Origin and Historical Development of the Community Property System

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ORIGIN AND HISTORICAL DEVELOPMENT OF THE COMMUNITY PROPERTY SYSTEM

The community property system is an institution peculiar to the civil law. Its exact origin has never been conclusively determined, but the present authorities are almost uniform in rejecting Roman law, the usual fountainhead of civil law institutions, as the source. The community property system is generally thought to be derived from old Germanic custom and folk laws diffused throughout continental Europe by the barbarian migrations following the fall of the Western Roman Empire. There is evidence, however, of earlier community property systems operating in ancient Egypt, Greece, and Babylonia. Due to lack of evidence indicating contact between these civilizations and the Germanic tribes, any similarity between the ancient systems and later European ones is generally dismissed as mere coincidence.

The occurrence of vestiges of community property in the ancient Middle Eastern law and the subsequent appearance of similar concepts in Western Europe seems better explained by the presence of common customs and motives than as the result of possible interchange between the two regions. The predominant universal cause of a community property system was the natural desire to provide for the wife's support and to curb the husband's despotic power. The marital community is an association consisting of husband and wife, and community property is the property belonging to this association. By investing the wife with an interest in such property the law affords her security.

1. Cole's Widow v. His Executors, 7 Mart. (N.S.) 41 (1828); 1 BURKE, COLONIAL AND FOREIGN LAWS 263, 418 (1888); 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 8, at 24 (1943) [hereinafter cited as DE FUNIAK]; McKAY, COMMUNITY PROPERTY §§ 7, 20, at 13 (2d ed. 1925) [hereinafter cited as McKAY].
2. 1 DE FUNIAK § 8; HUEBNER, HISTORY OF GERMANIC PRIVATE LAW § 94 (Philbrick's transl. 1918) [hereinafter cited as HUEBNER]; Lobingier, The Marital Community: Its Origin and Diffusion, 14 A.B.A.J. 211 (1928).
7. McKAY § 8.
10. Without some restriction on the husband's power of administration and
could then be explained as the efforts of different cultures to achieve the same general goal — protection of the weaker spouse.

This Comment will first examine the historical development of the community property system in the ancient world and continental Europe. Specific treatment will be given to the German, Spanish, and French contributions followed by a historical examination of Louisiana's system, including a brief sketch of Louisiana's exposure to community theory up to the time of redaction. The Comment will conclude with an examination of some of the more important Louisiana community provisions, especially those derived seemingly from sources other than the French.

ANCIENT VESTIGES

It is certain that a form of marital community existed in the ancient laws of Egypt, Greece, and Babylonia. The Code of Hammurabi, promulgated in Babylonia more than four thousand years ago, contained certain features of the community that differ but little from modern law. The same holds true for the Grecian Code of Gortyn. It has been suggested that these codes might have been the sources of the modern European community systems that were introduced into Spain and France through commerce. However, the earliest Western European community systems such as the Gothic and Frankish institutions, developed in lands where there was little commercial traffic with the East. A community of property between spouses control this property interest would be illusory. As to the development of early restrictions see notes 33 and 43 infra, and accompanying texts.

11. See notes 3-5 supra, and accompanying text.

12. See, e.g., Code of Hammurabi § 176 (Harper's transl. 1904): "If a slave of the palace or of a freeman take the daughter of a gentleman and . . . she enter the house of the slave . . . with the dowry of her father's house; if from the time they join hands they build a house and acquire property; and if later the slave . . . die; the daughter of the gentleman shall receive her dowry and they shall divide into two parts whatever her husband and she had acquired from the time they had joined hands; the owner of the slave shall receive one-half and the daughter of the gentleman shall receive one-half for her children."

§ 176A makes the same provision in case there is no dowry.

13. Roby, The Twelve Tables of Gortyn, 2 L.Q. Rev. 136, 144 (1886): "§ 3 of the Code provides that, 'If a man and woman separate, she shall have her own things which she had when she went to the man, and the half of the fruit, if it be from her own goods, and the . . . (part?) whatever it be (of) whatever she has woven, and five stators, if the man be the cause of the divorce; but if the man should say . . . the judge shall decide on oath.' (c. 450 to 350 B.C.)."

is also suggested in the ancient laws of Ireland, but once again we find no evidence linking these rudiments with the modern European systems. Judge Lobingier has dismissed these widely separated instances as another of "those coincidences which are not uncommon in legal history," but the common purpose of all these systems is surely sufficient to explain their independent development.

Because the community property system prevails in countries deriving most of their law from Rome, there has always been a tendency to consider Roman law as its origin. The theory was often advanced that the community property system commenced in Rome and was diffused throughout the provinces of Western Europe. Certain features such as dowry and paraphernalia undoubtedly followed that course. Moreover, the conventional community found its counterpart in Roman law, for "the spouses could contract for a partnership between themselves." Again Rome was one of those societies where the family was the basic social unit. But conjugal partnership was not a part of this early family community, as the community was between the father and his children with the wife treated legally, at least — as her husband's child. Indeed, early Roman marriage, called marriage "with manus," subjected the wife completely to the husband. She could not possess anything of her own. Everything she possessed at the time of marriage or acquired thereafter went to her husband. There was no common fund owned and held by the spouses in community. Under the later Roman law as the wife became capable of owning in her own name, she secured an almost complete legal independence. This emancipation gave rise to marriage "without manus" and with it the dowry system or Roman "marriage portion." The essential characteristic of this regime was sep-

15. See Bryant, Liberty, Order and Law under Native Irish Rule 78-82, 87-88 (1923); Ginnell, The Brehon Laws 211, 227-30 (1894).
17. See White, A New Collection of Laws, Charters and Local Ordinances of Great Britain, France and Spain 60, n.43 (1839).
18. 1 Beauchet, Histoire du Droit Privé de la République Athénienne 244 (1897).
19. See 2 Poste, Gaius §§ 111, 118 (1890); McKay § 20.
22. Ibid.
23. Bressaud § 16.
The wife kept her property, giving only a share of it, her dowry or marriage portion, to the husband as a reserve fund for her and for the family. The dowry was inalienable, neither spouse having the power to dispose of it, although dotal acquisitions inured to the husband. The rest of the wife's property was her paraphernalia of which she alone had the administration and enjoyment.25 The Roman dotal system, therefore, made a community property system not only less essential for the wife's protection but also unfeasible: with the high degree of control retained by the wife there was no substantial common fund to be administered by the husband — the essence of a community property system.26 Whatever community property vestiges there were in early Roman customary law, therefore, they did not survive the development of the Jus Gentium during the Republic, and there is no evidence of provincial diffusion.27

GERMANY

Frankish (Folk Law) Period

It is now almost universally believed that the origin of the present community property systems is in old Germanic customs and folk laws. The Frankish (Folk Law) Period is the earliest period in German legal history where there is anything resembling a community property system.28 As in the case of the early Roman marriage "with manus," prior to this period the wife was completely subjected to the control of her husband and was legally incapable of holding any property interests.29 However, the wife's legal capacity gradually became recognized: she was given the right to inherit as her own property portions of her father's estate.30 She was also granted the right to receive gifts of property from her husband.31 Although the wife technically owned this property, the husband through his

24. BRISSAUD § 550.
25. Ibid.
27. 1 BURGE, COLONIAL AND FOREIGN LAW 263 (1838).
29. See note 20 supra, and accompanying text.
30. BRISSAUD §§ 32, 522; HUEBNER § 94, at 624.
31. "Wittum" and "Morgengabe": The former developed from the Germanic Marriage Portion or purchase price paid by the husband; the latter was a provision given to the wife by the husband the day after the marriage to provide for unlawful or unequal marriages. BRISSAUD §§ 520, 521; HUEBNER § 94, at 627.
mundium (similar to the Roman manus) had exclusive control over it.  The only restriction was his inability to alienate immovables without her consent. The wife, meanwhile, had no independent dispositive power except over her immediate personal effects. Thus two distinct estates of ownership existed, with the profits from all the property included in the estate of the husband.

Some of the legal systems during this period began to depart from this principle of distinct estates to the extent of recognizing a true legal community in so-called acquets, that is, such property as was acquired by the spouses during marriage, by labor or by onerous title. The Goths, a branch of the Indo-Germanic race, began the procedure of granting one-third of these marriage acquets to the wife upon dissolution of the marriage in addition to her separate property.

**Medieval Period**

During the Medieval Period the community as we understand the term today first appeared. The Goths, again the innovators, created the common fund in the form of a collective estate. Prior to this time there had been the two distinct estates, with control over all the property in the husband. Under the real community developed by the Goths, called “the community in collective hand,” the estate of the wife was united with that of the husband, thereby forming “an indivisible whole of the individual pieces of property that were derived from husband and from wife, the whole being subject to their mutual rights of collective ownership.” The spouses’ shares remained undivided and uncollectible during the continuance of the community. “The wife was given, here, the same rights of ownership in the husband’s property included in the collective estate as he possessed in her property.” The “general community of goods,” by which all the spouses’ property was included in the collective estate, resulted by operation of the marriage it-

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32. Brissaud § 523; Huebner § 94.
33. Brissaud § 523; Huebner § 94; McKay § 39.
34. Brissaud 523; Huebner § 94; McKay § 39. Because these effects were so pecuniarily insignificant they were virtually disregarded as far as ownership principles were concerned.
35. Brissaud § 528; Huebner § 94; McKay § 39.
36. See note 35 supra.
37. McKay § 38.
38. Huebner § 95; McKay § 39.
39. See note 38 supra.
self. But the community might also be limited by agreement to certain pieces of property, so as to contain, for example, merely the acquets or movables.\textsuperscript{40} Also profits of the acquets which formerly accrued to the husband's estate alone now fell solely into the collective estate.\textsuperscript{41}

Granting to the wife a community ownership, however, did not completely destroy the \textit{mundium} of the husband.\textsuperscript{42} He still retained sole administration and enjoyment of the collective marital property, as well as the power of alienation. The only limitation was his inability to alienate immovable property, even that retained as separate property in the marriage contract by either spouse, except with the cooperation of his wife, that is, only with collective hand.\textsuperscript{43}

\textit{Modern Period}

The crucial legal event of the modern period was the adoption of the German Civil Code in 1900,\textsuperscript{44} which brought an end to provincial theories and practices and substituted a uniform system. The statutory regime stipulated for in the Code is basically one of separate property,\textsuperscript{45} but the Code provides three community regimes which may be set up by the marriage contract. The first of these is the "general community of property." By this system all the property of the spouses, irrespective of time or mode of acquisition, is classified as common property, except for certain types of property which are specifically excepted from the common fund as separate property, such as property declared to be excluded from the common fund in the marriage contract, donations declared to be for the benefit of only one spouse, or property acquired in substitution for

\textsuperscript{40} See note 38 \textit{supra}.
\textsuperscript{41} \textsc{Huebner} § 95.
\textsuperscript{42} \textit{Ibid}.
\textsuperscript{43} \textit{Ibid}.
\textsuperscript{44} Effective January 1, 1900.
\textsuperscript{45} The statutory regime is known as the "community of administration." The wife's property is divided into reserved and non-reserved property with the husband having sole administration and usufruct over the latter as well as his property. Title to the property belonging to either spouse is not affected by the marriage. The husband has an independent power to dispose of the wife's money and other articles of consumption, but he can alienate other non-reserved property only in common with his wife. The husband's usufruct entitles him to the income of the non-reserved property. The wife administers and receives the income of her reserved property entirely for herself and and she is not accountable to her husband for it. \textsc{German Civil Code} arts. 1363-1425 (Loewy's transl. 1909); \textsc{Friedmann, Matrimonial Property Law} 372-73 (1955).
other separate property.\textsuperscript{46} The second conventional system is the "community of income and profits." Here the common property is "constituted exclusively by the earnings, profits, and income accruing to the spouses during the subsistence of the marriage. All other property belonging to either spouse at the commencement of the community or accruing during its continuance, otherwise than by way of income, remains the separate property of such spouse."\textsuperscript{47} But the income from all the husband's property of whatever nature and from all the wife's property which is not privileged is included in the community.\textsuperscript{48} Under the third system, the "community of movables," the common property "consists of all movables belonging to either spouse at the commencement of the community or acquired subsequently, whether in the nature of capital or income and of all objects movable or immovable acquired in substitution for objects included in the common property. All immovable property, on the other hand, belonging to either spouse at the commencement of the community or accruing to him during its continuance remains separate property."\textsuperscript{49}

Spain

Visigothic Law

The Goths continued their contribution to the development of the community property system by initiating its diffusion into other parts of Europe. Spain was the first recipient, for during the fifth century the Visigoths migrated to the Iberian peninsula, bringing their customary law with them.\textsuperscript{50}

During the reign of the Gothic King Euric (466-485) the first legislation was enacted recognizing the marital community.\textsuperscript{61} This was soon incorporated with other extant legislation and published as the Code of Euric.\textsuperscript{52}

Under Recesvintus (653-672) the Visigoths established by statute a community of matrimonial gains as part of the general

\begin{footnotes}
\textsuperscript{46} German Civil Code arts. 1438, 1440 (Loewy's transl. 1909); Schuster, The Principles of German Civil Law 499, 500, 511-12 (1907).
\textsuperscript{47} Ibid.
\textsuperscript{48} Ibid.
\textsuperscript{49} German Civil Code arts. 1549, 1557 (Loewy's transl. 1909); Schuster, The Principles of German Civil Law 523 (1907).
\textsuperscript{50} 1 De Funiaq § 22.
\textsuperscript{51} McKay § 9, at 7.
\textsuperscript{52} 1 De Funiaq § 23, at 53.
\end{footnotes}
law of Spain.\textsuperscript{53} The statute provided that the acquets were to be divided upon the dissolution of the marriage according to the share contributed to the marriage by each spouse.\textsuperscript{54} The same method of division likewise applied to the fruits of the separate property of both spouses.\textsuperscript{55} It will be recalled that in Germany the wife received a definite fraction of the acquets instead of a proportional share. There is disagreement on which method was the older.\textsuperscript{56}

In 693 the general law was revised and published as the Second Visigothic Code (\textit{Forum Judicum}). In Spanish this was the \textit{Fuero Juzgo}, and with its adoption Spanish law, as such, came into existence.\textsuperscript{57}

\textbf{Spanish Law}

Under the \textit{Fuero Juzgo} a community of matrimonial gains prevailed as the general law of Spain. The fruits of the spouses' separate property, as well as other matrimonial acquets, fell into the common fund to be divided proportionately at dissolution of the community as set forth in the Code of Recesvintus. The husband's marital power was thus preserved in form, but the integrity of the wife's separate property was preserved by its return with the proportion of fruits it had produced.\textsuperscript{58} In time the wife came to be entitled to a moiety of the acquets rather than a \textit{pro rata} share. This general system of community was not compulsory; the spouses might by written contract stipulate some other arrangement of sharing than that provided by statute.\textsuperscript{59}

Although the German "ownership by collective hand" at first prevailed in Spain, the desire to grant further protection to the wife's separate property led to its rejection.\textsuperscript{60} Ownership in the husband alone was substituted, the theory being that if

\textsuperscript{53} McKay § 9, at 7.
\textsuperscript{54} See McKay § 43, at 33, where the following translation appears: "When persons of equal rank marry one another, and while living together, either increase or waste their property, where one is more wealthy than the other, they shall share in common the gains and losses in proportions to the amount which each one holds. ... This provision shall apply to, and be observed in all cases relating to the estate of both husbands and wives." (Continued as Fuero Juzgo bk. 4, tit. 2, L. 17 (693)).
\textsuperscript{55} McKay § 43.
\textsuperscript{56} McKay § 44; Brissaud § 528.
\textsuperscript{57} 1 De Puniax § 24.
\textsuperscript{58} McKay § 43, at 33.
\textsuperscript{59} 1 De Puniax § 24, at 56-57.
\textsuperscript{60} McKay § 54.
he were the sole owner of the community property then he alone would be liable for community debts until its dissolution. The exact time of this change in community ownership theory cannot be ascertained, although in French law it is known to have occurred in the fourteenth century.\footnote{61. McKay § 45.} At this time the wife was given the option to accept or renounce a moiety of the community if the debts outweighed the assets. If she renounced, she was then treated as a stranger to the community, as if it had never existed. Without the ability to renounce the community the wife would have been liable for the debts of the husband, since his debts were also debts of the community. Personal belongings would have been seized and the husband would have indirectly succeeded in depriving her of her separate property. This power of renunciation, therefore, enabled the wife to escape her husband's maladministration and to preserve her separate property.\footnote{62.}

In the thirteenth century the Spanish law was recodified, producing the \textit{Fuero Real} promulgated in 1255. Very little modification of the community system resulted from this revision, but it is nevertheless significant since subsequent compilations retained many of the \textit{Real}'s provisions in their original form.\footnote{63. The next compilation, \textit{Las Siete Partidas} (1263 or 1265), contained little dealing specifically with community property, although there were numerous provisions relating to marriage, dowry, and donations.\footnote{64.}} In 1310 the \textit{Leyes del Estilo}, a procedural code, appeared.\footnote{65. In 1505} The only significant change wrought by this compilation was the provision that property of the spouses was to be presumed community property until proved otherwise.\footnote{66. The \textit{Leyes de Toro} (1505) affirmed pre-existing community property principles ignored by the \textit{Partidas}, particularly the community system of acquets and gains.\footnote{67.}} The \textit{Leyes de Toro} (1505) affirmed pre-existing community property principles ignored by the \textit{Partidas}, particularly the community system of acquets and gains.\footnote{68.}

The Spanish community property system appeared much in its present form in 1567 with the promulgation of the \textit{Nueva Recopilación}. This was a compilation of past laws and included
most of the community provisions of the Fuero Real, Leyes del Estilo, and Leyes de Toro.\textsuperscript{68} This compilation persisted for nearly 250 years until new editions became insufficient to meet all needs and a new compilation was authorized under the name of the Novisima Recopilacion de las Leyes de Espana. Book X thereof deals with marriage and the community of acquets and gains containing intact the community property of the Nueva Recopilación together with two new provisions, local in nature.\textsuperscript{69}

The present Spanish law of the community is found in the Spanish Civil Code promulgated in 1889. Once again it is basically a reproduction of prior compilations.

\section*{France}

France also acquired the rudiments of a community property system from barbarian migrations and conquests. The Franks, another Germanic tribe, were the main contributors as they settled throughout most of northern and northeastern France, with the notable exception of Normandy,\textsuperscript{70} establishing their customary community law.\textsuperscript{71} The precise time of this diffusion is again speculative, and not until the fifteenth century was there a detailed regulation of the community system.\textsuperscript{72}

The Frankish system was a community of movables and acquets. The community consisted of all the spouses' movables at the time of the marriage along with all movable and immovable property acquired during marriage.\textsuperscript{73} The husband was the exclusive administrator of the community and had unrestricted dispositive power over the movables. But with jointly acquired immovable property he could not deal alone. It was not until the fourteenth century that he was deemed owner of the entire common fund and therefore able to dispose of immovable property acquired during marriage as well as movables.\textsuperscript{74} With this change in ownership the wife's power of renunciation of the community commenced.\textsuperscript{75}

Another safeguard for the wife, the action for separation

\textsuperscript{68} 1 DE FUNIAK § 33.
\textsuperscript{69} 1 DE FUNIAK § 34.
\textsuperscript{70} BRiSSAUD § 546.
\textsuperscript{71} mCKAY § 42.
\textsuperscript{72} BRiSSAUD § 553; mCKAY § 9, at 7.
\textsuperscript{73} BRiSSAUD § 556.
\textsuperscript{74} BRiSSAUD § 560.
\textsuperscript{75} See notes 60, 61 \textit{supra}, and accompanying text.
of property, was borrowed from the Roman law about the sixteenth century. The action could only result from a judgment, and the granting of the action to a certain wife depended on the discretion of the court. If allowed, however, the action afforded a greater guarantee to the wife as she would no longer have to wait for the dissolution of the marriage to protect her separate property. The action permitted the wife to administer and enjoy her possessions, but required that she pay a portion of her income to the husband to cover the expenses of the household.76

At first it appears the Frankish or "customary" community was compulsory. Gradually, freedom of matrimonial agreements evolved until in the sixteenth century rejection of the community system by marriage contract was tolerated.77 The "customary" community, however, was the general rule; it resulted either from a formal marriage contract establishing it or from the marriage itself where there was no contract.78

This region of France, in which custom governed and in which the Frankish customary community prevailed, was known as le pays du droit coutumier (the provinces of customary law), in contrast with le pays du droit écrit (the provinces of the written law), the southern region of France where Roman written law prevailed.79 This latter region was temporarily exposed to a community system by the Visigoths, who migrated northward from Spain, but were expelled at an early date. In the main, however, the Roman dotal system held sway.80 As a result the community property system was confined to the "provinces of customary law" for the next three centuries.81

The unique feature of the French community system as it developed in the "provinces of customary law" was the composition of the common fund. Originally the possessions of the wife were placed in the common fund under the administration and enjoyment of the husband with all the acquets accruing to him.82 During the Ancien Régime, however, a fundamental distinction was gradually established between movables and im-

76. BRISSAUD § 565, at 843.
77. BRISSAUD § 557.
78. Ibid.
80. 1 DE FUNIAK § 8, at 25.
81. 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 522 (1923).
82. BRISSAUD § 552.
movables, the latter alone representing a real value. Eventually the "customary" community contained only immovables acquired for a consideration during the marriage, along with all movables regardless of time or mode of acquisition. The placing of all movables in the common fund can be explained in two ways. In the first place, there was generally no inventory at the time of the marriage to ascertain to whom the movables belonged. As the husband had formerly had free disposal of them, it seemed sufficiently sound to leave them in the common fund. In the second place, the relatively low value of movables during this period meant that no great hardship was imposed by the inclusion of all movables in the common fund. The distinction between movables and immovables, therefore, suited the nature of fortunes as well as the social position of the wife. Moreover, it had the advantage of eliminating the problem of proving to which spouse the movables belonged.

The co-existence of the two separate regimes, the custom of the North and the Roman derivatives of the South, persisted until the seventeenth century when a need for uniformity initiated a period of codification culminating in the Code Napoleon in 1804. The substantive provisions of the Code were based to a large extent on Teutonic customary law. The conventional dotal system allowed by the Code was based on Roman law, while all the other matrimonial systems were derived from the law formerly pertaining only to the "provinces of customary law." The Code had above all the effect of unifying throughout France the legal regime applicable to married people who had not made a marriage contract, for they were henceforth placed under the regime of the "community of movables and acquets." All movables were included in the common fund except those acquired by donation during the marriage under express contrary stipulation. In addition, all fruits, revenues, interest, and arrears were community property. Only immovables acquired during the marriage, however, fell into the common fund.

The husband's control over the community has always been

84. Brisaud § 558.
85. Ibid.
86. 3 Planiol, Civil Law Treatise (An English Translation by the Louisiana State Law Institute) no. 771 (1959).
88. French Civil Code art. 1401.
extreme in French law. Under the old customary law he was complete head and master of moveables and immovable gains: he could sell, alienate, mortgage, and even donate them inter vivos by his will alone.\textsuperscript{89} Under the Code Napoleon, although the husband was still able without the concurrence of the wife to make all types of onerous transactions affecting community property\textsuperscript{90} provided he acted in good faith,\textsuperscript{91} his power to donate community property was somewhat restricted.\textsuperscript{92} Furthermore, although he retained the management of the wife's separate property, he could not convey her immovables without her consent.\textsuperscript{93}

\textbf{Louisiana}

\textit{Historical Background}

The great influence in Louisiana's early development was the alternating control of France and Spain. The French were first in command, La Salle establishing the French colony of Louisiana in 1682.\textsuperscript{94} French community property theories were soon introduced into Louisiana because the royal charters given to the early settlers provided that the governing law should be the Custom of Paris, which included the "customary" community.\textsuperscript{95}

Following the French and Indian War France ceded Louisiana to Spain in 1763, and by 1769 the Spanish had formally substituted their own law by proclamation.\textsuperscript{96} Since the \textit{Recopilación de Indias} (1680), a collection of colonial laws for Spanish America, stipulated that the Spanish civil law was to prevail unless otherwise provided, Spanish community principles became effective in Louisiana.\textsuperscript{97}

In 1800 Spain re-ceded Louisiana to France; but, since the latter did not take formal possession until twenty days before

\begin{footnotes}
\item[89] 3 Planiol, Civil Law Treatise (An English Translation by the Louisiana State Law Institute) no. 1018 (1959).
\item[90] French Civil Code art. 1421.
\item[91] Id. art. 243.
\item[92] Id. art. 1422.
\item[93] Id. art. 1428.
\item[95] Hood, A Crossroad in Louisiana History, 22 La. L. Rev. 709, 710 (1962).
\item[96] Ibid.
\item[97] I de Funiak § 35, at 67.
\end{footnotes}
selling the Territory to the United States in 1803, no reintroduction of French law was made.

Louisiana's civil law precepts were incompatible with the common law and many serious conflicts occurred before the civil law was formally vindicated by the Code of 1808. With this redaction a community property system for Louisiana was assured.

Sources of Louisiana's Community Property Law

Because the Louisiana Civil Code so closely resembles the Code Napoleon, and, indeed, frequently translates it literally, there is often a tendency to assume that institutions incorporated in the Louisiana Code are directly taken or indirectly derived from French sources. Community property law clearly deviates from this norm. It is true that most Louisiana provisions were obviously taken from the available French materials. Most of the basic provisions on marriage contracts adopted in 1808 were strikingly similar to Code Napoleon provisions. These provisions were retained in the revisions of 1825 and 1870 with but slight modification. Louisiana's dowry provisions were predominantly either similar to, or identical with, the French provisions. These provisions were likewise incorporated in the two revisions without significant change. With respect to paraphernalia and extradotal effects all of the provisions were either similar to, or identical with, Code Napoleon law. The two revisions retained these provisions vir-

tually intact.\textsuperscript{107} There can also be little doubt as to the French origin of the action for separation of property during the marriage as provided for in the 1808 Code. What provisions were not lifted \textit{in toto} from the French authorities\textsuperscript{108} were altered only slightly.\textsuperscript{109}

Of almost equal certainty, however, is the conclusion that the provisions relating to the composition of the common fund were purely of Spanish, rather than French origin.\textsuperscript{110} As mentioned earlier, the legal community established by the French Civil Code is the "community of movables and acquets." Article 1401 of that Code enumerates the three elements comprising the legal community: (1) all movables regardless of time or mode of acquisition except donations after the marriage where the donor has expressed the contrary; (2) all fruits, revenues, interests, and arrears falling due or acquired during the marriage; (3) all immovables acquired during the marriage.\textsuperscript{111} The Louisiana Civil Code of 1808, on the other hand, provides for a common fund having quite a different content: (1) profits of all the effects of which the husband has the administration and enjoyment; (2) produce of the labor of both spouses; (3) immovable and movable estate acquired during marriage by donations made jointly to both spouses, by purchase, or any other means even though the acquisition is made in the name of only one of the spouses.\textsuperscript{112} Furthermore, the 1808 Code provided that

\textsuperscript{107} See \textsc{La. Civil Code} arts. 2360-2363, 2365-2367 (1825); \textsc{La. Civil Code} arts. 2383-2386, 2388-2390 (1870).

\textsuperscript{108} Compare \textsc{La. Civil Code} p. 342, arts. 93-97 (1808) with \textsc{French Civil Code} arts. 1445(2)-1449.

\textsuperscript{109} Compare \textsc{La. Civil Code} p. 340, art. 86, p. 342, arts. 87-90, 92 (1808) with \textsc{French Civil Code} arts. 1443, 1445(1), 1452 and \textsc{Projet du Gouvernement} bk. 3, tit. 10, art. 61 (1800).

\textsuperscript{110} \textsc{Friedmann, Matrimonial Property} Law 33 (1955).

\textsuperscript{111} \textsc{French Civil Code} art. 1401: "The assets of the community consist,

\textsuperscript{112} \textsc{La. Civil Code} p. 336, art. 64 (1808): "This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment; of the produce of the reciprocal labor and industry of both husband and wife; and of the estates which they may acquire during the marriage either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the
property brought into marriage or inherited or acquired during marriage by will or lucrative contract would not fall into the community. These provisions clearly reject the general French principle that all movables are community property. The redactors in 1808 chose to emphasize time and mode of acquisition of property rather than type. This same principle had traditionally been the touchstone for classification of property in the Spanish system, and is today reiterated in the Spanish Civil Code. Indeed the community of acquets and gains was operative in Louisiana during Spanish occupancy. One cannot but conclude that here the draftsmen rejected French theory in favor of the Spanish.

The provision of the Louisiana Civil Code dealing with the "marital fourth" seems to present another situation where the French was almost certainly not the source. This provision, not recognized at all in the French Code, seems probably to be Spanish-derived.

As to most of the remaining community property provisions, their origin is more uncertain. The provisions dealing with debts contracted during the community seem to be derived from Spanish law. The basic French provision, although purchase was made is alone attended to and not the person who made the purchase.

This corresponds to La. Civil Code art. 2402 (1870).

113. La. Civil Code p. 324, art. 13 (1808): "We understand by effects proper or hereditary, all such as either husband and wife brings in marriage or which he or she inherits or acquires during the marriage by will or lucrative contract."

Id. p. 324, art. 14: "In fine we understand by common effects or gains such as the husband and wife acquire during the marriage by their labor, industry, purchase or any other similar way."

These correspond to La. Civil Code art. 2334 (1870).

114. See Fuego Real bk. 3, tit. 3, L. 2, 3 (1255); Nueva Recopilación bk. 3, tit. 9, L. 4, 5 (1567); Novísima Recopilación bk. 10, tit. 4, L. 2, 3 (1805).

115. Spanish Civil Code arts. 1396, 1401 (1888).

116. See Daggett, Community Property System of Louisiana 4 (1945): "The customary or unwritten law of Northern France was incorporated into the Code Napoleon upon which the present Louisiana Civil Code was patterned. The community system, however, made its way to colonial Louisiana before the adoption of the first code in 1808 via the custom of Paris and the laws of Spain."

117. It should be noted that a conventional community of acquets and gains may be established by marriage contract in French law. See French Civil Code art. 1497.


similar to that of Louisiana, provides in addition that all movable debts of the spouses, even those contracted before the marriage, are liabilities of the community. Such a provision, although a logical result if all movable assets are to fall into the community, cannot sensibly be allowed where the common fund excludes assets acquired before the marriage.

As to administration and disposition of the community the Louisiana provisions seem to correspond to the French although similar provisions are found in the Spanish law.

The presumption of common effects or gains provided for in the Louisiana Civil Code also is found in a corresponding French provision and in comparable Spanish articles, either of which could be considered the source of the Louisiana presumption.

The Louisiana provisions relating to the settlement of the community upon dissolution do not seem to have been derived from the French authorities, as the latter provisions were applicable to a community of movables and acquets rather than to one of acquets and gains. Former Spanish provisions may very well have been the source for the Louisiana articles, or they may simply have been innovations of the redactors.

The origin of the wife's power of renunciation of the community has been considered earlier. Because the institution arose for similar reasons in both Spain and France, both systems have very similar provisions. It is uncertain in which

121. French Civil Code art. 1409.
122. Compare LA. Civil Code p. 336, art. 66 (1808) and LA. Civil Code art. 2373 (1825) and LA. Civil Code art. 2404 (1870) with French Civil Code arts. 1421, 1422.
123. See Leyes del Estilo L. 205 (1310) ; Nueva Recopilación bk. 5, tit. 9, L. 5 (1567).
124. LA. Civil Code p. 336, art. 67, continued as LA. Civil Code art. 2374 (1825) and LA. Civil Code art. 2405 (1870).
125. See French Civil Code art. 1402.
126. See Leyes del Estilo L. 203 (adopted in 1566) ; Nueva Recopilación bk. 5, tit. 9, L. 1 (1567).
127. LA. Civil Code p. 336, arts. 68, 69, p. 338, art. 70 (1808), continued as LA. Civil Code arts. 2375-2377 (1825) and LA. Civil Code arts. 2406-2408 (1870).
128. See Fuero Juzgo bk. 4, tit. 2, L. 17 (693) ; Fuero Real bk. 3, tit. 3, L. 1 (1255) ; Nueva Recopilación bk. 5, tit. 9, L. 2 (1567).
129. See notes 60 and 75 supra, and accompanying text.
130. See Leyes de Toro L. 60 (promulgated in 1505) ; Nueva Recopilación bk. 5, tit. 9, L. 9 (1567) : "When the wife renounces the profits let her not be obliged to pay any part of the debts which the husband made during the marriage."

Cf. French Civil Code art. 1453: "After the dissolution of the community,
country the power of renunciation first developed, but it is known that both French and Spanish provisions for this power existed at the time of redaction in 1808.\textsuperscript{131} Because of the great similarity in language between the Louisiana and French articles, however, it seems reasonable to assume that the French constituted the source.\textsuperscript{132}

It can be seen, therefore, that Louisiana's community property law is not of single origin. Spanish theories contributed substantially, as manifested by Louisiana's classification of property. The influence of over forty years of Spanish occupation on Louisiana custom cannot be overlooked, especially when dealing with an institution that owes so much of its development to customary law. Consequently when interpreting Louisiana's community property provisions, one should be wary of relying solely on French authorities. Spanish authorities and commentators should also be considered to assure the most accurate interpretation possible of Louisiana's community property law.

Paul H. Dué

CLASSIFICATION OF PROPERTY

Every marriage contracted in Louisiana\textsuperscript{1} creates a community of acquets and gains unless the parties have expressly stipulated otherwise by prenuptial contract.\textsuperscript{2} In this regime of community property all property brought into the marriage or acquired by the spouses during the marriage is classified as separate property or community property.\textsuperscript{3} A thorough understanding of the legal principles governing this classification is essential, as the legal status of the property affects the rights of all persons concerned with it — the spouses themselves, their

1. The rule also applies to marriages contracted outside of the state when the parties establish a domicile in Louisiana. Property acquired after their arrival is governed by Louisiana law. See \textit{La. Civil Code} art. 2401 (1870).
2. \textit{Id.} arts. 2325, 2329, 2399.
3. \textit{Id.} art. 2334.