to have and to hold" the *gananciales*, was empowered to act in regard to them. He was described as "in actu" (in control) as well as "in habitu" (in present interest). The wife was only "in habitu" or "in habitu et in creditu" (in present interest as creditor) in regard to the *bienes gananciales*, but no less a co-owner.\(^8\)

The wife's right to own and possess one-half of the *gananciales* included the right to all possessory remedies\(^8\) such as the right to acquire, retain, and to recover possession of them. These actions were not exercisable by her before the dissolution of the community of gains,\(^8\) however. Authority is ample to the effect

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76. Fuero Real. 3.3.1; 3.20.14; Nueva R. 5.9.2; N.R. 10.4.1, 4; Matienzo, Comm. to N.R. 10.4.1, Gloss III and Gloss IV, no. 1; Azevedo Comm. to same law, no. 18; Gutierrez, Quaestio CXVIII; Llamas y Molina, Comm. to N.R. 10.4.8; Matienzo, "Comm. to same law, Gloss I, nos. 1-4; Azevedo, Comm. to same law, nos. 3, 12.

77. The word commonly used by the Spanish writers to describe the common interest of the husband and wife in *bienes gananciales* was *dominio*. Escriche, Diccionario, Bienes Gananciales, at 87, col. 2; Feb. 1.1.4.1.29-30. In addition to this the husband held *dueno de todos* during marriage which implied control or management; whereas the wife did not become *duena* until the marriage was dissolved. Feb. Jul. 1.1.4.1.30. *Dominio* (from the Latin *dominium*) is seen, therefore, to be a minimum form of ownership, not necessarily complete in itself. See Feb. Jul. 1.1.4.2.66 for an excellent example of the usage of the two Spanish words *dominio* and *dueno*. See also 9 Manresa 8.

78. Matienzo, Comm. to N.R. 10.4.1, Gloss II, no. 2.

79. See, e.g., 9 Manresa 8, 150-51, 529, 540, 635, 657, and 655.

80. Matienzo, Comm. to N.R. 10.4.1, Gloss III, no. 18; Llamas y Molina, Comm. to N.R. 10.4.8, nos. 22-26; Escriche, Diccionario, Bienes Gananciales, at 87, col. 2. See also 9 Manresa 654-55, 657-60 and 1 de Funiax § 100.


82. Matienzo, Comm. to N.R. 10.4.1, Gloss III, no. 18; Gutierrez, Quaestio CVIII, nos. 14-17; Llamas y Molina, Comm. to N.R. 10.4.8, no. 82; Matienzo, Comm. to N.R. 10.4.6, Gloss II, no. 2 (moiety appertains to wife upon dissolution). See also Feb. Jul. 1.1.3.2.60; Feb. Jul. 1.1.4.1.30-32; Feb. Jul. 1.1.4.2.63; and Escriche, Diccionario, Bienes Gananciales, at 87, col. 2; 1 Manresa, arts. 59-63, especially at 593.
that the wife as co-owner of the gananciales could have been sued\(^3\) for her half share\(^4\) of the common debts. It is probable, however, by analogy to the possessory actions, that suit could not have been brought against the wife until the community of gains had been dissolved, when the wife was said for the first time to possess “in actu,” as well as in “in habitu.”\(^8\)

**Husband’s administration**

The husband’s administration of the ganancial assets was considered full and general,\(^8\) but subject to certain exceptions. He could make a moderate gift\(^8\) and sell or dispose onerously of the gananciales without his wife’s consent,\(^8\) but he could not alienate or dispose of the community assets in fraud of his wife.\(^8\) Nor could he dispose by last will and testament of more than his share of the gananciales,\(^9\) inasmuch as testation looks forward to a future time at which the husband would no longer have the power to dispose of the whole of them.\(^9\) The wife could object to certain transactions and refuse to share in them;\(^9\) but this specific renunciation by the wife was not given effect until after the dissolution of the community of gains.\(^9\)

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\(^8\) Matienzo, Comm. to N.R. 10.4.1, Gloss III, no. 16.
\(^4\) Matienzo, Comm. to N.R. 10.4.2, Gloss VII, no. 2; Azevedo, Comm. to N.R. 10.4.9, no. 18.
\(^8\) Matienzo, Comm. to N.R. 10.4.1, Gloss III, no. 18; Feb. Jul. 1.1.3.2.60.
\(^8\) Nueva R. 5.9.5; N.R. 10.4.5; Matienzo, Comm. to same law, Gloss VI; Azevedo, Comm. to same law, nos. 8-21; Gutierrez, Quaestio CXXI; Feb. Jul. 1.1.4.1.29-30; Feb. Jul. 1.1.4.2.64-66. Cf. Part. 3.2.5 (husband given administration of wife’s estate to supply his wants, when he stood in need, on condition to furnish her with what was necessary, according to her fortune and rank).

For husband’s administration in general see 9 Manresa, arts. 1412-1416, at 630-62.

\(^8\) Feb. Jul. 1.1.4.2.65-66. Although much debated at one time, the gift-making power of the husband was resolved in his favor; see Matienzo, Comm. to N.R. 10.4.5, Gloss VI, nos. 3-11, 14-17; Gutierrez, Quaestio CXXI, Llamas y Molina, Comm. to L. Toro 53, nos. 8-10; Feb. Jul. 1.1.4.2.64-65; Feb. Cont. 1.1.2.245 (wry comment justifying husband’s gift-making power in view of wife’s prodigality). See also 1 de FuniaK § 121.

\(^8\) L. Estilo 205; Nueva R. 5.9.5; N.R. 10.4.5; Matienzo, Comm. to same law, Gloss VI, no. 2; Azevedo, Comm. to same law, no. 7; Escrice, Diccionario, Bienes Gananciales, at 87, col. 2; Feb. Jul. 1.1.4.1.29.

\(^8\) L. Estilo 205; Nueva R. 5.9.5; N.R. 10.4.5; Matienzo, Comm. to same law, Gloss VI, no. 2; Gloss VII; Azevedo, Comm. to same law, nos. 17-18; Llamas y Molina, Comm. to L. Toro 60, no. 10; Feb. Cont. 1.1.1.22.245; Feb. Jul. 1.1.4.1.30. Cf. Part. 5.10.13.

\(^8\) L. Toro 18, Nueva R. 5.9.7; N.R. 10.4.8; Matienzo, Comm. to same law, Gloss I; Azevedo, Comm. to same law, nos. 1-12; Llamas y Molina, Comm. to same law, nos. 1-89; Feb. Cont. 1.1.1.22.250.

\(^9\) Azevedo, Comm. to N.R. 10.4.5, no. 15.

\(^9\) Matienzo, Comm. to N.R. 10.4.1, no. 60; Matienzo, Comm. to N.R. 10.4.9, Gloss I, no. 2.

\(^9\) 9 Manresa 530-37.
Similarly the wife's action for her husband's fraud or for his acts prejudicial to her share of the ganancial assets was available only after dissolution of the community of gains, upon proof of the wrongful intent to defraud her. If the husband's share of the gananciales in the hands of the heirs were insufficient to cover the amount of which the husband had defrauded her, the wife could have proceeded by action of nullity or rescission against the assets fraudulently alienated by the husband and then in the hands of third persons; but not otherwise.

The husband's power of administration was further limited by the fact that he was obliged to indemnify the wife upon dissolution for any losses resulting from his acting as surety for a third person. The wife indeed shared in the losses as well as in the profits of the sociedad, yet any losses due to debauchery, gambling, and dissolute living, where so excessive as to suggest wrongful intent and fraud, were not allowed to penalize the wife's share of the gananciales. Just as in the case of other prejudicial acts by the husband, the wife's action for the husband's losses due to suretyship of third persons, gambling, or dissolute living, was reserved for accounting procedures at the dissolution of the sociedad.

**Wife's administration of her separate assets**

The wife's lack of capacity to administer the sociedad or

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94. For definition of "acts prejudicial to the wife" see 9 MANRESA, arts. 1412-1416, at 641-42, which seem to support the implications of Feb. Cont. 1.1.22.245. See also 9 MANRESA 665.


In a number of instances de Funiaq states that the wife of ancient Spain could bring action against her husband during marriage for his acts in fraud of her rights, but his statements are not supported by the authorities cited. See, e.g., 1 DE FUNIAQ 291, 298-99, 324, 363, and 437.

96. Matienzo, Comm. to N.R. 10.4.5, Gloss VI, no. 2; Gloss VII, no. 2; Azevedo, Comm. to same law, no. 17; Feb. Jul. 1.1.4.2.63; Feb. Cont. 1.1.1.22-245.

97. Feb. Cont. 1.1.22.245; Feb. Jul. 1.1.3.1.49; Feb. Jul. 1.1.4.2.63; Asso y Manuel, INSTITUCIONES 1.7.3.2. The law remains the same today. See 9 MANRESA arts. 1412-1416, at 641-46.

98. Azevedo, Comm. to N.R. 10.4.5, nos. 18, 20, 21; Gutierrez, Quaestio CXXVIII, nos. 14; Feb. Jul. 1.1.4.2.68-69.


100. Matienzo, Comm. to N.R. 10.4.5, Gloss VI, no. 12; Azevedo, Comm. to same law, no. 19; Feb. Jul. 1.1.4.2.44, 64-65. Cf. Gutierrez, Quaestio CXXI, nos. 7 & 8, CXXVIII, no. 3.

101. Matienzo, Comm. to N.R. 10.4.5, Gloss VI, nos. 7 & 12; Gutierrez, Quaestio CXXII, nos. 7 & 8; Feb. Jul. 1.1.4.2.68-69.
interfere in any way with her husband's administration of it during its existence was in direct contrast to her capacity to administer her separate assets (proprios bienes) which she had not placed under the administration of her husband specifically and in writing\(^\text{102}\) as paraphernalia.\(^\text{108}\) Even when she administered her separate assets herself, it was still necessary for her husband to authorize most of her contracts and all of her appearances in court in regard to her patrimony;\(^\text{104}\) but this requirement of authorization seems to have been a mere formality,\(^\text{105}\) easily obtained by court order, if the husband appeared reluctant to give it.\(^\text{106}\) Any contracts made by the wife without her husband's or the court's authorization, which in fact benefited her, were considered valid contracts.\(^\text{107}\)

If the wife did transfer administration of her paraphernalia to her husband, it became subject to the same rules as those

\(\text{102. Part. 4.11.17; Asso y Manuel, Instituciones 1.7.2; Feb. Jul. 1.1.3.1.43; Feb. Cont. 1.1.2.1.11. In case of doubt the married woman was presumed to have retained administration of her bienes. Feb. Jul. 1.1.3.1.42. According to Castan Tobenas the most frequent situation was that in which the wife merely let her husband administer her paraphernalia without giving him the administration formally and in writing. See V Castan Tobenas, Derecho Civil Español pt. 1, at 356 (1954). This is probably what is meant by Azevedo in his Comm. to N.R. 10.4.3, no. 22.}

\(\text{Cf. Sp. Civ. Code art. 1384 and La. Civ. Code arts. 2354-2386. In Louisiana the presumption has always been directly contrary to that of Spain. If there is doubt, the husband is presumed to administer the wife's paraphernalia. See Breaux v. LeBlanc, 16 La. Ann. 145 (1861); Hall & Lisle v. Wyche, 31 La. Ann. 734 (1879); Bank of Coushatta v. Coats, 170 La. 163, 127 So. 587 (1930).}

\(\text{For general discussion of administration of paraphernalia see 9 Manresa, art. 1384, at 471-83; V Castan Tobenas, Derecho Civil Español pt. 1, at 355-68 (1954).}

\(\text{103. For wife's four kinds of bienes see Matienzo, Comm. to N.R. 10.4.11, Gloss IV. For further description and sub-classification see Part. 4.11.1-3, 17; Feb. Cont. 1.1.2.1.1-2, 4-6, 11-14.}

\(\text{104. L. Toro 54-56, Nueva R. 5.3.1-3; N.R. 10.20.10 and N.R. 10.1.11-12, corroborating Fuero Real. 1.11.8; 3.18.5; 3.20.13 (no authorization needed by wife for individual acts in trade, once permission had been given to be engaged in trade which, according to Gloss of Montalvo 3.20.13 was due to the fact that she was engaged in man's work); Matienzo, Comm. to N.R. 10.4.1, Gloss II, no. 2; Feb. Cont. 1.1.5.75-76; 24.4.109; Feb. Jul. 1.2.1.1.27; Schmidt, Civil Law of Spain and Mexico, art. 482. (1851).}

\(\text{See also Escribche, Diccionario, Mujer Casada, at 245, col. 2; 9 Manresa, art. 1384, at 475-81 (particularly for discussion of L. Toro 55 as limiting administrative rights given married women by Part. 4.11.17).}

\(\text{Cf. Sp. Civ. Code arts. 59-63, 65-66 (incapacity of married woman said by Manresa to be deduced from husband's duty of protection. 1 Manresa 404) and La. Civ. Code arts. 121-135 (now superseded by La. R.S. 9:101-105 so far as the married woman over eighteen and not interdicted is concerned).}

\(\text{105. L. Toro 57; Nueva R. 5.3.4; N.R. 10.4.13. See 1 de Fumiak 319-20.}

\(\text{106. Cf. Escribche, Diccionario, Bienes Extradotales, at 84, col. 2 (if the husband denies the authorization, the judge cannot compel it).}

\(\text{107. L. Toro 58; Nueva R. 5.3.5; N.R. 10.1.14; L. Toro 55, Comm. by Llamas y Molina, nos. 6 & 7; Schmidt, Civil Law of Spain and Mexico, art. 483 (1851). See also text accompanying notes 133-136 infra.}\)
applied to the administration of dowry. Consequently, in the event of the husband’s mismanagement of her *paraphernalia* the wife could avail herself of the same action prevailing in the case of the mismanagement of her dowry. Even during marriage the wife could require her husband judicially to surrender her *paraphernalia* (or her dowry) to her, place it in the hands of some third person, or give security so that he would not alienate it. If the wife had reason to know of her husband’s mismanagement of her *paraphernalia* or dowry and failed to take action against him, prescription began to run against her, because she was presumed to have consented to his mismanagement by her silence. The principal remedy of the wife, however, both in the case of *paraphernalia* and of dowry, was to take action on the tacit mortgage which she held on her husband’s entire patrimony, including his separate assets and his share of the *gananciales*, for the amount of her separate assets which he administered or had received as dowry.

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108. PART. 4.11.17; Feb. Jul. 1.1.3.1.43. It did not enjoy the same privilege which the dowry had, however. *See* Azevedo, Comm. to N.R. 10.4.3, No. 23; Goyena, FEBRERO, 1.1.5.10.1.268 (1844). *Cf.* SP. CIV. CODE arts. 1367-81, 1391.

109. PART. 4.11.29. *Cf.* SP. CIV. CODE arts. 225-29, 1433 (action for civil interdiction in case of prodigality), LA. CIV. CODE arts. 2387, 2391, LA. R.S. 9:291 (1850) (action for restitution of paraphernal effects) and LA. CIV. CODE art. 2425 (action for separation of property when dowry is in danger). *But see* V CASTAN TOBENAS, DERECHO CIVIL ESPAÑOL, pt. 1, at 356 (1854), which indicates that today the right of administration given by the wife to the husband in the marriage contract cannot be withdrawn, because it would vary the marriage contract, which is now forbidden.

*La. CIV. CODE* art. 2425, together with article 2430, has been interpreted to authorize the wife, not only to sue for the return of her dowry, but also to sue for a complete dissolution of the community. *See*, e.g., Davock v. Darcy, 6 Rob. 342 (La. 1844) (wife allowed to sue for separation of property to protect future earnings even though she had no dowry and no claim against her husband at the time); Childers v. Johnson, 6 La. Ann. 634 (1851); Robertson v. Conyngham, 9 La. Ann. 268 (1854) (no suit by wife possible without claim against husband); Snoddy v. Braashere, 13 La. Ann. 469 (1858); Burns v. Thompson, 39 La. Ann. 377, 384, 1 So. 913, 919 (1887). Even in pre-codification days a suit for separation of property was interpreted as a suit for dissolution of the community. *See* Labbe’s Heirs v. Abat, 2 La. 553 (1851).

110. PART. 3.29.8; SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, art. 1409(5) (1851); Feb. Cont. 1.2.1.39. *See also* Feb. Jul. 1.1.3.1.42 (wife had no privilege or preference, however).

111. PART. 4.11.17; N.R. 10.4.2, Azevedo, Comm. Nos. 22-24; Matienzo, Comm. to same law, Gloss VII, no. 6; Matienzo, Comm. to N.R. 10.4.3, Gloss II, no. 2; Azevedo, Comm. to N.R. 10.4.9, nos. 16, 17; Feb. Cont. 1.2.1.1.11, 50-54; Feb. Jul. 1.1.3.1.42 (wife had no privilege or preference, however).

*Cf.* SP. CIV. CODE arts. 1362, 1384; 9 MANRESA 392-94, 696; LA. CIV. CODE arts. 2376, 2380. *See* Cassou v. Blanque, 3 Mart.(O.S.) 390 (La. 1814); Dreux v. Dreux’s Syndics, 3 Mart.(N.S.) 239 (La. 1825); DeGruy v. St. Pe’s Creditors, 4 Mart.(N.S.) 404 (La. 1826) (no privilege, however).

*See also* notes 263-264 infra.
Wife’s acts of administration relating to community assets

The wife had no right alone to bind the community;\textsuperscript{112} nor could she interfere with her husband’s administration of it, or even of her own assets, so long as she permitted him to administer them; yet in certain instances administrative acts regarding the community assets did become available to her. In the case of the husband’s insanity or incapacity for other reasons, and in the case of his absence, the wife could apply to the court for the power to perform all the acts which her husband would have exercised in good management of the sociedad, such as the power to contract, appear in court, etc.\textsuperscript{113}

The wife was empowered at all times to make gifts out of the common fund for the support of a needy person, or for a pious object, and without her husband’s authorization.\textsuperscript{114}

III. Obligations and Liabilities of Husband and Wife

The basic principle of the ancient Spanish law concerning debts of the spouses stems from a provision of the Fuero Real, promulgated in 1255, which provision was expanded in the Leyes de Estilo and in the Nueva and Novissima Recopilaciones of 1567 and 1805, set forth below in original and translation.\textsuperscript{115}

\begin{quote}
A. Fuero Real, 1255 A.D.
Book 3, Title 20, Law 14

Como el deudo fecho durante el matrimonio, lo deben pagar marido, e muger justamente.

Todo deudo que marido, e muger ficieren en uno, paguenlo, otro si, en uno; e si antes que fuesen ayuntados por casamiento algunos dellos ficiere deudo, paguelo aquel que to fiza, y el otro no sea tenudo de pagarlo de sus bienes.
\end{quote}

\textsuperscript{112} N.R. 10.4.9, Llamas y Molina, Comm. no 16. See also notes 143-144 infra.

\textsuperscript{113} Part. 6.18.13; L. Toro 54.59, Comm. by Llamas y Molina; Asso y Manuel, Instituciones 1.2.1.3-4; Schmidt, Civil Law of Spain and Mexico, art. 42 (1851); Sp. Civ. Code arts. 1436, 1441; 9 Manresa, 661-62. Cf. La. Civ. Code art. 64 (wife has similar rights only in case of declared absence of husband).

\textsuperscript{114} Matienzo, Comm. to N.R. 10.4.5, Gloss VI, no. 8; Azevedo, Comm. to same law, no. 11 (no gift to the value of more than 40 crowns); Feb. Jul. 1.1.4.2.67.

\textsuperscript{115} The text and the translations of these laws are from 2 de Funik, Principles of Community Property (1943), and are based on the scholarship of Lloyd M. Robbins of San Francisco, California.
Translation

How a debt contracted during marriage should rightly be paid by husband and wife.

Every debt that husband and wife have contracted in common, let them likewise discharge it in common; and if before they were joined in marriage either of them contracted a debt, let that one pay it who contracted it, and the other shall not be liable to pay it from his or her properties.

B. Leyes de Estilo, 1310 A.D.

Law 207.

Quando la muger es obligada a las deudas que faze el marido durante el matrimonio.

Todo el deudo el marido, et la muger fizieren en uno, paguenlo otrosi en uno. Et es a saber, que el deudo que faze el marido, muger la muger non lo otorque, nin sea en la carta deudo, tenuda es a la meytad del deudo. Et otrosi es a saber, que si la muger se obliga con el marido al deudo de mancomun, et cada una por todo: que si a la muger demandan toda lo deuda, que lo poder faze, et es tenuda de pagar toda la deuda. Otrosi, si la muger es menor de edad quel fuero manda, et es casada, et se obliga con su marido en el emprestido en la carta deudo; tenuda es ella a la su meytad del deudo; et si se obligo de mancomun, et cada uno por todo, sera tenuda a todo el deudo si gelo demandan, muger sea menor de edad. Ca el casamiento cumple la edad, et la malicia la edad. Et como quiere parte en las ganancias, asi se debe parar a las deudas. Mas si la qui es menor de edad non se obliga en la carta con su marido, non sera tenuda a la deuda. Et el ome menor de edad desque casado es sera tenudo a todo emprestipo, et obligamiento de deuda que faga; pero en las otras cosas donde es otorgada restitucion a los menores, podre demandar restitucion.

Translation

When the wife is liable for the debts contracted by the husband during marriage.

Every debt that husband and wife have contracted in common, let them likewise pay it in common. And that is to say, that the debt that the husband contracts, although the wife
does not authorize it and is not a party to the evidence of debt, she is obligated for half of the debt. And likewise if the wife binds herself [solidarily] with the husband jointly for the debt, each one for the whole, if the whole debt is demanded of the wife, which can be done, she is obligated to pay the whole debt. Likewise, if the wife is a minor as declared by law, and is married and binds herself with her husband on the loan in the evidence of the debt, she is obligated for half of the debt; and if the obligation is joint [solidary], each one for the whole, she will be obligated for the whole debt upon demand even though she be a minor. For marriage and intent bring about (or effect) majority. And to the extent that she seeks a share of the earnings, so she should also assume the debts. But if one who is a minor does not bind herself on the note with her husband, she will not be obligated for the debt. And a husband who is a minor will be bound for the whole loan and obligated for any debt he incurs; but in other things where restitution to minors is authorized, he can demand restitution. (Derived in part from Law 14, of Book 3, Title 20, of Fuero Real, promulgated in 1255.)

C. Novisima Recopilacion, 1805 A.D.
Book 10, Title 11. De las Deudas y Fianza.
Law 2

La muger no sea obligada ni presa por fianzas ni deudas del marido.

Mandamos, que por fianza que el marido ficiere en cualquier manera, o por cualquiera razón, no sea obligada su muger, ni sus bienes. Y ordenamos, que por las deudas que el marido debiere, o por la confianza que ficiere, no sea presa la muger, aunque las deudas sean de nuestras rentas y pechos y derechos.

Translation

The wife shall not be bound or charged for undertakings or debts of the husband.

We, order, that for any undertaking or obligation that the husband shall contract in whatever manner, or for whatever reason, the wife shall not be bound, nor her properties. And we order, that for the debts that the husband shall owe, or for the security or pledge that he shall contract, the wife shall not be
charged, even though the debts are for our rents, taxes or legal claims. (Originally Laws 7 and 8, Title 3, Book 5, of the Nueva Recopilacion, promulgated in 1567, Law 7 of which was promulgated by Don Juan in 1387 and Law 8 of which was continued from the Laws of Toro, of 1505, which in turn was probably based on Law 5, Title 18, Book 3, of the Fuero Real of 1255.)

Law 3.

La muger no se pueda obligar por fiadora del marido, ni de mancomun, sino en los casos que se expresan.

De aqui adelante la muger no se pueda obligar por fiadora de su marido, aunque se diga y alegue se convirtio la tal deuda en provecho de la muger; y asimismo mandamos que quando se obligaron mancomun, marido y muger en un contrato, o en diversos, que la muger no sea obligada a cosa alguna, salvo si probare que se convirtio la tal deuda en provecho de ella, ca entonces mandamos que pro rata del dicho provecho sea obligada; pero si loque se convirtio en provecho de ella fue en las cosas que el marido le era obligado a dar, asi como en vestirla, y darla de comer y las otras cosas necesarias, mandamos que por esto ella no sea obligada a cosa alguna; lo qual todo que dicho es, se entienda si no fuere la dicha fianza y obligacion mancomun por marvedis de neustras rentas o pechos o derechos de ellas.

Translation

The wife cannot bind herself as surety for the husband, or jointly or severally, except in the cases provided.

Henceforth, the wife cannot bind herself as surety for her husband, even though he states and alleges that such debt is converted to the benefit of the wife; and likewise we order that when husband and wife bind themselves jointly or severally, the wife shall not be liable for anything, unless it be proved that such debt was converted to her benefit, in which event we order that she be liable pro rata to the extent of such benefit; but if that which was converted to her benefit was anything that the husband was bound to supply her, such as clothing, food, and other necessaries, we order that as to this she shall not be liable in any way; it being understood that the aforesaid

117. That is, the proceeds for which the debt was incurred. Id. at 25.
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does not apply where the said joint undertaking and obligation was for money for our rents, taxes or claims against her. (Originally the 61st Law of Toro, promulgated by the Cortes at Toro in 1505, and continued as Law 9, Title 3, Book 5, of the Nueva Recopilacion of 1567.)

Ante-nuptial debts

Certain general principles may be drawn from these laws. First, as between the spouses, all debts contracted before marriage were chargeable only to the spouse contracting or incurring them. If the husband, as administrator, with full use of the ganancial assets, voluntarily paid any of the debts which he or his wife had contracted before marriage, their respective patrimonies, including their share of the ganancial profits, would have been debited upon dissolution with the amount paid in satisfaction of ante-nuptial debts. Even though the husband and the community were identical in the eyes of third persons, nothing has been found either in the ancient Spanish authorities or in the early Louisiana decisions to indicate whether ante-nuptial creditors could have proceeded against the common assets during marriage for satisfaction of their credits, except in the case of legal charges as set forth below.

Under ancient Spanish law the legal obligation to support one's parents or children of a former marriage was considered an ante-nuptial debt inasmuch as the obligation arose prior to the existing marriage. As an ante-nuptial debt the obligation of support was properly chargeable to the spouse whose parents or children were being supported. If this spouse's patrimony were insufficient, or if monies were not available to discharge this obligation since all fruits of the separate patrimonies fell into the common fund, payment could be made voluntarily from the common fund in satisfaction of the obligation of support. Upon dissolution the other spouse or his heirs could seek reimburse-

118. See id. at 24.
119. Pechos—taxes paid to the Crown by those who did not belong to the nobility.
120. Feb. Jui. 1.1.3.3.69.
121. Azevedo, Comm. to N.R. 10.4.9, nos. 20, 21; Gutierrez, Quaestio CXXIX Feb. Jui. 1.1.6.1.1; 2.
122. See 5 SANCHEZ-ROMAN, vol. 1, at 848, which raises the question of the value of the right given to ante-nuptial creditors to collect at dissolution. See also Feb. Jui. 1.1.3.3.69.
123. Gutierrez, Quaestio CXXIX; Matienzo, Comm. to N.R. 10.4.2, Gloss VII, no. 10. Part. 4.19.2 (a natural right); accord, Feb. Jui. 1.1.3.3.73-75.
ment for one-half the cost of the support of the parents or children during the marriage.\textsuperscript{124}

\textit{Separate debts contracted during marriage}

Any debts contracted or incurred during marriage which concerned the separate patrimony of either spouse and did not benefit the marriage ultimately,\textsuperscript{125} personal or private debts,\textsuperscript{126} debts resulting from the husband’s suretyship,\textsuperscript{127} and debts of a similar nature, were considered separate and not to be debited to the other spouse’s share of the \textit{gananciales} upon accounting. As in the case of ante-nuptial debts, nothing has been found to indicate whether the separate creditor of a spouse could have obtained execution against the community assets during marriage, even though the husband and the community were the same in the eyes of third persons. Certainly the wife’s separate creditors could not have obtained execution against the common assets in the hands of the husband during marriage, only against her separate assets.

In the case of obligations imposed by law, such as penal obligations for criminal delicts,\textsuperscript{128} the half-interest of the husband or wife in the \textit{gananciales} could be reached in satisfaction of these claims during marriage, provided that the spouse’s separate patrimony was insufficient to meet his obligation. Although the ancient writers are not clear on this point, it may be assumed, consistently with the principle of the community regime, that the other one-half interest was retained by the innocent spouse as a separate asset.

Under a law of the \textit{Partidas},\textsuperscript{129} which was a vestige of a still older Roman law,\textsuperscript{130} a married woman was prohibited from acting as a surety for anyone, including her husband. Eight exceptions were made to this rule, one of which permitted the wife

\begin{footnotesize}
\textsuperscript{124} Gutierrez, \textit{Quaestio} CXXIX. See Feb. Jul. 1.1.3.3.74-75.
\textsuperscript{125} Gutierrez, \textit{Quaestio} CXXVIII, no. 4.
\textsuperscript{126} N.R. 10.11.2, Feb. Jul. 1.1.4.2.69. For modern definition of “personal debts,” which probably has not changed from the ancient, see 9 \textit{Manresa arts.} 1385-1386, at 487.
\textsuperscript{127} Gutierrez, \textit{Quaestio} CXXVIII, nos. 1-4. See also text accompanying notes 98, 100-101 supra.
\textsuperscript{128} Azevedo, Comm. to N.R. 10.4.10, nos. 15-17, 20; Matienzo, Comm. to same law, Gloss III; Llamas y Molina, Comm. to same law, nos. 29, 38-40; Matienzo, Comm. to N.R. 10.4.11, Gloss III; Llamas y Molina, Comm. to same law, nos. 10-14.
\textsuperscript{129} Part. 5.12.2.
\textsuperscript{130} D. 16.1; C. \textit{Pauli Sententiae} 2.11.
\end{footnotesize}
to renounce this law in her own favor. Later, under the Sixty-First Law of Toro, the wife was specifically prohibited from acting as surety for her husband, although she was permitted to contract jointly and solidarily with him for obligations benefiting her separate patrimony and to act as surety where taxes and debts of the Crown were involved. If the benefit for which

131. PART. 5.12.3. Cf. LaCroix v. Coquet, 5 Mart. (N.S.) 527 (La. 1827).
132. Although a matter of much controversy over the centuries, it seems that the prohibition against the wife's acting as surety for her husband was not renounceable. See Llamas y Molina, Comm. on L. Toro 61, nos. 69-92, 72-77, 85, 87; ALVAREZ POSADILLA, Comm. on L. Toro 61.

It is stated in Beauregard v. Piernas, 1 Mart. (O.S.) 281, 296 (La. 1811), that the courts of Spain construed L. Toro 61 as if it contained a clause of renunciation. No doubt it was in acknowledgment of the legal practices of the day, rather than due to his own ignorance or misunderstanding of L. Toro 61 as repealing Part. 5.12.3 (third exception), that impelled the famous notary Febreo to write at length prescribing forms for the renunciation by married women of the prohibition enacted for their own benefit against their acting as sureties for their husbands. See Feb. Cont. 2.4.4.114-121, 125.

Whether in reliance upon Febreo or upon other Spanish commentators, it is clear that, until prohibited by article 2412 of the Code of 1825, Louisiana courts did recognize the right of a married woman to renounce the prohibition against her acting as surety for her husband, provided that she did it expressly. See Beauregard v. Piernas, 1 Mart. (O.S.) 281 (La. 1811); Brognier v. Forstall, 3 Mart. (O.S.) 577 (La. 1815); Bourcler v. Lanusse, 3 Mart. (O.S.) 581 (La. 1815) (case decided on another point); Chapillon v. St. Maxent, 5 Mart. (O.S.) 168 (1817). See also Treme v. Lanaux's Syndics, 4 Mart. (N.S.) 230 (1826) (discusses all the above-cited cases, although decided on another point); and Gasquet v. Dimity, 9 La. 592, 604 (1836) (dissent by J. Martin reveals his understanding of the Spanish law and of the early Louisiana law as permitting the renunciation by the married woman of the prohibition against acting as surety for her husband).

In the following cases the Louisiana courts ignored the Spanish commentators and interpreted the pertinent laws for themselves as forbidding the renunciation by the married woman of the prohibition against acting as surety for her husband: Durnford v. Gross, 7 Mart. (O.S.) 465 (La. 1820) (briefs of counsel very interesting); Banks v. Trudeau, 2 Mart. (N.S.) 39 (La. 1823); Spriig v. Boussier, 5 Mart. (N.S.) 54 (La. 1826); McMicken v. Smith, 5 Mart. (N.S.) 427 (La. 1827); Hughes v. Harrison, 7 Mart. (N.S.) 251 (La. 1828); Pile v. Patin, 8 Mart. (N.S.) 692 (La. 1830).

See also Bank of Louisiana v. Farrar, 1 La. Ann. 49 (1846), which states that article 2412 of the Code of 1825 only codified existing law in Louisiana prohibiting a married woman from acting as her husband's surety, but accepts section 32 of the Act of 1824 (which states that married women are capable of acting as sureties for their husbands in banking matters) as an exception to Art. 2412 of the Code of 1825, not repealed by it.

133. L. Toro 61; NUEVA R. 53.9; N.R. 10.11.3. See Azevedo, Comm. to N.R. 10.3.4, nos. 11-12. See also Feb. Jul. 1.1.3.3.68.

The rule that the contracts of a married woman when contracting as a principal would be valid only when they were proved to have enured to her own separate benefit and did not provide those things which her husband was already obligated by marriage to provide has always been the law in Louisiana from earliest times, even though after the passage of Act 200 of 1855 it became unnecessary to prove her acts when properly made. See, e.g., Chapillon v. St. Maxent, 5 Mart. (O.S.) 166 (La. 1817); Durnford v. Gross, 7 Mart. (O.S.) 465 (La. 1820); Lombard v. Guilliet, 11 Mart. (O.S.) 453 (La. 1822); Lawes v. Chinn, 4 Mart. (N.S.) 358 (La. 1826); Perry v. Gergeau, 5 Mart. (N.S.) 339 (La. 1826); Brandegge v. Kerr, 7 Mart. (N.S.) 64 (La. 1829); Sowell v. Cox, 10 Rob. 68 (La. 1845); Beauregard v. Her Husband, 7 La. Ann. 293 (1852).
the wife contracted were in the form of food, clothing, or other
necessaries which the husband was required by the law of mar-
rriage to supply his wife, she could seek reimbursement from
him at dissolution of the regime. If the wife discharged the
obligation and if it were discovered subsequently that it had
enured to the husband's separate benefit, she could demand
indemnification from him in this instance also. It is clear that
the husband could bind himself solidarily with the wife for her
separate obligation, despite the fact that she could not bind
herself for his.

As mentioned earlier, it was only in limited instances that
the separate patrimonies of the spouses actually had liquid funds
with which to satisfy separate debts. As a result separate debts
contracted during marriage very often were paid voluntarily
with common funds, with the proper spouse's share of the ganan-
cial profits being debited with them in the final accounting. The
whole matter of separate debts was of far less importance to
the Spanish, however, because separate assets were used for the
common benefit. Most transactions, although concerning the
separate patrimony, in reality benefited the marital partnership
and became its obligation.

Common debts

Since the Spanish sociedad de gananciales was built upon a
theory of complete equality of benefit and mutuality of obliga-
tions, it was logical that the spouses should have shared equally
in the debts incurred during marriage and contracted for its
benefit. This principle prevailed whether the husband acted
alone or together with his wife or whether the wife acted in

134. PART. 3.2.5; SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, art. 56 (1851).
135. L. TORO 61, NUEVA R. 5.3.9; N.R. 10.11.3; Feb. Jul. 1.1.3.2.59.
136. Azevedo, Comm. to N.R. 10.3.4, no. 16.
137. L. TORO 61; NUEVA R. 5.3.9; N.R. 10.11.3.
138. See text accompanying notes 59-60 supra.
139. See notes 15-16 supra. Cf. N.R. 10.4.2; Matienzo, Comm., Gloss VII, no. 6; and N.R. 10.4.3.
140. 1 DE FUNIAK § 160 at 450.
142. FUERQ REAL 3.20.14; Matienzo, Comm. to N.R. 10.4.1, Gloss III, no. 16; Matienzo, Comm. to N.R. 10.4.2, Gloss VII, no. 1; Llamas y Molina, Comm. to N.R. 10.4.8, no. 47; Gutierrez, Quaestio CXXVIII, no. 3; Quaestio CXXIX, no. 1; Azevedo, Comm. to N.R. 10.4.9, nos. 15-16.
143. L. ESTILo 207; Matienzo, Comm. to N.R. 10.4.2, Gloss VII, no. 2; Feb. Jul. 1.1.3.3.68.
her own name with the authorization of her husband, express or tacit, or as his mandatary. These were the “common debts” for which, generally speaking, the “common assets” were liable.

In the ancient Spanish law there was no prohibition against the husband and wife contracting together or obligating themselves jointly or solidarily in their common interests. If they obligated themselves solidarily, either spouse could be compelled by third parties to pay the entire debt out of his separate assets; but as to each other, each spouse remained liable for half only. Contrary to the general rule that the wife was not personally liable on common debts so far as third persons were concerned, creditors of the husband could obtain execution against the wife’s separate assets where the debt had been contracted for support of the wife and where both the community assets and the husband’s separate assets proved insufficient. Recovery was allowed in this instance, probably, for reasons completely apart from the matrimonial regime. Inasmuch as the wife had actually received the benefit of the husband’s obligation, it seemed just that she should pay it, if able, rather than make the creditor suffer.

Renunciation

If the spouses had contracted against a community of acquets and gains before or at the time of marriage, the wife did not become liable for the common debts. Nor did she become liable

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144. Matienzo, Comm. to N.R. 10.4.2, Gloss VII, no. 2; Matienzo, Comm. to N.R. 10.4.1, Gloss II, no. 2; Llamas y Molina, Comm. to N.R. 10.4.9, no. 16; Feb. Jul. 1.1.4.1.6. See also 9 MANRESA 657-61.

145. Matienzo, Comm. to N.R. 10.4.2, Gloss VII, no. 2; Gutierrez, Quaestio CXXVII, no. 3; Llamas y Molina, Comm. to N.R. 10.4.9, no. 16.

146. PART. 5.5.2; 5.11.4; L. Toro 55, Llamas y Molina, Comm., no. 8; Feb. Conf. 2.7.1.2; Labbe’s Heirs v. Abat, 2 La. 553, 565 (1831) (acknowledges that husband and wife could contract together under Spanish law). See also 10 MANRESA, arts. 1457-59 at 119-125.

147. L. ESTILÓ 207. See also Feb. Jul. 1.1.3.3.68.


149. L. ESTILÓ 207; Matienzo, Comm. to N.R. 10.4.2, Gloss VII, no. 2; Azevedo, Comm. to N.R. 10.4.9, no. 18.

150. Llamas y Molina, Comm. to N.R. 10.4.9, no. 16.

151. Matienzo, Comm. to N.R. 10.4.2, Gloss VII, no. 5.


153. See text accompanying note 3 supra.
for the common debts at the time of dissolution\textsuperscript{154} if she renounced her right to share in the profits. The wife had the right to renounce not only at the time of marriage and upon its dissolution, but also during marriage,\textsuperscript{155} even though this renunciation would be in effect a donation,\textsuperscript{156} and donations were strictly forbidden between the spouses.\textsuperscript{157} Once the wife had accepted the community; however, she became bound by her decision.\textsuperscript{158}

There were certain exceptions to the wife's right of renunciation during marriage, for the wife was not permitted to renounce ganancial profits to the prejudice of the inheritance rights of her heirs.\textsuperscript{159} Although there was much debate on the subject, it was finally resolved that the wife could not renounce ganancial rights during marriage to the prejudice of existing creditors, but that she could renounce as to future creditors.\textsuperscript{160} Those favoring the validity of the wife's right to renounce during marriage did so on the basis that it made the wife no poorer, since her interest in the community was "revocable," and her renunciation would not injure the rights of third parties. The husband was not permitted to renounce the community at any

\textsuperscript{154} Matienzo, Comm. to N.R. 10.4.9, Gloss I, no. 8; Azevedo, Comm. to same law, no. 20; Gutierrez, Quaestio CXVI, no. 1. Azevedo raises the question of whether or not a wife who has agreed to participate in profits may also make an agreement not to be liable for debts (Comm. to N.R. 10.4.9, no. 10).

\textsuperscript{155} Matienzo, Comm. to N.R. 10.4.1, Gloss I, no. 60; Matienzo, Comm. to N.R. 10.4.9, Gloss I, no. 2; Llamas y Molina, Comm. to same law, no. 2; Gutierrez, Quaestio CXXVI, especially no. 1; Feb. Jul. 1.1.4.2.58-60. Eschichen, Diccionario, Bienes Gananciales, at 88, col. 2. Renunciation during marriage was acknowledged in early Louisiana, too. See Labbe's Heirs v. Abat, 2 La. 553, 565 (1831).

Renunciation during marriage is no longer permitted in Spain, because it would permit a variation of the marriage contract, and constitute a prohibited donation. See Sp. Civ. Code, art. 1394, and also 9 Manresa art. 1394 at 534-37.

Although Louisiana forbids the alteration of the marriage contract (La. Civ. Code art. 2329), the action for separation of property and a consequent dissolution of the community in effect constitute a renunciation during marriage. See note 109 supra.

\textsuperscript{156} Matienzo, Comm. to N.R. 10.4.1, Gloss I, no. 60; Matienzo, Comm. to N.R. 10.4.9, Gloss I, no. 2; Azevedo, Comm. to same law, no. 8; Llamas y Molina, Comm. to same law, nos. 6-9, 11; Feb. Jul. 1.1.4.2.59.

It has been suggested that modern day life insurance, where the spouses are beneficiaries, follows the same principle of donation of community assets between the spouses. 1 de Funiax §§ 79, 143.

\textsuperscript{157} Part. 4.11.4-5.

\textsuperscript{158} N.R. 10.4.9, Matienzo, Comm., Gloss I, no. 9; Azevedo, Comm. to same law, no. 13; Feb. Jul. 1.1.4.2.71.

\textsuperscript{159} Gutierrez, Quaestio CXXVII, no. 4; Llamas y Molina, Comm. to N.R. 10.4.9, no. 18.

\textsuperscript{156} Matienzo, Comm. to N.R. 10.4.9, Gloss I, no. 6; Azevedo, Comm. to same law, nos. 5, 9-10; Gutierrez, Quaestio CXXVI, no. 5 and Quaestio CXXVII; Llamas y Molina, Comm. to same law, nos. 13-17, 19.
time;\textsuperscript{161} therefore, he remained personally liable for common debts at all times and despite the wife's renunciation during marriage.

The right of the wife to renounce during marriage and the right of either spouse to use separate funds and assets for the benefit of the community between them, thereby subjecting these assets to the possibility of being changed in nature, in reality permitted the spouses the right to vary their matrimonial agreements. The right to vary the marriage contract after marriage derived from the Roman law and prevailed widely in ancient Spain,\textsuperscript{162} although it is prohibited there today,\textsuperscript{163} and has been prohibited in Louisiana since 1808.\textsuperscript{164}

\textbf{Partnerships}

Since the spouses were able to vary their marriage contracts after marriage, and since a married woman did not need her husband's authorization for each particular act in trade,\textsuperscript{165} once she had secured his permission initially to engage in trade,\textsuperscript{166} there would seem to have been no obstacles under ancient Spanish law to spouses becoming business partners \textit{with each other} or with third persons. Unless the spouses contracted to the contrary prior to marriage, all profits and gains from the spouses' commercial ventures, even where their separate capitals were used, became ganancial assets under general principles enunciated previously. Accordingly, the wife's obligations as partner became the husband's obligations as well, inasmuch as the profits of the partnership entered the community of acquets and

\begin{footnotesize}
\begin{enumerate}
\item Llamas y Molina, Comm. to N.R. 10.4.9, no. 16. It was specifically provided under the Louisiana Digest of 1808 that the wife who had obligated herself jointly with her husband remained bound toward those creditors, but with the right to reimbursement from the husband or his heirs, if she renounced. La. Digest of 1808, bk. 3, tit. 5, art. 85.
\item D. 23.4.1; D. 23.3.72(2.). See also 9 MANRESA, arts. 1319, 1320 at 144.
\item La. Digest of 1808, bk. 3, tit. 5, art. 85, now LA. CIV. CODE art. 2329.
\item FUERO REAL, 3.20.13; SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, art. 482 (1851).
\item This rule is stated clearly in SP. CÓDIGO DE COMERCIO art. 5 (1829). No specific statement to this effect has been found in the older Spanish sources, but presumably the wife engaged in trade was considered as acting with her husband's consent, for the Spanish wife owed her husband obedience. SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, art. 38 (1851). Montalvo's Gloss to FUERO REAL, 3.20.13, stating that the wife engaged in trade is not required to obtain her husband's permission to every act of trade because she was engaged in man's work, is not inconsistent. He is addressing his comment to the need for protecting third persons dealing with the wife and not toward the question of whether or not she may be a public merchant without her husband's permission.
\end{enumerate}
\end{footnotesize}
gains. Thus the husband and wife in the ordinary community of gains were powerless to vary the net results of their matrimonial regime by entering into a commercial partnership.

Remedies

Just as husband and wife were able under the ancient Spanish law to acquire contractual liability against each other, so they were able to sue each other in satisfaction of it. As already noted the wife could sue her husband in regard to her dowry and her paraphernalia administered by him. There is no evidence, however, to indicate that the wife could sue her husband in regard to her ganancial interest until dissolution.

A wife's suit against her husband for any delict, including theft, was permissible. Husbands' suits against wives for delicts were permitted, also, but did not extend to theft.

Since a delict was a personal matter attributable to the fault of an individual, no delict of either spouse to a third person could be held to injure the innocent spouse or his share of the gananciales. As mentioned below, where the delict was committed against the Crown, it could proceed, even during marriage, to confiscate as delictual damages the interest of the spouse at fault in the gananciales, provided that his separate assets were insufficient to satisfy the claim. In the case of wrongs against private individuals they might have to await dissolution and a final

168. Part. 3.2.5; Escrich, Diccionario, Mujer Casada 244. See also Llamas y Molina, Comm. to L. Toro 55, no. 17.
169. See text accompanying note 109 supra.
170. Presumably La. Code of Practice art. 105 (1805) was intended to reflect the Spanish rules of suits between husband and wife when separated in property, or in regard to their separate capitals, but not their common assets. The Louisiana article has been severely distorted by the jurisprudence (leading case, Carroll v. Carroll, 42 La. Ann. 1071, 8 So. 400 (1890)) and later by the legislature (La. R.S. 9:291 (1960)) under the direction of the Louisiana State Law Institute, which apparently completely misunderstood the basic principles involved and forbids suits between husband and wife no matter what the matrimonial regime between them, except in the cases of legal separation, divorce, separation of property, and suit by the wife for recovery of her paraphernal assets.
171. Part. 7.14.4.
172. Part. 3.2.5; 7.14.4; Feb. Jul. 1.3.1.1.28.
173. Part. 5.10.7, 13; 7.34.18, 22; L. Toro 77; Nueva R. 5.9.10; N.R. 10.4.10; Matienzo, Comm. to same law, Gloss II; Azevedo, Comm. to same law, nos. 1-7, 11-20; Llamas y Molina, Comm. to same law, nos. 1-2, 16-18, 29-43; Matienzo, Comm. to N.R. 10.4.2, Gloss VII, no. 11; Feb. Cont. 1.1.22.243; Feb. Jul. 1.1.4.2.44-45; Asso y Manuel, Instituciones 1.7.5.2. Cf. Sp. Civ. Code art. 1410; 9 Manresa art. 1410 at 623-25.
174. See text accompanying note 252 infra.
175. See note 252 infra.
determination of ganancial assets before they could execute their
claims against the wrong-doer, if his separate assets were not
adequate to meet his claims during marriage; but never could
the ganancial interest of the innocent spouse be prejudiced by
the other's delictual acts.

If the obligation being sued on had enured to the benefit of
the marital partnership, the husband was the proper person to
sue or be sued, whether the obligation was for a delict, a
matter of reviving a prescribed debt, a mortgage signed by hus-
band and wife, or some other matter directly affecting the
affairs of the community.

Creditors of existing obligations relating to the community
of gains might have sued to set aside fraudulent transfers of
ganancial assets made by the husband within one year from the
day they were informed of them, provided that they could prove
that the person receiving the assets, if a major, knew that the
debtor had alienated them maliciously. Donations inter vivos
or mortis causa by the spouses also were subject to attack under
the same conditions as in the case of fraud of the creditors' rights.

All losses to the separate things of the respective spouses
were to be borne ultimately by the community, except in the
case of the fault of the owner. If the husband used ganancial
funds to improve his or his wife's separate asset, with the result
that the improvement became a part of the separate asset, an
accounting could be obtained upon dissolution, with the right of
reimbursement in the community. It is not clear whether com-
mon creditors had any remedy under these circumstances before
dissolution; certainly in the case of the improvement's becoming
a part of the wife's separate asset, they did not.

Priority of creditors

The question of priority of creditors did not arise until disso-
lution; hence it will be treated elsewhere.

176. PART. 3.2.5; L. ESTMO 205; N.R. 10.4.5; SCHMIDT, CIVIL LAW OF SPAIN
AND MEXICO arts. 40, 51 (1851).

177. PART. 5.15.7, 11; Matienzo, Comm. to N.R. 10.4.5, Gloss VI, nos. 5, 10.

178. Id.

179. See notes 261-264 infra.

180. Azevedo, Comm. to N.R. 10.4.1, no. 12; Matienzo, Comm. to N.R. 10.4.2, Gloss VII, no. 6; Comm. to N.R. 10.4.3, Gloss II, no. 2.

181. See note 56 supra.

182. Feb. Jul. 1.1.4.3.73-75; ASO Y MANUEL, INSTITUCIONES 1.7.5.2.

183. See text accompanying notes 268-278 infra.
IV. DISSOLUTION

Death was the principal cause of the dissolution of the sociedad de gananciales. Renunciation by the wife during marriage also might effect a dissolution. Separation from bed and board, which the Spanish called "divorce," confiscation of the assets of one of the spouses, and forfeiture by the wife due to her own misconduct, all interrupted or suspended the community of gains, but did not prevent future sharing on a different basis. There is no evidence of a complete dissolution of the community of gains without a complete dissolution of the marriage by death, except in the rare instance of a wife's renunciation during marriage. Dissolution of the community due to the husband's mismanagement was not possible as it is in Louisiana today.

Death: testamentary disposition

Spouses might make testamentary dispositions to each other as well as to third persons from their own shares of the ganancial assets, subject to the rights of creditors and to the limitations of the Spanish laws on forced heirship. Where the testator attempted to leave specific community assets to the descendants or other heirs, the legacy was valid only as to the testator's share in the asset. The surviving spouse might consent to the validity of the entire legacy, however, if it were not prejudicial, and accept reimbursement from some other ganancial asset to the extent of one-half the value of that particular piece.

Death: intestate succession

In the case of intestate successions the deceased's share of the ganancial assets and liabilities passed automatically to his or her heirs who accepted the succession. In the case of the wife, it was not necessary for her to accept it before her share of the gananciales passed to her heirs, because she had already owned it prior to death. The heirs of the wife could renounce

184. See 9 Manresa 668.
185. La. Civ. Code arts. 2425, 2430; See also 1 de Funiak § 129.
186. L. Toro 16; Nueva R. 5.9.7; N.R. 10.4.8.
187. Fuero Juzgo. 4.4.1; Fuero Real. 3.12.7; 3.5.10; Part. 6.7.2, 12; L. Toro 6, 9, 10 and 28; Nueva R. 5.5.1; N.R. 10.20.1; Matienzo, Comm. to N.R. 10.4.8, Gloss II; Schmidt, Civil Law of Spain and Mexico, arts. 975-979 (1851); Feb. Cont. 1.1.14.169; Feb. Jul. 2.2.1.2.21-32.
188. Gutierrez, Quaestio CXXI, no. 6.
189. See note 192 infra.
190. Gutierrez, Quaestio CXXIII, no. 1; Matienzo, Comm. to N.R. 10.4.5, Gloss IX, nos. 2 and 3; Azevedo, Comm. to N.R. 10.4.6, no. 4; and Comm. to N.R. 10.4.8, no. 4.
the community without renouncing her succession, but not vice versa. The heirs of the husband, however, did not have the privilege of renouncing his share of the community of acquets and gains¹⁹¹ separately from his succession; but they could repudiate his entire succession,¹⁹² including his one-half share in the community assets and liabilities.

Death caused an instantaneous cessation of the formerly existing sociedad de gananciales¹⁹³ which could not be continued between the surviving spouse and the heirs of the other. If, however, these parties retained the community assets undivided in their hands, their inaction and course of conduct might create the presumption that an ordinary partnership (sociedad) had been formed tacitly among them.¹⁹⁴ If the heirs of the deceased were minors under fourteen years of age, they were without the legal capacity to contract a partnership. At the age of fourteen, with their tutors or curators consenting,¹⁹⁵ or when they reached the full age of majority at twenty-five,¹⁹⁶ the heirs could either consent to the existing arrangement, which thereupon constituted it a partnership, or they could ask for a partition.¹⁹⁷ Any profits accumulated during this period of ownership in indivision were shared equally between the surviving spouse and the heirs.¹⁹⁸ Whether or not a partnership were so established, the new co-

¹⁹¹ Matienzo, Comm. to N.R. 10.4.5, Gloss IX, nos. 2 and 3; Comm. to N.R. 10.4.9, Gloss I, no. 8.

¹⁹² Under ancient Spanish law, deriving from the Roman, a succession was held in abeyance until the heirs accepted it tacitly or expressly. See Part. 6.6.11. See also Feb. Cont. 3.14.1.1.; Feb. Jul. 1.1.2.108-110. SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, arts. 1267-1269 (1851). DOMAT, CIVIL LAW TREATISE 2.1.1.14 (Wm. Strahan transl. 1722). This same principle prevailed in Louisiana under La. Digest of 1808, bk. 3, tit. 6, art. 74 until the doctrine of le mort saisit le vif was adopted from the French by La. Civ. Code arts. 934, 935, 940-943 (1825); cf. St. Civ. Code, arts. 988-1004; 7 MANRESA 339-351.

¹⁹³ Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 13, 16, 17; Matienzo, Comm. to N.R. 10.4.6, Gloss II, no. 5; Gutierrez, pref. to Quaestio CXXX; SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, art. 57 (1851); Feb. Jul. 1.1.4.4.89, 97. See also Pizot v. Meuillon's Heirs, 3 Mart. (O.S.) 97 (1813).

¹⁹⁴ Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 9, 11, 18, 19, 22-29, 34; SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, art. 58 (1851); Feb. Jul. 1.1.4.4.86, 90-94, 97-98, 102-103; Feb. Jul. 1.1.6.2.41. See also Feb. Cont. 3.9.1.13.

Since the father is the administrator of the children's bienes of right, the fact that he as surviving spouse continued to hold their things in indivision and administer them did not necessarily indicate the formation of a new sociedad with them. Feb. Jul. 1.1.4.4.96.

¹⁹⁵ PART. 5.10.1; PART. 5.11.4-5; SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, art. 476 (1851); See also FUERGO REAL. 1.11.7; PART. 5.1.5.

¹⁹⁶ PART. 6.16.12; Feb. Jul. 1.1.4.4.95.

¹⁹⁷ Azevedo, Comm. to N.R. 10.4.1, nos. 14, 15.

¹⁹⁸ Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 20-21; Azevedo, Comm. to same law, no. 15; Feb. Jul. 1.1.4.4.98.
owners had the obligation of completing any unfinished business begun before death, sharing in its profits and losses. 199

There was no usufruct in favor of the surviving spouse over the portion of the community of gains inherited by the deceased's heirs, similar to that provided by prevailing Louisiana legislation. 200 In intestate successions the surviving spouse might inherit a portion from the deceased in usufruct, 201 but this was without reference to the community formerly existing between them.

Succession administration

An extensive search of the ancient laws and authoritative writings fails to reveal any procedure for the liquidation or administration of a community after dissolution by death or otherwise. It is clear that the administration of the husband ends at the death of either spouse, but there is no provision or suggestion to be found in the ancient Spanish law regarding the person to take his place for liquidation purposes. It is possibly significant that, in a section setting forth those persons who are required to take inventories, Febrero does not list a surviving spouse or a community representative. 202 Indeed Febrero affirms the complete silence of the ancient Spanish laws and writers as to time, place, or manner of settlement of the community of gains after dissolution. 203 There is no suggestion or direction that the community be liquidated before or after or during the succession of either spouse. There is nothing to indicate that there is to be any differentiation in procedures in liquidation of the community depending upon whether it is the husband or wife who has died.

The conclusion seems inescapable that the ancient Spanish did not contemplate an administration of the community of gains after dissolution. The Spanish did recognize that the surviving

199. Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 20-21; Gutierrez, Quaestio CXXX; Feb. Jul. 1.1.4.486, 99-100.
200. LA. Civ. CODE art. 916.
For surviving spouse's obligation to preserve during a second marriage bienes acquired from the other spouse by lucrative title see FUERO JUZGO. 3.1.6; 4.4.2; FUERO REAL. 3.2.1; PART. 5.13.26; L. TORO 15; SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, arts. 237(2), 1203, 1209 (1851).
202. Feb. Jul. 1.1.1.2.42. In Juicios 1.1.6.2.46 Febrero states very clearly that the wife may reintegrate her dowry and deduct it immediately from the mass without the necessity of any inventory or partition.
203. Feb. Jul. 1.1.3.3.77.
spouse and the heirs of the deceased became possessed of the assets and liabilities of the former community of gains immediately upon its dissolution.\textsuperscript{204} subject only to the right of the wife or her heirs to renounce.\textsuperscript{205} The widow’s exercise of possessory and other actions in regard to her share of the former community assets and liabilities was recognized\textsuperscript{206} without any requirement of a prior settlement or liquidation or adjudication or designation of the widow or anyone else as administrator.

The community assets and liabilities had to be determined before the decedent’s succession was finally settled, for these or a part of these might form a part of the succession; yet no statement to this effect exists in the ancient Spanish legal writings.\textsuperscript{207} In all probability the distribution of assets and payment of debts was handled informally by the heirs and surviving spouse without the aid of a judicially appointed administrator,\textsuperscript{208} except in the case of an insolvent or vacant succession. This, of course, did not prevent an aggrieved heir\textsuperscript{209} or creditor\textsuperscript{210} from petitioning for partition and asking judicial determination of ownership and rights. Anyone alleging an asset to be separate had the burden of proof.\textsuperscript{211}

It was possible, also, for creditors to force the wife or her

\textsuperscript{204} See notes 188, 190 supra. The transmission of rights to the former existing community of acquets and gains is to be distinguished from the transmission of inheritances, for which see note 192 supra.
\textsuperscript{205} Gomez, Comm. to L. Toro 53, no. 76.
\textsuperscript{206} See notes 81, 82 supra.
\textsuperscript{207} Feb. Jul. 1.1.3.77. See also 5 MANRESA, art. 657, at 277, which, in a discussion of partition procedures, confirms the fact that legislation on the subject is still deficient, but that in practice the community assets and liabilities must be determined, although not necessarily liquidated, prior to a settlement of the whole succession. Accord, V CASTAN TOBENAS, DERECHO CIVIL ESPAÑOL pt. 1, at 244 (1954) (as to practical procedures).
\textsuperscript{208} Dr. FUNIAK describes this as a “taking over” of the community property. 1 DE FUNIAK, § 203, at 582. See also Feb. Jul. 2.2.1.1. For modern practices probably reflective of traditional procedures see V CASTAN TOBENAS, DERECHO CIVIL ESPAÑOL 239 (1954).
\textsuperscript{209} That this was the practice in Louisiana until 1825 is confirmed by Comment, 23 Tul. L. Rev. 384-85 (1949), and Oppenheim, One Hundred Fifty Years of Succession Law, 23 Tul. L. Rev. 43, 55 (1958).
\textsuperscript{210} Part. 6.15.2. The heir had ten years in which to claim the estate judicially of the one in possession; twenty years, if he were out of the country (Part. 6.14.7). Heirs, of course, were required to pay the debts of the deceased and of his succession. Feb. Jul. 1.1.1.2.43; SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, art. 1339 (1851). If accepting by inventory the property of the deceased became liable to the creditors insofar as it was sufficient (Part. 6.6.7).
\textsuperscript{211} Matienzo, Comm. to N.R. 10.4.4, Gloss I, no. 3; Azevedo, Comm. to same law, no. 3.
heirs, by court order, to accept or reject the community within one hundred days of death, or less within the discretion of the judge.\textsuperscript{212} If the wife, or her heirs, accepted the community of gains, either informally by the exercise of some possessory action, or formally as a result of judicial order, she then became liable for her share of the debts contracted during marriage.\textsuperscript{213} The wife, who was a major of twenty-five years of age or over, who accepted was not allowed to change her mind thereafter.\textsuperscript{214}

**Renunciation**

One of the most important rights of the wife under ancient Spanish law was that of renouncing her share in the community of gains, either before, during, or after marriage.\textsuperscript{215} The right of the wife to renounce after dissolution of the marital partnership by her husband’s death, if she feared that the liabilities might far exceed the assets, was considered especially important as a correlative to the husband’s power to administer the sociedad de ganancias during its existence.\textsuperscript{216} Presumably excessive losses were attributable to poor management by the husband. Common creditors could force an undecisive widow into accepting or rejecting the community of gains as mentioned above.\textsuperscript{217}

A renunciation by the wife during marriage interrupted the sharing of the spouses in community gains and effectively produced a dissolution of the sociedad; for the wife was bound forever by a decision of renunciation,\textsuperscript{218} just as she was by a decision of acceptance following dissolution by death.\textsuperscript{219}

**Divorce, annulment, and separation**

An absolute divorce which completely dissolved the marriage was impossible under Spanish law.\textsuperscript{220} It was possible, however,
to have a marriage annulled for reasons of impediment.221 This constituted a complete dissolution of the marriage and of the resulting sociedad de gananciales. Even though the annulled marriage was considered as never having existed, sharing by the spouse in good faith from the time of the solemnization of the marriage until its dissolution was permitted on the theory of the marriage having been a putative one.222

Although a complete dissolution of a valid marriage was not possible in Spain, a separation of bed and board,223 termed a divorce, was available. A legal separation for fault produced a partition of ganancial profits to date, and a cessation of mutual sharing.224 If the wife were granted a separation from bed and board against the husband, she became entitled to the return of her dowry,225 and to one-half of the community profits acquired by her husband prior to separation.226 At the same time the wife was not obliged to divide with her husband the acquisitions and gains which she had made.227 Thereafter the legally separated wife who was not at fault continued to share in her husband's acquisitions without having to share hers with him.228 This continued sharing by the innocent wife in the husband's gains, even after legal separation, could be compared

221. Impediments could consist of lack of consent (Part. 4.1.4; 4.2.5, 6, 10); error (Part. 4.2.10); affinity (Part. 4.6); physical defects (Part. 4.8); and many other factors (Part. 4.2.10). Actions in nullity for impediment could be brought by the husband, wife, or third parties under varying circumstances. See Part. 4.9.

222. Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 4-7. Although the language used by Matienzo in the above-cited passage describes the time for the termination of the sharing only as "dissolution," de Funiak suggests that sharing continued until the time of the decree of annulment (1 De Funiak 633-34) but without sufficient documentation to support this statement. Perhaps the "decree of annulment" time for termination of sharing can be drawn by analogy from the termination of sharing by the decree of papal dispensation (Matienzo, Comm. to N.R. 10.4.1, Gloss I, no. 56; Azevedo, Comm. to same law, no cessation of good faith). See Patton v. Cities of Philadelphia and New Orleans, 1 La. Ann. 98 (1846) (legitimacy of children of one parent in good faith grounded upon Part. 4.13.1). Apparently the doctrine of the Patton case has been extended in Louisiana to other civil effects of marriage.

223. Part. 4.10; Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 47, 54-55; Azevedo, Comm. to same law, no. 14.

224. Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 47, 49, 51. Matienzo speaks in terms of "fruits of the dowry" (no. 49) and the "profits of the dowry" (no. 51).

225. Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 47-79.


227. Matienzo, Comm. to N.R. 10.4.1, Gloss I, no. 53.

228. Id.
to our modern day system of alimony awarded on the basis of fault.\textsuperscript{229}

If the wife were at fault instead of the husband, the whole situation was reversed. The husband continued to share the wife's acqisitions, but the wife ceased to have any right in acquisitions by the husband, including those acquired before the separation.\textsuperscript{230} If the wife's adultery were the basis of the separation, she lost her dowry\textsuperscript{230} and marriage deposit (\textit{arras})\textsuperscript{232} as well as her half of the acquets and gains.\textsuperscript{233} In the case of a legal separation due to one spouse's fault it is seen that the advantages of the community ceased as to the guilty party, but it continued to exist as to the innocent spouse despite the legal separation until death dissolved the marriage.\textsuperscript{234}

If the separation from bed and board were caused by some factor other than the fault of the spouses, such as the insanity of one of the spouses which rendered living together dangerous,\textsuperscript{235} or a papal dispensation,\textsuperscript{236} or the act of one spouse of entering into a religious order,\textsuperscript{237} or the fact of the spouses having lived separate and apart in chastity by mutual consent,\textsuperscript{238} then the community of acquets and gains was dissolved and sharing ceased. Anything acquired by either spouse after the separation without fault became his separate asset,\textsuperscript{239} contrary to the situation which prevailed if there were one innocent spouse and one guilty spouse.

\textit{Abandonment and separation in fact}

If either spouse abandoned the other without sufficient cause, and even though no legal proceedings for separation from bed and board were brought, the same principles applied as in the case of legal separation for partition of the community to the

\begin{footnotes}
229. \textit{See} Matienzo, Comm. to N.R. 10.4.1, Gloss I, no. 50, in which he states that the wife who has been wrongfully expelled by her husband is entitled to support.

230. Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 54 and 55; Azevedo, Comm. to same law, no. 14.

231. \textit{Part.} 7.17.15; 7.25.6; Matienzo, Comm. to N.R. 10.4.1, Gloss I, no. 55.

232. \textit{Fuero Real} 4.5.5; \textit{Part.} 7.17.15; Matienzo, Comm. to N.R. 10.4.1, Gloss I, no. 55.

233. \textit{Matienzo, Comm. to N.R.} 10.4.1, Gloss I, nos. 54 and 55; Azevedo, Comm. to same law, no. 14.


235. \textit{Schmidt, Civil Law of Spain and Mexico} art. 31(6) (1851).

236. \textit{Part.} 4.10.2; Matienzo, Comm. to N.R. 10.4.1, Gloss I, no. 56; Azevedo, Comm. to same law, no. 14.

237. \textit{Part.} 4.10.2; Matienzo, Comm. to N.R. 10.4.1, Gloss I, no. 56.

238. Matienzo, Comm. to N.R. 10.4.1, Gloss I, no. 57.

239. Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 56 and 57.
\end{footnotes}
date of abandonment. After a voluntary separation sharing on a non-mutual basis continued, grounded on fault, just as in the case of a legal separation.

Forfeiture by wife

If the wife were guilty of adultery, or lived wantonly, and voluntary separation occurred, she forfeited her dowry, her marriage deposit (arras), and all her share in the community profits acquired and yet to be acquired. Reconciliation with and forgiveness by the husband brought about a restoration to the wife of her dowry, and arras, and her ganancial rights, but it was necessary that the reconciliation be effected within two years of the acts of adultery.

The misconduct of the wife within the year following her husband's death was penalized similarly if she lived dissolutely, wantonly, extravagantly, lustfully, or scandalously. Misconduct by the widow caused her to lose her share of the ganancial profits which passed to her husband's heirs. Even after the year of mourning the misconduct of the widow would cause her to lose any legacies bequeathed her by her husband. A single act of fornication, unless it were notorious, would not cause the widow to lose her share of the ganancial profits, but a single act of fornication within the year of mourning would cause her to lose any legacies from her husband. The widow's separate assets were not affected by her misconduct, nor was her dowry forfeited, as in the case of voluntary or legal separation due to the wife's adultery.

240. Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 45, 49-52, 55. See also Feb. Jul. 1.1.4.2.51.
241. Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 53 and 54; Azevedo, Comm. to same law, no. 14.
242. See note 231 supra.
243. FUERO REAL. 3.2.8. See also note 232 supra.
244. See note 233 supra.
245. PART. 7.17.15. See also Feb. Cont. 3.13.1.6.
246. NUEVA R. 5.9.5; N.R. 10.4.5; Matienzo, Comm. to same law, Gloss VIII, nos. 1, 2, 7; Azevedo, Comm. to same law, nos. 22-24; Gutierrez, Quaestio CXXII. See also PART. 4.12.3.
248. Matienzo, Comm. to N.R. 10.4.5, Gloss VIII, no. 7; Gutierrez, Quaestio CXXII.
251. Matienzo, Comm. to N.R. 10.4.5, Gloss VIII, nos. 8-12, 18.
Confiscation

A confiscation by the Treasury of all assets of either spouse due to high treason, heresy, or criminal delict, could bring about the partition of the ganancial profits existing at the time of the passing of judgment, so that only the share of the guilty spouse in the community of gains could be reached.\(^\text{252}\) There is little in the writings of the ancient Spanish scholars concerning sharing by the spouses following confiscation. Inasmuch as the marriage which was the basis of the sharing continued in most instances,\(^\text{253}\) it seems likely that the usual sharing on a mutual basis resumed after the penalty of confiscation had been satisfied. Confiscation normally brought about only an interruption of the community of acquests and gains.\(^\text{254}\)

Administration following separation, abandonment, and confiscation

The ancient Spanish law and the ancient Spanish commentators are silent as to the administration of the assets and liabilities of the spouses following separation of bed and board or voluntary separation by reason of abandonment, which suggests that there was no change in administration, the husband continuing to administer the assets of both husband and wife.\(^\text{255}\) The language of Matienzo in stating that the wife separated from the husband due to his fault no longer acquired for him\(^\text{256}\) suggests that the innocent wife's acquisitions after separation became her separate assets. If this be true, she probably administered her own acquisitions, even though her separated husband still administered all of his own acquisitions falling into the community of gains in which she continued to share.\(^\text{257}\)

There is no doctrinal treatment of administration following

\(^\text{252.}\) L. Toro 77 and 78; Nueva R. 5.9.10 and 11; N.R. 10.4.10 and 11. See Commentaries of Matienzo, Azevedo, and Llamas y Molina on these laws. See also Feb. Jul. 1.1.4.2.44-45; Feb. Cont. 3.10.2.25 (accounting procedures in case of wife's adultery).

\(^\text{253.}\) Under Roman law a distinction was made between the crimes bearing capital penalties for the wife in which the marriage was dissolved and those in which it was not. By declaring that this is not the law in Spain Llamas y Molina implies that capital penalties did not dissolve marriages nor cause a cessation of sharing. Comm. to N.R. 10.4.11, nos. 14-15.

\(^\text{254.}\) See 5 Sanchez-Roman, vol. 1, at 848-49. But see Schmidt, Civil Law of Spain and Mexico, art. 59 (1851).


\(^\text{256.}\) Comm. to N.R. 10.4.1, Gloss I, no. 53.

separation where the wife had specifically given the administration of her paraphernalia to her husband.\textsuperscript{258} It was possible for the wife to retake this administration under certain circumstances;\textsuperscript{259} so it can be assumed that the innocent wife availed herself of these possibilities to regain the administration of her paraphernalia. Presumably she administered the dowry which she had regained and any part of the gananciales which became her separate asset.\textsuperscript{260}

**Priority of creditors**

After dissolution of the community of gains by death or annulment the capital of each of the two spouses was ascertained,\textsuperscript{261} made whole from the community, if need be, and set aside.\textsuperscript{262} Since the wife held a tacit mortgage on the husband's entire patrimony\textsuperscript{263} for the amount of her dowry and her paraphernalia administered by her husband, her capital was made whole from the husband's capital, if necessary.\textsuperscript{264} Assum-
ing that assets were sufficient to permit the withdrawal of the husband's capital, that was accomplished next. Following this there was a debiting to the proper spouse of all debts for which his separate patrimony was liable, but which had been paid from the common fund during marriage (e.g., ante-nuptial debts, solidary obligations made with the wife which did not concern the marriage, or which were for necessities the husband was responsible for furnishing the wife, obligations for support of a spouse's parents or children from a previous marriage). The remaining mass was divided equally between the spouses or between the surviving spouse and the heirs of the other. Payment to third-party creditors followed thereafter as set forth below.

Although the ancient writers spoke of the payment of the common debts following the withdrawal of the separate patrimony, they were speaking in terms of accounting procedures to be used in the final determination of the respective spouses' shares in the gananciales. The ganancial assets and liabilities passed at the time of dissolution and did not await any determination of a surplus of assets over liabilities before partition and distribution.

If the succession of the deceased spouse or the respective

265. Azevedo, Comm. to N.R. 10.4.1, no. 12; Llamas y Molina, Comm. to N.R. 10.4.5, no. 48; Azevedo, Comm. to N.R. 10.4.9, no. 17; Feb. Jul. 1.1.3.2-3.54-55.


266. Feb. Jul. 1.1.3.3.68-75.

267. Azevedo, Comm. to N.R. 10.4.1, no. 12; Matienzo, Comm. to N.R. 10.4.4, Gloss II, no. 3; Azevedo, Comm. to N.R. 10.4.9, nos. 16, 17.


269. As illustration of this see Febreiro, Juicios, Book I, entitled Compre

hensivo del Juicio de Inventario, y de el de particion entre la viuda, y here

deros de su marido hasta reintegrara de todos sus derechos, which is com

posed entirely of accounting procedures to be used in the inventorying and partitioning of assets and liabilities following dissolution by death. Note particularly Feb. Jul. 1.1.3.1.1; Feb. Jul. 1.1.3.3.67, 70-71; Feb. Jul. 1.1.6.2.46. See also forms for inventories, partitions, appraisals, etc., in Feb. Jul. 2.2.10.2. The same idea may be inferred from Matienzo, Comm. to N.R. 10.4.4, Gloss II, no. 3.

270. See notes 189-190 supra. Cf. Sp. Civ. Code arts. 1392, 1417, which to

gether state that ganancial rights pass at the time of dissolution by death, annulment, and other causes. See also 9 Manresa, art. 1392 at 527-530; id., art. 1417 at 697-74.
patrimonies were solvent, all debts were paid following the determination of the masses with no question of priority arising. If the succession were insolvent, however, or if the patrimony of the surviving spouse were insolvent, the separate and common creditors of each spouse applied the rule of preference pertaining to that succession or patrimony which was insolvent. There is nothing in the Spanish legislation or literature to indicate that the community of gains formed a separate unit or patrimonial mass so far as creditors were concerned; nor was there anything to indicate that “community creditors” enjoyed a preference over “separate creditors.”

Secured creditors, both common and separate, were paid first; then the preferred creditors, both common and separate, proceeded simultaneously against the two masses in the hands of the surviving spouse and the heirs of the other. Common creditors could elect to proceed against the husband alone for the satisfaction of the whole of each debt or against the wife for the one-half of the common debts for which she was liable. After the secured and preferred creditors were paid, the ordinary creditors, both common and separate, proceeded next.

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271. Although it is stated in 1 de Funiak § 170 that community creditors enjoy a preference over separate creditors of husband and wife, there is no substantiation given in de Funiak or in ancient Spanish doctrine or legislation for this theory. Nor does Febrero, in his extensive treatment of creditors' rights ever allude to a preference between community and separate creditors. See Feb. Jui. 2.3.3. In the absence of legislation creating a positive preference none can be assumed.

For the order of preference of unsecured creditors see Feb. Jui. 2.3.3.2.-185-231.

272. See notes 261-262, 266-267 supra.

273. This was and is the constant practice. Neither the ancient nor the modern Spanish legislation contains a specific provision on the subject, but doctrinal accounts assume the rule throughout their discussions. The rule is best understood if the community is envisaged as an arrangement between the spouses which does not affect the liability of either of them for debts contracted toward third persons and if the community assets and liabilities are treated as a part of the patrimony of the husband in which the wife may share at dissolution of the regime without affecting the personal liability of the husband or his heirs for debts contracted by him during marriage, as regards third persons. See Feb. Jul. 1.1.3.1.20.

L. Estilo 205, 207, 223, and N.R. 10.11.2, 3, when read together, substantiate the idea that common debts are the husband's during marriage. Commentaries of Matienzo, Azevedo, Gutierrez, and Llamas y Molina on N.R. 10.4.3 also indicate that the common debts are the husband's as regards third persons; as do the following: Matienzo, Comm. to N.R. 10.4.2, Gloss VII; Comm. to N.R. 10.4.5, Gloss VI; Comm. to N.R. 10.4.9, Gloss II, no. 3; Gutierrez, Quaestio CXXI; Llamas y Molina, Comm. to N.R. 10.4.9, nos. 14-16. The extensive commentaries of Llamas y Molina to N.R. 10.4.8 acknowledge that the obligations between husband and wife have their origin in the marriage contract, and imply that the husband becomes obligated to third persons as a result. See also note 5 supra.

274. L. Estilo 207. See also note 84 supra.
on a pro rata basis, obtaining satisfaction from the spouses in the same proportion as indicated above. There was no preference as between the ordinary separate and ordinary common creditors.\textsuperscript{275} Nor was there a preference between husband and wife\textsuperscript{276} except that the wife was entitled to have her capital made whole from her husband's assets if the ganancial assets were insufficient and enjoyed a tacit mortgage upon all of his assets for her dowry and paraphernalia administered by him; but not for her half of the gananciales.\textsuperscript{277}

Apparently the ancient Spanish did not contemplate an administration of the deceased spouse's succession for the payment of debts and partition of the assets under ordinary circumstances, for none is mentioned;\textsuperscript{278} and certainly none was contemplated for the patrimony of the surviving spouse.

\textbf{Conclusion}

Thus the Spanish sociedad de gananciales was a marital partnership based upon the cohabitation of husband and wife, whose living and working together was accompanied by complete equality of benefit and mutuality of obligation. The separate patrimonies of the two spouses were preserved intact, but used for the benefit of the mutual undertaking, the marriage. All fruits and advantages of the separate patrimonies, as well as all earnings of both spouses fell into the common fund to be used by the partners for themselves and to satisfy their obligation to the children of the marriage. All acquisitions by onerous title, as distinguished from lucrative title, became assets of the community of gains. All obligations incurred by the husband, or by the wife in his behalf, for the benefit of their common interests became the obligation of the husband, who was the community in the eyes of third persons. The wife shared in the common obligations to the extent of one-half their amount, but did not become personally liable for them until her acceptance of the community of gains after dissolution which, in the usual case in Spain, was at death.

Although the spouses were co-owners of the sociedad de gananciales, the husband alone enjoyed its administration during

\textsuperscript{275} See note 271 supra.
\textsuperscript{276} If one spouse were the debtor of the other see 9 MANRESA 708-709.
\textsuperscript{277} Feb. Jul. 2.3.3.1.49.
\textsuperscript{278} Feb. Jul. 1.2.1.1.1. confirms the informal handling of successions by the surviving spouse and heirs. See also note 208 supra.
its existence, probably for reasons of practicality. The wife's protection against the husband's mismanagement was her right to renounce the community at any time before, during, or after dissolution of the marriage. This was a right which the husband enjoyed at no time. The husband's administration ended abruptly upon death or dissolution, when the assets and liabilities passed in equal proportions to the spouses, or to the surviving spouse and the heirs of the other, without any necessity for determining surplus of assets over liabilities, or partition, or distribution. No administration was required or provided for in ancient Spain.

While enjoying an economic system during marriage under the sociedad de gananciales, which was eminently fair and just to both partners to the sociedad, they nevertheless preserved the integrity of their individual patrimonies. The wife continued to administer her separate patrimony, unless she gave its administration to her husband specifically and in writing. It could be retaken under certain circumstances. Neither spouse was permitted to injure the other's patrimony, separate or ganancial, by his delict. Nor was either spouse able to obligate the other in any way for an undertaking which was private or personal in nature and did not pertain to their common affairs. Since the marriage was presumed to have been contracted for an honest purpose, no unjust, unlawful, or dishonest act of one of the partners was permitted to damage the other or his share in the gananciales. To preserve their individuality and integrity more readily spouses were permitted to sue each other in ancient Spain and to contract with each other and solidarily with third persons. The prohibition against the wife's acting as her husband's surety was enacted for her protection; for she was never permitted to dissipate her own resources in the interests of the marital obligations, which were her husband's. Upon accounting at the time of dissolution restoration was made for all usage of individual patrimonies during marriage. With its emphasis upon equality of contribution and ultimate profit the sociedad de gananciales of ancient Spain commends itself in many ways to fair-minded persons of today.