Problems In Classification of Particular Property Under Community Property Regimes

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PROBLEMS IN CLASSIFICATION OF PARTICULAR PROPERTY UNDER COMMUNITY PROPERTY REGIMES

For centuries the community property regime has been based on a two-fold classification: the property of the community and the separate property of the spouses. The basic concepts were conceived in an age when, unlike today, most of the wealth was represented in immovables. To the system’s credit, it has worked admirably in our modern society. Yet, the advent of new types of property, undreamed of centuries ago, along with the operation of a community property system in a federal union under a supreme constitution, has brought additional pressures to bear and required some adjustments. The areas in which adjustments to the general scheme of property classification have been found necessary are few, but only the more important ones will be investigated in this Comment. Areas selected for consideration are: transactions involving United States savings bonds; stocks and dividends, with emphasis on stock dividends; homestead associations; pensions; commingling of community and separate property; and separate and joint bank accounts. These subjects are essentially unrelated, save by the common difficulty in application of the general rules of classification.

UNITED STATES SAVINGS BONDS

The United States savings bond is available to natural persons in three capacities: sole owners, co-owners, and beneficiaries. The federal government’s power to issue savings bonds rests upon the constitutional power to borrow money and the “necessary and proper” clause of the Constitution, and it is exercised through congressional acts and Treasury Regulations promulgated pursuant to congressional grants of authority. Treasury Regulations provide that no judicial determination will be recognized which impairs the rights of survivorship given to a co-owner or beneficiary. When a savings bond is registered in the name of co-owners, and one co-owner dies before the bond is presented, “the survivor will be recognized

1. 31 C.F.R. § 315.7 (1957). This regulation provides that only two persons may use the co-ownership or beneficiary forms. In the former case the registration must be in the form “X or Y,” and in the latter case in the form “X payable on death to Y,” or “X P.O.D. Y.”
4. Id. § 315.20(a).
as the sole and absolute owner” as if the bond were registered in his name alone. Beneficiary bonds, though payable to the owner during his lifetime, become the sole and absolute property of the beneficiary at the owner’s death.

These Treasury Regulations have the force of federal law. Given conflicting state property schemes, particularly those of the community property states, much litigation has considered rights relative to savings bonds under federal and state law. In resolving conflicts between state laws governing transmission of property at death and the survivorship provisions of the Treasury Regulations, most state courts concluded that the Regulations prevailed over the state law and governed both the ownership and distribution of the proceeds of the bonds, though they disagreed on the underlying rationale.

The Louisiana court originally leaned towards the majority rule, giving unconditional effect to the Treasury scheme of survivorship despite conflicting state law, but in the first case dealing directly with a conflict between the Treasury Regulations and the community property system, the Louisiana court made a break with the majority position. A husband had used

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5. Id. § 315.61.
6. Id. § 315.66.
8. Among the various theories used to explain the so-called “majority rule" were:
   (d) Survivor takes ownership as third party beneficiary, e.g., Murry’s Estate, 236 Iowa 807, 20 N.W.2d 49 (1945).
9. Succession of Tanner, 24 So. 2d 642 (La. App. 1st Cir. 1946). Tanner held that when husband and wife purchased co-ownership bonds, and then one died, there was no inheritance tax due by the survivor, and it was proper to omit the bonds from the estate of the deceased. However, a subsequent case, Succession of Raborn, 210 La. 1033, 29 So. 2d 53 (1946), pointed out Tanner had failed to consider the wording of the Treasury Regulations, which specifically made the bonds subject to state inheritance taxes.
10. Succession of Geaggn, 212 La. 574, 33 So. 2d 118 (1948). See Comment, 7 Kan. L. Rev. 512 (1959), where the author severely criticizes the Louisiana position after Geaggn, perhaps without full appreciation of the social interest of Louisiana in the preservation of the community property system.
community funds to purchase beneficiary bonds in favor of a stranger to the community. The court paid homage to the federal regulation by awarding the beneficiary full ownership of the bonds, but held that the surviving wife (who had not participated in the purchase) was entitled to a sum equal to one-half the value of the bonds at the husband's death. The court reasoned that a contrary holding would allow a husband, as manager of the community, to dispose mortis causa of his wife's interest in community property by a contract with the federal government. In later cases similar reasoning was fortified by the rationalization that the federal government was not concerned with inheritance of property within a state and that such was beyond its constitutional power.

11. The facts of Geagan left little doubt that the husband was attempting to place as many of the community assets as possible beyond the reach of the wife. The evidence showed the husband had much animosity toward his wife: he had openly declared his intention to defeat her rights and had systematically disposed of community assets. The court said: "[T]he dispositions of community property by decedent were large in proportion to the total value of the community property. . . . We do not mean to imply that a disposition of such proportion would, of itself, in every case, be fraudulent or injurious to the wife, or that there is any specific proportionate amount of movable community property which the husband cannot donate by particular title, but the disposal of such a large proportion of the community becomes important when considered with all the other facts and circumstances surrounding this particular case." 212 La. at 595, 33 So. 2d at 125.

The Geagan court was also concerned that allowing the husband to so contract with the federal government would be in effect allowing him to dispose mortis causa of the wife's half of the community. Id. at 597, 33 So. 2d at 126. This, of course, would prejudice the wife's right to make a testamentary disposition of her interest in the community. See Slater v. Culpepper, 222 La. 962, 64 So. 2d 234 (1953).

12. Succession of Gladney, 223 La. 949, 954-58, 67 So. 2d 547, 549-50 (1953): "There is no need of the federal government in its contractual regulations with its bondholders to encroach on the law of Louisiana, when a reasonable construction can be given to both federal regulations and our State laws. . . . We have on several occasions held that the bonds will be paid in accordance with the stated contract, beneficiary or co-owner, but that the payee or beneficiary is a debtor of the former owner or his heir. . . . Here in seeking authority for a construction of a federal regulation or a reasonable implication therefrom, loose construction could come to mean the right of the federal government to do in its regulations whatever was not forbidden by the U.S. Constitution, provided the act was deemed to be for the general good. If such a theory of constitutional construction were to prevail and the original notion of the Constitution as a grant of power, under which everything not granted was withheld—were to be replaced by the rule that everything not withheld was granted, the federal government would be admittedly supreme and the reserved rights of the States would speedily become only a formula of words."

Winsberg v. Winsberg, 220 La. 398, 406-07, 56 So. 2d 730, 732 (1952): "[T]he defendant cannot be accorded greater rights, merely because the donation is in the form of a federal contract, than he would have had if it had been by last will and testament as prescribed by our law. And, while Louisiana may not require that the bonds be paid to anyone other than the named beneficiary, it undoubtedly has the power, which was reserved to it by the Tenth Amendment . . . to decree that the beneficiary or payee is indebted to the estate of the former owner, or his heir, in an amount equal to the value of the gift."
The Louisiana rule was limited neither to attempts of a husband to deprive his wife of her share in the community property, nor to the use of beneficiary bonds. If the spouses used community funds to purchase co-ownership savings bonds in the form of "husband or wife," the surviving spouse was recognized as owner of the bonds; but he was debtor of the estate of the deceased spouse for half the value of the bonds.13 As this debt could be enforced even by legatees of the deceased spouse,14 a fortiori forced heirs were likewise protected. The Louisiana court did concede that the Treasury Regulations provided an additional method of disposition mortis causa, free of the formal requirements of the Louisiana Civil Code.15 Clearly, the Louisiana court assumed that the Treasury Regulations were designed merely to provide a simple method of payment for the federal government," so that it would not be subjected to inconvenience and delays attendant to the settlement of conflicting or disputed claims."16 The very wording of the regulations lent authority to this proposition.17

Texas law developed similarly: first it adhered to the majority position,18 then abandoned it,19 thus setting the stage for

13. Slater v. Culpepper, 222 La. 962, 64 So. 2d 234 (1953). Slater concluded that registration of bonds in co-ownership form did not show an intent to make a disposition mortis causa, although it was conceded that use of beneficiary bonds would show such intent. See Winsberg v. Winsberg, 220 La. 398, 56 So. 2d 730 (1952); Succession of Geagan, 212 La. 574, 33 So. 2d 118 (1948). Succession of Land, 212 La. 103, 31 So. 2d 609 (1947) was a case similar on its facts to Slater. A widow had purchased co-ownership bonds, payable to herself or her daughter, and the widow died first, leaving her daughter as her universal legatee. The court held the daughter entitled to the entire amount of bonds, free from any judgment in favor of the deceased’s succession. Slater distinguished Land on the ground the daughter took the bonds under the deceased’s will rather than by their survivorship provisions, a distinction which may be less than sound. It should be noted that in Land the court reserved the right of another forced heir to claim his full legitime, and to claim collation because of the gift. See text accompanying notes 41-44 infra. Query: since the court recognized the daughter took the bonds as a donation mortis causa, would not the forced heir’s only remedy be reduction instead of collation?

17. See 31 C.F.R. § 315.61 (1957): "[T]he survivor will be recognized as the sole and absolute owner" (Emphasis added); 31 C.F.R. § 315.66 (1957): "[T]he beneficiary will be recognized as the sole and absolute owner" (Emphasis added.). The argument was made that there was a distinction between the language of the regulations, and language indicating that the survivor will "be" the sole owner. Note, 37 Tul. L. Rev. 115, 116 (1962). Free v. Bland, 369 U.S. 663, 668 (1962) disposed of this argument on the ground the distinction was insubstantial in light of the intent of the regulations to create a right of survivorship.

the important decision in Free v. Bland. A husband had used community funds to purchase co-ownership bonds in the names of both spouses. The wife died, leaving the bonds uncashed, and vesting the bulk of her estate in a son by a prior marriage. The son claimed either half the bonds themselves or half their value. The Texas court rendered a judgment vesting ownership of the bonds in the husband in accordance with the Treasury Regulations, but ordered the husband to pay the deceased wife's heir half the value of the bonds. The United States Supreme Court reversed, holding that the state law must yield under the supremacy clause to the Treasury Regulations. The regulations were interpreted to provide not only a convenient method of payment, but to determine ownership of the proceeds of the bond as well as the bond itself. The Court reasoned that the sale of savings bonds was inextricably bound up with management of the national debt, the success of its management depending "to a significant measure upon the success of the sales of the savings bonds." Congress' commission to the Treasury to make the bonds attractive to investors was thus interpreted as an authorization to issue bonds which would avoid probate proceedings. Hence by compelling reimbursement to the estate of the deceased co-owner of his share of community funds used to make the purchase the state interfered with the federal scheme, and in fact nullified the state's ostensible compliance with the regulation by awarding ownership to the surviving co-owner.

Though Free is couched in broad language and is susceptible
of an equally broad interpretation that most transactions with savings bonds are outside the purview of state law, it does contain limiting language. A possible limitation is suggested by language employed in stating its holding: the Court mentioned that state laws which prohibited a married couple from taking advantage of survivorship provisions must fall. Does this mean the advantage can be exercised only inter se, or does it mean one spouse can use community funds to purchase savings bonds and name one not his spouse as co-owner or beneficiary, and avoid reimbursement to the other spouse? Free, limited to its facts, does not answer this question. A second limitation, equally important, was expressed in the following caveat, which hereafter will be referred to as the fraud exception to Free:

["T"]here is an exception implicit in the savings bond regulations, including the survivorship provisions, so that federal bonds will not be a 'sanctuary for a wrongdoer's gains.' . . . The regulations are not intended to be a shield for fraud, and relief would be available in a case where the circumstances manifest fraud or a breach of trust tantamount thereto on the part of a husband while acting in his capacity as manager of the general community property. However, the doctrine of fraud applicable under federal law in such a case must be determined on another day, for this issue is not presently here." (Emphasis added.)

It is unclear whether the Court means that the existence of fraud applicable under federal law would be determined under state law. However, support of the quoted language by citation of a leading case which created an exception to the Erie doctrine, seems to indicate the Court was thinking in terms of creating a federal standard of fraud, apart from concepts of fraud under state law.

Perhaps the scope of Free was delineated in the later and troublesome opinion in Yiatchos v. Yiatchos, a case arising under the community property law of the state of Washington. A husband used community funds to purchase beneficiary savings bonds, payable upon his death to his brother, thus creating

24. 369 U.S. 663, 670 (1943).
the fact situation not posed in *Free*. The state court felt the mere use of community funds to benefit one not a member of the community brought the case within the fraud exception of *Free*, and imposed a trust upon the bonds for the benefit of the deceased husband's estate and his widow. The United States Supreme Court chose as the proper implication of *Free* that fraud would be judged by federal standards, but added significantly that in applying the federal standard it would be "guided by state law insofar as the property interests of the widow created by state law are concerned." (Emphasis added.) On its face, this language may represent a retreat from the broad language of *Free*, which arguably had indicated a supremacy of federal law regardless of the importance of the state law to a coherent local property system. Any other conclusion appears negated by the words of the Court:

"It would seem obvious that the bonds may not be used as a device to deprive the widow of property rights which she enjoys under Washington law and which would not be transferable by her husband but for the survivorship provisions of the federal bonds."

Even following these two leading decisions, surprisingly little can be said with certainty concerning the relation of savings bonds to community property. It is clear that both *Free* and *Yiatchos* require states to recognize savings bonds as simple methods of transferring property at death, without regard to formalities required by state law for valid testaments. This requirement is not a severe blow to state property schemes; Louisi-
isiana had made such a recognition even prior to \textit{Free}.$^{32}$ Thus if the amount of the bonds is less than the purchaser's interest in the community, the surviving beneficiary or co-owner is entitled to all the bonds without any reimbursement obligation, at least where state law does not prevent the disposition for reasons other than form. \textit{Yiatchos} places one restriction on the use of bonds as a "will-substitute": if under state law a spouse has a vested one-half interest in \textit{each item} of community property, both during the marriage and after its dissolution, all the bonds could not pass by the survivorship provisions; instead only the half which had belonged to the purchaser-spouse would do so.$^{33}$ At least under these limited circumstances, \textit{Yiatchos} seems to allow a judgment for half the bonds themselves,$^{34}$ a remedy not even recognized by most state courts prior to \textit{Free}.

Also established is the proposition that if the state property law allows one spouse to consent to a conversion of community property into separate property either by agreement to become effective upon death of one spouse, or by gift during lifetime, and such consent is given, all the bonds pass to the surviving beneficiary or co-owner, again without any reimbursement obligation.

Though not explicit in the jurisprudence the Treasury does at least have a valid interest in rapid and easy identification of

33. The nature of the wife's interest in community property during the marriage is discussed in Comment, 25 La. L. Rev. 159 (1964). The dissenting Justices in \textit{Yiatchos} criticized the suggestion that the wife could have a vested half interest in each individual item of the community during the existence of the marriage. 84 Sup. Ct. 742, 747 (1964). It seems fairly clear in Louisiana that the wife, after dissolution of the marriage, does have a vested half interest in each item of the property of the former community. See, \textit{e.g.}, Tomme v. Tomme, 174 La. 123, 139 So. 901 (1932); Succession of Heckert, 160 So. 2d 375 (La. App. 4th Cir. 1964). Query: could states, either by judicial decision or legislativa act, take the position that the wife does have a vested half interest in each item of the community property during the marriage, thus if the husband invested an amount equal to half the community property in beneficiary (or perhaps co-ownership) bonds, he would have succeeded in willing only one-quarter of the total community property to the beneficiary, when his intent was to will his entire half interest? The remaining part of the purchaser's interest would then pass under his will, if any, and if not, in intestacy.
34. 84 Sup. Ct. 742, 745-46 (1964): "According to the court below, the widow had a 'vested one-half interest' in the bonds, which may mean that under Washington law the wife before and after death has a half interest in each item of the community estate, including the particular bonds involved in this case, and cannot be forced to take cash or something else of equal value upon a division of the community property between herself and those entitled to take her husband's half. Under such circumstances, since we cannot say that this property right, if it exists, is insubstantial, to allow all of the bonds to pass to the designated beneficiary would effect an involuntary and impermissible conversion of the widow's assets."
the payee of savings bonds. In fact, this was well settled in Louisiana prior to the confusion introduced by *Free*. Thus, whenever an adjustment is required to protect the interest of an adverse claimant to savings bonds, it is submitted that the proper method is to vest the named beneficiary or co-owner with ownership of the bonds, and render a money judgment in favor of the adverse claimant for the amount necessary, even though it be equal to the value of the bonds, thus making the named payee a mere conduit. Exceptionally, if the adverse claimant had, during the existence of the community, a vested interest in *each bond*, as opposed to an interest which could be satisfied by the proper amount of any property from the common fund, courts may be authorized to order the payee of the bonds be changed. Of course, whether reimbursement would ever be proper depends on the present force of *Free* and its relation to *Yiatchos*—inquiries which, at best, verge on speculation.

There seem at least two resolutions of the *Free* and *Yiatchos* decisions. By the first the cases consider different and unrelated problems. *Free* determines primarily rights acquired by transmission of property at death and only collaterally affects community property—the result would have been exactly the same if the facts had arisen in a state not utilizing the community property system, since Treasury Regulations having the force of federal law determine such rights. One writer has even advanced the suggestion that *Free* could be considered an open invitation to defeat the rights of heirs, particularly forced heirs. *Yiatchos*, on the other hand, clearly stands as a direct exposition of the relation between savings bonds and community property, as the Court here considered whether the husband, as head and master of the community, can utilize federal savings bonds to dispose mortis causa of property owned not by him but by his wife. The facts of the decisions graphically illustrate the distinction: in *Free* the adverse claimant unsuccessfully asserted rights allegedly acquired by transmission on death of a co-owner, rights directly in conflict with Treasury Regulations governing savings bonds; in *Yiatchos*, at least under one interpretation of the facts, the surviving wife successfully asserted

35. See text accompanying note 15 supra.
36. This was the solution adopted by the Louisiana Supreme Court in Winsberg v. Winsberg, 220 La. 398, 56 So.2d 730 (1952). See note 49 infra, and accompanying text.
37. See note 34 supra.
that her present ownership in the bonds could not be divested by the death of her husband.\textsuperscript{39} In one case the claimant had, prior to the purchaser's death, only an expectancy; in the other, the claimant had ownership. It is certainly arguable that the latter rights are entitled to greater protection than the former, and indeed the latter rights may be protected under the due process provisions of the United States Constitution. This analysis would allow \textit{Free} to be fully effective within its ambit of inheritance rights, and \textit{Yiatchos} equally effective in the realm of the wife's ownership rights acquired under community property systems. Thus savings bonds may be freely used to transmit property at death, but they may not be used to deprive a member of a marital regime of ownership. Since fraud was \textit{never} alleged in \textit{Free}, and under this analysis \textit{Yiatchos} would likely not be used to interpret directly the extent of the \textit{Free} rule, it would yet be uncertain just what conduct would constitute fraud under the exception. Is it inconceivable that even the conduct in \textit{Free} relative to inheritance rights would be fraud? If \textit{Yiatchos} could be used to illuminate the newly-created federal standard of fraud, it is at least arguable that any conduct which deprives one of property rights under state law would be "fraud."\textsuperscript{40} Truly, \textit{Free} would be emasculated. The important point, however, is that recognition of a distinction between the two decisions would not compel adoption of the latter argument, leaving the fraud test to be delineated by later decisions.

It may be questioned whether the above analysis would be appropriate in relation to the peculiar Louisiana institution of forced heirship, which has received constitutional protection,\textsuperscript{41} and is certainly more fully protected than ordinary rights of heirship. Louisiana has held, despite \textit{Free}, that under state law savings bonds must be considered in calculating the mass of the succession under article 1505\textsuperscript{42} and thus in determining the amount of the forced portion. One subsequent decision\textsuperscript{43} indi-

\textsuperscript{39} The problem of the wife's interest in the community property during the marriage is a complex one. See note 33 \textit{supra}. See, e.g., Bender v. Pfaff, 282 U.S. 127 (1930).

\textsuperscript{40} See discussion at notes 46-49 \textit{infra}.

\textsuperscript{41} \textit{LA. CONST.} art. IV, § 16: “No law shall be passed abolishing forced heirship. . . .”

\textsuperscript{42} Succession of Mulqueeny, 156 So. 2d 317 (La. App. 4th Cir. 1963), \textit{cert. denied}, 157 So. 2d 234 (“no error of law”).

\textsuperscript{43} Succession of Weis, 162 So. 2d 791 (La. App. 4th Cir. 1964): “We are not concerned with the question of disposable portion nor with a legitime or the doctrine of collation. U.S. Savings Bonds are governed strictly by the federal law and not by the state law. . . . It is to what extent these bonds figure in
icated in dictum that collation of savings bonds registered in the name of one heir could be required. The \textit{Yiatchos} rationale appears to support these decisions, but their continued application depends wholly upon a recognition by the United States Supreme Court that the interest of the forced heir is as important as that of a spouse.\textsuperscript{44} Even affirming these two Louisiana decisions would not answer the more difficult problem whether reduction could be applied to a disposition by savings bonds, should it be otherwise impossible to fulfill an heir's legitime.

The first possibility, though attractive, is greatly weakened by the fact that the Court, in \textit{Yiatchos}, completely ignores the suggested distinction between the two cases, and in fact, the Court characterizes the later case as one delineating the scope of the fraud exception to \textit{Free}.\textsuperscript{45} Thus the second possibility, already mentioned, is suggested by the language of the court: that the fraud exception of \textit{Free} has come to mean that utilization of savings bonds to deprive one of a property interest recognized under state law is "fraud."\textsuperscript{46} The interest of a spouse in the community property has been recognized by the United States Supreme Court as ownership.\textsuperscript{47} The clear implication seems to be that each spouse's moiety in the community would be preserved inviolate under this theory. Following this theory to its ultimate result leads to the conclusion that, since it is based on the state property law's valuation of the interest to be protected, the interest of the forced heir would receive protection almost equal to that of the spouse in the community. This suggested interpretation of the "fraud" standard appears most clearly when considered in relation to the facts of \textit{Winsberg v. Winsberg}.\textsuperscript{48} There a man purchased beneficiary savings bonds payable to his brother; subsequently the purchaser married. After his death the widow gave birth to a posthumous child. Certainly the conduct of the father would not constitute fraud

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\item calculating the inheritance tax or a legitime or an interference with the rights of a child born subsequently to the naming of a payee on death that the state law governs." Compare Succession of Gladney, 223 La. 949, 67 So. 2d 547 (1953).
\item 44. See generally McKAY, \textit{COMMUNITY PROPERTY} §§ 57, 62 (2d ed. 1925).
\item 45. 84 Sup. Ct. 742, 744 (1964).
\item 46. See Comment, 11 \textit{LOYOLA L. REV.} 311, 319 (1963), wherein the author, writing prior to \textit{Yiatchos}, suggests it may be fraud whenever one member of a community buys savings bonds which will go to a third party without the knowledge or consent of the other spouse; further, that since there is no independent federal law of inheritance or community property, state law should determine the consequences.
\item 47. Bender \textit{v. Pfaff}, 282 U.S. 127 (1930).
\item 48. 220 La. 398, 56 So. 2d 730 (1952).
\end{itemize}
in the usual meaning of the term, yet it is submitted that Yiatchos could logically mean the father would be depriving the posthumous child of a property right recognized under state law, and the child would be entitled to appropriate protection. 49

Whichever theory is adopted, one further point may weigh against much sympathy for the forced heir in relation to savings bonds. It is well settled that the forced heir may realistically be deprived of his legitime through the use of life insurance policies. 50 It may not be contrary to Louisiana policy, therefore, to recognize an additional method to accomplish the same end. Even so, under what seems to be the better analysis of Yiatchos—any use of savings bonds to deprive one of a property interest recognized under state law is "fraud" within the meaning of Free—such a determination would be for the courts of Louisiana, and not for federal courts.

COMMUNITY PROPERTY AND HOMESTEAD ASSOCIATIONS

The importance of building and loan associations in Louisiana has been repeatedly affirmed. 51 Here it is proposed to investigate the relevant law, inasmuch as it touches the community property system. Unique law has developed in two particulars: ownership of stock purchased in the name of the wife,

49. One difficulty with the suggestion in the text is that under Louisiana law a testament falls by the posterior birth of a legitimate child. La. Civil Code art. 1705 (1870). Certainly, this would also include a posthumous child. Winsberg v. Winsberg, 220 La. 398, 56 So. 2d 730 (1952). Would it follow that the disposition by savings bonds, a federal contract, would likewise be invalid? It is submitted that the policy behind identification of the payee, for the benefit of the federal government, would dictate the sound result to be that the named beneficiary or surviving co-owner of the bonds would be entitled to the proceeds, so that the federal government could discharge its obligation by payment to him. Then, the rights under state law, as provided by article 1705, could be protected by rendering a judgment against the payee in the full amount of the bonds. This was the solution adopted by the Winsberg court prior to the decision in Free. Following Yiatchos it is submitted Winsberg may still have validity. Winsberg pointed out, and it is suggested this may be proper following the Yiatchos interpretation of Free, that the supremacy of Treasury Regulations only made it unnecessary to follow the formal requirements under state law for a valid testament, but still left applicable the other state rules applicable to dispositions mortis causa. Id. at 404, 56 So. 2d at 731.

50. The leading case establishing this proposition is Sizeler v. Sizeler, 170 La. 128, 127 So. 388 (1930).

51. E.g., Mayre v. Pierson, 171 La. 1077, 1084, 133 So. 163, 165 (1931): "The purpose for which building and loan associations are established is to enable persons of small means and limited incomes to acquire homes and thus become better citizens and more identified with the welfare and growth of the community." See Legislative Symposium: The 1958 Regular Session—Civil Code and Related Subjects: Part II, 19 La. L. Rev. 65, 68 (1958): "The building and loan associations have made possible the high percentage of individual home ownership in Louisiana. . . ."
and the sale-and-resale device customarily used to secure the loan transaction.

Ownership of Stock in Building and Loan Associations Purchased in Name of the Wife

A. Statutory Basis

The first building and loan statute was enacted in 1888,52 and in 1894 reference to acquisition of stock by married women was added.53 The 1894 enactment gave married women somewhat broader authority than was customary prior to the married women’s emancipation act,54 but it remained for Act 120 of 190255 to inject new concepts into the relatively static field of community property. Section 13 of that act allowed married women to “subscribe for, hold, withdraw, transfer, pledge, borrow upon and surrender stock . . . without the . . . authorization of their husbands.” Significant as an indication of the intent of the legislature, the same section provided that these activities were “for her separate benefit as paraphernal property.”

Despite frequent amendment to other portions of the building and loan law, the portions relevant to community property remained unchanged until the passage of section 34 of Act 140 of 1932. The significant portions of the 1902 act were retained, but it was added that during the marriage or after its dissolution, the shares held in the name of a married woman “shall not form part of the marital community or of the estate of the husband for any purpose.”56 This section gave any person who might have a claim adverse to the wife’s interest in building and loan shares standing in her name a ninety-day period from the effective date of the act in which to challenge her ownership.57 In the absence of suit within the stated period, the interest of

52. La. Acts 1888, No. 115. Prior to this time there was no statutory law on the subject, but such associations were in existence, and later they were held to have been valid organizations. American Homestead Co. v. Linigan, 46 La. Ann. 1118, 15 So. 369 (1893); Succession of Latchford, 42 La. Ann. 529, 7 So. 628 (1890); see Plough, Commentary, Homestead, Building and Loan Associations in Louisiana, in 2 West’s La. Stat. Ann. 289, 290 (1951).
56. The opinion has been advanced that the purpose of this legislation was to encourage small investments in homestead associations. See Daggett, Policy Questions on Marital Property Law in Louisiana, 14 La. L. Rev. 528, 541 (1954).
57. The statute termed this a period of “prescription and repose” and pro-
the wife became incontestable.\textsuperscript{58} The statute was again amended in 1938 to delete both the peremption period and the incontestable interest of the wife, thus almost reviving its 1902 wording: "Any married woman may subscribe for, own, hold, withdraw, transfer, give, pledge, borrow upon and surrender shares in such associations as a femme sole."\textsuperscript{59} However, the significant clause which provided that such activities should be "for her separate benefit as paraphernal property" was omitted. This change was probably intended to subject the shares of building and loan associations to the applicable rules of community property.\textsuperscript{60} In effect it greatly reduced the intrusion of the building and loan law into the field of community property law. In 1958 the 1938 act, now appearing as R.S. 6:750, was amended to allow the married woman to receive the fruits from shares held in a building and loan association.\textsuperscript{61}

A similar statute enacted in 1940 governs the ownership of shares in federal savings and loan associations. The act almost tracks the provisions of the 1938 act governing state building and loan associations, but added the significant provision that the shares shall be the wife's paraphernal property only if purchased with separate funds of the wife.\textsuperscript{62} Shortly thereafter, the latter provision was dropped\textsuperscript{63} to make the act correspond exactly with the statute governing state associations. This uniformity was preserved when the 1958 amendment relative to the fruits of the stock was likewise made applicable to federal savings and loan associations.\textsuperscript{64}

\textbf{B. Jurisprudence}

The statutory development has more than academic interest,
since generally the ownership of building and loan stock standing in the name of the wife will be determined by the statutory provisions in force at the time the stock is acquired. 65 *Carter v. Third Dist. Homestead Ass'n* 66 was the first case interpreting the building and loan law in relation to ownership of stock. Before 1932 the wife had purchased stock in her name, and her husband took possession of the shares, alleging she had used community funds to pay the price. The wife sued in effect for restitution of her paraphernal property. 67 The husband argued that the 1902 act was unconstitutional 68 and that the 1932 act could not be applied to purchases before its passage. The court implied that the 1902 act was unconstitutional but that any infirmity was cured by the peremption period allowed the husband after the passage of the 1932 act to challenge acquisitions of stock in the name of the wife. 69 Since the husband had not filed suit for that purpose he was barred from asserting a claim to the stock's ownership adverse to the wife. 70 More important,

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65. Cameron v. Rowland, 215 La. 177, 40 So. 2d 1 (1949); *Carter v. Third Dist. Homestead Ass'n*, 195 La. 555, 197 So. 230 (1940). Note, however, that in *Carter* the court found later enactments could cure possible constitutional infirmities in earlier statutes by the device of a period of prescription within which any interested party is required to file suit to challenge rights acquired under the earlier statute.

66. 195 La. 555, 197 So. 230 (1940).

67. Procedurally the suit was a mandamus proceeding against the homestead association to compel issuance of duplicate shares, and the husband was cited as a defendant. The court pointed out the legal effect of the suit was a suit against the husband to compel the restitution of paraphernal property. *Carter v. Third Dist. Homestead Ass'n*, 195 La. 555, 197 So. 230, 232 (1940). It is clearly recognized in the Civil Code that a wife may sue the husband for the restitution of her paraphernal property without seeking a dissolution of the marriage. *La. Civil Code* arts. 2357, 2391 (1870). This is independent of the action of the wife to sue for the separation of property during the existence of the marriage. *Id.* art. 2325.

68. The ground of unconstitutionality urged was that the title of the act did not state as its purpose a change of the community property system. *Carter v. Third Dist. Homestead Ass'n*, 195 La. 555, 562, 197 So. 230, 232 (1940).

69. *Accord*, *Ferguson v. Hayes' Heirs*, 202 La. 810, 13 So. 2d 233 (1943). Here the wife had likewise purchased shares prior to 1932, and no suit had been instituted within the ninety-day period to have the shares declared community property. Consequently, it was held the shares belonged to the separate and paraphernal estate of the wife, and her collateral heirs were entitled to have them distributed among themselves. *La. Acts* 1932, No. 140, § 34, was held constitutional, both against attack that it was broader than its title and contained two objects, and that it created a special law in favor of married women who have subscribed for and own stock in building and loan associations and changed the law of descent and succession as regards a special class of property. *Id.*

70. *Carter v. Third Dist. Homestead Ass'n*, 195 La. 555, 564, 197 So. 230, 233 (1940): "Under the general law of this state... a man has no right to assert judicially against his wife a claim that is based upon only his interest in the matrimonial community as long as the community remains undissolved, unless it be in a suit which seeks or which may accomplish a dissolution of the community. In the present case it is admitted that the matrimonial community has not been dissolved. Hence the only right of action that the husband has..."
the court gave the 1932 statute the effect which the wife contended the 1902 act had — ownership of the stock in the wife when the shares were placed in her name, regardless of the source of the purchase money. The husband was barred from showing that community funds were used on the ground that the marriage was still in existence, but the court left open the question whether the husband would be able to assert a claim for his share of the community funds which went to pay for the stock.

_Cameron v. Rowland_²¹ presented facts which encompassed most of the legislation in this field. Here a wife began purchasing shares in a state building and loan association in 1914 and continued periodic purchases until her husband’s death in 1941. In 1930 she had purchased a bloc of investment shares in the same institution, and in 1935, the association was converted into a federal corporation. All the shares were in the wife’s name, and all purchases were made with community funds. A forced heir of the deceased husband contended that the stock belonged to the community. On rehearing,²² the court confirmed the _Carter_ implication that the ownership of the stock was governed by the legislation in force at the date of acquisition.²³ The investment shares purchased in 1930 were thus the separate property of the wife; all the other shares purchased prior to 1938 fell under either the 1902 act or the 1932 act; in either case they also became the separate property of the wife. The 1938 act was construed as showing intent that shares be governed by

had to assert judicially any community interest that he might have claimed in the building and loan stock that was bought in his wife’s name was the right of action which was accorded him by section 34 of the act of 1932; and that right of action expired ninety days after the act went into effect. . . . [S]ection 34 of the act of 1932 . . . remained in effect for a period far exceeding ninety days, which was long enough for the statute of limitation and repose to have its effect."³

²¹ 215 La. 177, 40 So. 2d 1 (1949).

²² Cameron v. Rowland, 215 La. 177, 203, 40 So. 2d 1, 15 (1949). In the original opinion the court had ruled that the right of the forced heir to challenge the placing of the funds in building and loan stock in the name of the wife had come into existence only at the death of her father; that the applicable act in effect at the death was La. Acts 1940, No. 95; that although most of the stock had been acquired when the institution was state-chartered the wife had accepted the re-issue of shares in the federal institution, and had thus become bound by the laws relating thereto; that, therefore, all the stock must be classified as community property.

²³ Id. at 222, 40 So. 2d at 18. The court found that whatever the interest of the widow prior to the conversion of the institution into a federal corporation and the exchange of her stock, this interest was not thereby altered. It was characterized as only a transformation of her interest from one association to the other. See Kittredge v. Grau, 158 La. 154, 103 So. 723 (1925); cf. Dillon v. Freville, 129 La. 1005, 57 So. 316 (1912).
general community property law, and thus the shares purchased between the date of this act and the 1940 act, which specifically governed federal corporations, were treated as community property. Since the 1940 act required the purchase to be made with paraphernal funds to classify shares as separate property of the wife, those shares purchased from the date of that act until the husband's death were community property.\(^7\)

*Cameron*'s application of the peremption period against the forced heir may be questioned, since the presumptive heir could not bring suit within the ninety-day period to protect inheritance rights, unless his ancestor should die within that period. The court, however, avoided grave constitutional problems\(^5\) and protected the forced heir by answering the question of restitution left open in *Carter*, ruling that the legislation was designed to protect building and loan associations in their transactions with married women and not to divest the community of the funds used in the purchase of stock which became the property of the wife merely because of the special statute then in force.\(^6\) Thus the adverse claimant is entitled to an accounting adjustment at the dissolution of the community. Though constitutional objections may thus be avoided, the plight of the adverse claimant is not wholly settled by the *Cameron* rule, since apparently no consideration would be allowed for increases in the value of the stock or interest for the use of the funds.\(^7\)

The incongruity of the *Cameron* restitution rule is indicated

\(^{74}\) Implicit in this reasoning is a holding that the ownership of shares in federal savings and loan associations was governed by the law applicable to state-chartered associations until such time as the state passed special laws to govern ownership of stock held by its citizens in federal corporations. It is at least arguable that neither could the state make its general law applicable to govern ownership in federally chartered corporations nor pass special laws to govern such. See *Free v. Bland*, 369 U.S. 663 (1962); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). Compare *Bank of America v. Parnell*, 352 U.S. 29 (1956).

\(^{75}\) *La. Const.* art. IV, § 16.

\(^{76}\) See Plough, *Commentary, Homestead, Building and Loan Associations in Louisiana*, in 2 *West's La. Stat. Ann.* 289, 321 (1951), where the author seems critical of *Cameron* for ordering an accounting of the wife's indebtedness to the community for the purchase price of all stock decreed to be her separate property on the ground that all the stock acquired under the tenure of Act 140 of 1932 should be free from all adverse claims, even as to restitution of funds used for the purchase. This criticism may be questioned, for as interpreted by *Cameron* the act was only intended to reach the bare question of ownership. Compelling restitution is an entirely different question, and *Cameron* would appear in line with decisions in other areas of community property on this holding. See text accompanying notes 224-246 infra.

\(^{77}\) See *Slater v. Culpepper*, 233 La. 1071, 99 So. 2d 348 (1957); *Succession of Geagan*, 212 La. 574, 33 So. 2d 118 (1948).
by a later case\textsuperscript{78} where shares were purchased at a time when the applicable statute caused ownership to vest in the wife. She sold the stock for a lesser sum, which was then turned over to the community. The court properly ruled that she was indebted to the community for the deficit, but left little doubt that had the shares sold for more than the purchase price, the wife could have retained the profits as her paraphernal property. If the legislation was in fact merely designed to protect the building and loan associations in their transactions with married women, there seems little justification for allowing a wife to speculate with community funds and retain all profits from the speculation.

Though not yet interpreted, the most recent amendments\textsuperscript{79} deserve investigation. They purport to allow a married woman to receive the fruits from shares standing in her name in both state and federal building and loan associations to the same extent as if she were single. It now seems the courts will look to the general rules governing classification of property to determine whether shares in her name are separate or community property.\textsuperscript{80} However, also under community property law, fruits from either separately owned shares of the wife or community owned shares would normally fall into the community.\textsuperscript{81} If the shares were her paraphernal property, she could preserve the fruits as separate property only by filing certain declarations.\textsuperscript{82} In light of the \textit{Cameron} rationale the amendments may have been intended only to protect the associations, so they could safely pay dividends to the person in whose name the stock stands without subjecting themselves to possible adverse claims. Thus the community would own the fruits. On the other hand, the amendments could be interpreted as intending to change the general rule, and make the wife owner of all the fruits from stocks held in her name. This interpretation would allow the possibility of channeling profits of admittedly community property, if community funds were used to buy building and loan stock in the name of the wife, into the separate estate of the wife. In this event the husband or his heirs would obtain

\textsuperscript{78} Slater v. Culpepper, 233 La. 1071, 99 So. 2d 348 (1957).
\textsuperscript{80} See notes 108-116 \textit{infra}, and accompanying text.
\textsuperscript{81} See notes 108-116 \textit{infra}, and accompanying text.
\textsuperscript{82} LA. CIVIL CODE art. 2386 (1870), as amended.
half the stock or half its value at the time of dissolution, but presumably they would have no claim for the dividends earned by their half of community stock until that date. An intermediate approach, and perhaps the soundest one, would be to decide that the amendments relieved the wife of the necessity of filing the declarations to preserve dividends from separate stock as separate property, but that in case of community stock in her name she would have no authority to appropriate the dividends for her estate.

Borrowing Money — Current Status of Sale-and-Resale Device

The first statute granting building and loan associations power to acquire a vendor's privilege on immovable property as security for loans. This grant of power has been continued through many amendments of the statute. The device first chosen for this purpose was the sale-and-resale: the borrower sells the property to the association for a cash amount equal to the loan requested, then the association resells to the borrower on credit. But for special statutes approving the procedure, Louisiana jurisprudence would classify this transaction as a pignorative contract, a security transaction, and would give it effect only as a mortgage. The lawmaker's motive in granting the vendor's privilege to building and loan associations is obvious: the legislature has found that these as-

84. La. R.S. 6:766 (1950) contains the present provision.
85. See Sarpy, Why the Building and Loan Sale and Resale in Louisiana, 16 Tul. L. Rev. 249, 251 (1942). See also Plough, Commentary, Homestead, Building and Loan Associations in Louisiana, in 2 West's La. Stat. Ann. 289, 292 (1951): "To no other type of corporation has the legislature ever granted the very valuable privilege of a vendor's lien upon real estate taken as security for loans. Ordinarily, where one person sells his property for cash to a second person and the latter resells it to the former on terms of credit, the jurisprudence is definitely established in Louisiana that such second person has only the security of an ordinary mortgage and does not acquire the rights and privileges of a real vendor. But, as to these associations, Act No. 115, and all subsequent statutes dealing with the organization and operation of such institutions, have given and preserved to these institutions this valuable right and the law reports are replete with cases recognizing this peculiar and distinctive advantage. Possessed exclusively by these institutions, that right has been jealously protected and preserved by the Court, as it crashed head-on into other laws of the State, particularly the laws of descent and distribution and those relating to the ownership of property."
86. Capillian v. Chambliss, 211 La. 1, 17, 29 So. 2d 171, 176 (1946): "[A] lien, unlike a mortgage, cannot be created by convention or contract between the debtor and creditor unless there is a statute declaring that such a contract shall create the lien."
sociations perform a useful social function, and their formation and existence are to be encouraged. The ordinary mortgage has a low rank in competition among Louisiana security devices; the vendor's privilege enjoys a much higher ranking and increases the chances of loan repayment. Privileges are creatures of legislative intent; and while the method chosen may be open to question, there can be no longer any question of the power of the legislature to so favor building and loan associations.

Early cases established that the sale-and-resale transaction. In Succession of Lewis, 157 So. 2d 321, 323 (La. App. 4th Cir. 1963), a husband had acquired separate property prior to his marriage, and in an effort to make the property that of the community, he conveyed it to his attorney, who reconveyed it back to the husband and wife. Forced heirs of the husband were allowed to attack the transaction: "A spouse does not, by a sale valid on its face and a resale, change the character of his property from separate to community. He certainly cannot do so by a simulated transaction in fraud of his heirs." Accord, Betz v. Riviere, 211 La. 43, 29 So. 2d 465 (1947).

88. La. Acts 1888, No. 115, declared building and loan associations were corporations of "public utility and advantage." See Treigle v. Acme Homestead Ass'n, 181 La. 941, 160 So. 637 (1935); State ex rel. Cotonio v. Italo-American Homestead Ass'n, 177 La. 766, 149 So. 449 (1933); First Nat'l Bank v. Louisiana Tax Comm'r, 175 La. 119, 143 So. 23 (1932).

89. LA. CIVIL CODE art. 3186 (1870): "Privilege is a right, which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors, even those who have mortgages."

90. Id. arts. 3186, 3267.


92. Mayre v. Pierson, 171 La. 1077, 1084-85, 133 So. 163, 165 (1931): "Ordinarily, therefore, the transaction by which a building and loan association lends money to one of its members and secures such loan by a charge on the property of such member would be classed as a mortgage, except for the fact that our Legislature has deemed it well, in pursuance of its policy to encourage the formation and operation of building and loan associations, to invest such a transaction with the status of a sale so as to secure the amount due by the borrowing member by a vendor's lien and privilege on the property affected. Since liens and privileges are created by law, it was within the power of the Legislature to do this."

93. In Liquidators of Prudential Savings & Homestead Soc'y v. Langermann, 156 La. 76, 100 So. 55 (1924), the first wife of husband had died in 1907, and in 1910 he had sold to and reacquired from a building and loan association certain property the first wife had bequeathed to him. While still owing the amount borrowed, husband remarried in 1915. In 1919, he made a dation en paiement of the property to the association. Son by first marriage then contended LA. CIVIL CODE art. 1735 (1870) (now repealed) caused forfeiture of the ownership of the husband. The court held the second marriage could not have the effect of divesting the ownership of the building and loan association, which association was standing in the position of the unpaid vendor. Thus the husband had only a defeasible title. The dation en paiement was assimilated to a voluntary retrocession, in lieu of compulsory enforcement by suit of the resolutory condition implied in the sale.

In Huts v. Crowley Building & Loan Ass'n, 146 La. 85, 83 So. 417 (1919), community property had been acquired during the existence of the marriage. In 1900 husband had sold the property to building and loan association, and wife
tions were actual sales, in which title passed to the building and loan association, and then back to the borrower, and which consequently imposed upon the building and loan association all the incidents of a normal sale, such as the risk of loss and the warranty liability of an ordinary vendor. Recognition of title transfer inevitably led to problems when the borrower was one member of a conjugal union, and the property which served as security for the loan had, prior to the sale and resale, belonged to the separate estate of the borrower. It seemed logical to argue that as the reacquisition was under a title different from the former ownership, the latter title would have to fulfill all the requirements relative to acquisitions under onerous title by one spouse during the marriage in order to retain its former character.

This problem was squarely raised in the leading case of Mayre v. Pierson. There the wife owned paraphernal property, had died in 1902, prior to the reconveyance of the property. In 1903 the property was recovered. Over a claim by the wife's heir that the transactions should be considered as one, which should have taken place at one time, the court held that, as the husband had become a widower prior to the time of the reconveyance, he became the owner of the whole of the property. This is a clear recognition that the community held no title at the time of the death of the wife, the title at that time resting in building and loan association.

See also Barnes v. Thompson, 154 La. 1036, 98 So. 657 (1923); Holloman v. Alexandria & Pineville Bldg. & Loan Ass'n, 137 La. 970, 69 So. 764 (1915) (transaction not a mortgage, but a purchase and resale); American Homestead Co. v. Karstendick, 111 La. 884, 35 So. 964 (1903) (transaction a valid sale; provision held constitutional).

94. Caire v. Mutual Bldg. & Loan Ass’n, No. 7315, Orl. App. unrep. dec., discussed in Plough, Commentary, Homestead, Building and Loan Associations in Louisiana, in 2 West's La. Stat. Ann. 289, 302 (1951). Here the property suffered hurricane damage while title stood in the name of the association. The court said “the language of the statute regulating these associations” left “no room for any other construction than that such transfer and re-transfer not only have (had) the effect of a sale and a resale so as to operate a privilege equal in rank to that of a vendor, but that such transfer and re-transfer are in fact and in law a sale and resale for all purposes whatever.”


96. It is possible for either spouse to acquire property as his separate property during the existence of the community. In the case of acquisitions in the name of the husband, in order for him to prove later that it is his separate property, it is sacramental, Succession of Goll, 156 La. 910, 101 So. 263 (1924), that he include in the deed of acquisition the dual declaration that the property is acquired with his separate funds, and is for his separate estate. See, e.g., Slaton v. King, 214 La. 89, 36 So. 2d 684 (1948). In the case of acquisitions in the name of the wife, to avoid a presumption that the property is community, she must prove: (1) that she possesses separate funds under her administration and available for investment; (2) that the cash portion of the price bears such a relation to the whole as to make the property purchased sufficient security for the credit portion; and (3) that her paraphernal property and revenues are such as to enable her to make the purchase with reasonable expectation of meeting the deferred payments. See Fortier v. Barry, 111 La. 776, 35 So. 906 (1904).

97. 171 La. 1077, 153 So. 163 (1931).
and she entered the traditional sale-and-resale to secure a building and loan association advance for the payment of her separate debts. Thereafter judgments were recorded against her husband, and a subsequent purchaser of the land brought action to compel erasure of the judicial mortgages which had allegedly attached to the property on the theory that it became community property when reacquired during the marriage. The court found that the wife had conveyed the property as her separate and paraphernal property, and that it came back to her in the same classification; thus the judicial mortgage was ineffective. However, the apparent adherence of the Mayre court to the formal requirements for acquisition of property by the wife as her separate property prevents the opinion from casting much doubt on the sale theory.

An approach other than the sale theory was taken in the later case of Succession of Farley, where the court classified the transaction as a pignorative transaction, intended not pass title but only to create security for the building and loan association. Later affirmation of this theory made it clear that a wife could use her property as security without danger of changing its character.

Strangely, the problem of sale-and-resale of the husband's

98. La. Civil Code art. 2402 (1870). Compare Id. art. 2334, as amended to codify the jurisprudential theory of reinvestment of separate funds.

99. In Robinson v. Allen, 88 So. 2d 64, 66 (La. App. Orl. Cir. 1956), the court said: "It is true that in Mayre v. Pierson the deeds executed by the wife contained recitals that the property was sold, reacquired and mortgaged as the separate and paraphernal property of the wife under her separate administration and control, while the deeds before us in the instant case contain no such recital as to the property remaining the paraphernal property of the wife or that it was under her separate administration and control. But we do not believe that the absence of such recitals in the deeds we are considering makes any difference whatever, and our opinion is that notwithstanding that . . . [the wife] sold her property to the homestead and then reacquired it for the purpose of borrowing . . . with the property as security, this did not change the character of the property from paraphernal to community or common property."

100. 205 La. 972, 18 So. 2d 586 (1944). A son had conveyed his property to an association, and it was resold to the son and his mother, the latter apparently being added to give the association greater security. At the time of the resale the husband of the mother was living, and at his death the heirs contended a one-half interest in the property should be inventoried as community property. The mother entered a formal disclaimer of intent to acquire any interest in the property, and while the decision largely turned upon the disclaimer as offsetting the presumption that property acquired in the wife's name during marriage belongs to the community, the court said: "The transaction . . . was never intended to operate as a transfer of title. . . . The sale and resale of the land constituted a pignorative contract, which was made in the form of a sale and resale for the purpose merely of giving the building and loan association a vendor's lien, in addition to the special mortgage." Id. at 984-85, 18 So. 2d at 590.

separate property was not presented until the courts had fully developed the present theory in relation to the wife's separate property. Following the earlier sale theory to its logical conclusion, the position of the husband seeking to preserve his property as separate and yet have use of it as security would be somewhat weaker than that of the wife because the normal rule in relation to acquisitions under onerous title by the husband requires dual declarations in the deed that he is using his separate funds and purchasing for his separate estate to preserve the separate character of the acquisition.\(^{102}\) However, in the first case\(^{103}\) the court decided that the dual declaration rule was not applicable, on the theory that the husband had merely exchanged his property for a loan, thus invoking the only recognized exception to the dual declaration requirement.\(^{104}\) Shortly thereafter,\(^{105}\) the sale-and-resale of the husband's property was clearly characterized as a pignorative contract. As a result, the separate property of the husband and of the wife will be treated the same way in sale-and-resale transactions with building and loan associations.

Though a judicial solution has been carefully worked out, recent legislative action may eventually make the problem moot. After many years of agitation,\(^{106}\) the legislature in 1958 adopted a statute\(^{107}\) which provides that a mortgage taken by a building and loan association shall rank as a vendor's privilege upon immovable property, just as if the sale-and-resale had been entered into. It is expressly provided that this procedure is merely optional; but in view of the expense and additional trouble of the sale-and-resale transaction, it is likely that usage of the older procedure will decline. However, even should the older procedure be completely supplanted, knowledge of the earlier jurisprudential solution will continue to be necessary for a long period to come.

104. See, e.g., Succession of Land, 212 La. 103, 31 So. 2d 609 (1947).
STOCK, CASH DIVIDENDS, AND STOCK DIVIDENDS

Generally, acquisitions of stock by members of a marital community are governed by the general rules of property classification. Thus, when stock is acquired during the community’s existence, even in the name of one spouse, it is presumed to be community property, but either husband or wife may rebut this presumption and prove the stock is separate property. Should evidence establish that a mixture of separate and community funds was used to acquire it, the stock will be community property. Stock inherited by one spouse is separate property of that spouse and the same result follows from a donation of stock to one spouse. The restrictive rule that a

108. This proposition may have been questionable under some of the provisions of the Louisiana version of the Uniform Stock Transfer Act, LA. R.S. 12:521-543 (1950). However, a significant addition made by La. Acts 1954, No. 648, § 1, appears to attest the validity of the proposition advanced in the text. This act now appears as LA. R.S. 12:525 (Supp. 1963) : “[A] married woman may subscribe for, own, hold, transfer, give, pledge, borrow upon, and surrender shares and certificates of stock in corporations organized under the laws of this state or of any other state or of the United States as a femme sole, and further provided, that when a certificate of stock stands in the name of a married woman the corporation transferring the stock upon her sole endorsement thereof is fully protected in making said transfer of said endorsement.

“[I]n all cases in which, at the time of the enactment of the present amendment, any husband, heir, creditor, or other person or party in interest claims or pretends or believes or is in a position to assert that said husband or his heirs, or any heirs, creditors, or any other party or parties in interest has or have any interest or ownership or claim whatsoever, adverse to any transfer or pledge herefore made, without the authorization of her husband, by any married woman of stock standing in her name, or adverse to the right of any married woman to make hereafter, without the authorization of her husband, any transfer or pledge of any stock now standing in her name, suit to have said ownership or interest declared and recognized must be instituted by such party or parties within a delay of ninety days from July 28, 1954, it not being the purpose hereof to affect the ownership of any such certificate or certificates of stock as between the married woman and such other party but it being the purpose hereof to protect any corporation that has made or may make such transfer on the sole endorsement of such wife or any transferee or pledgee who has received or may receive said stock certificate on the sole endorsement of such wife; and this period of prescription shall run and operate against all persons whomsoever, including married women, minors and interdicts.” (Emphasis added.)

The similarity of the introductory provisions of the above act to the acts relative to acquisition of stock of building and loan associations by married women is striking. See notes 52 through 64 supra, and accompanying text.


110. Fleming v. Commissioner, 153 F.2d 361 (5th Cir. 1946); Succession of Hemenway, 228 La. 572, 83 So. 2d 337 (1955); Bruyninckx v. Woodward, 217 La. 736, 47 So. 2d 478 (1950).


husband, to prove that an acquisition is his separate property, must declare in the act of acquisition that he is purchasing for his separate estate and with his separate funds is apparently relaxed in the case of stock purchases,\textsuperscript{115} as it may also be in the case of all movables.\textsuperscript{116} Property holdings which are directly traceable to separately owned stock will retain the character of separate ownership.\textsuperscript{117} Thus where a spouse owns a separate partnership interest, which during marriage is converted into a corporation, the stock which now represents his interest will remain his separate property,\textsuperscript{118} and where corporate reorgani-

\textsuperscript{115}Bruyninckx v. Woodward, 217 La. 736, 47 So. 2d 478 (1950); cf. Fleming v. Commissioner, 153 F. 2d 361 (5th Cir. 1946); Kittredge v. Grau, 158 La. 154, 103 So. 723 (1925).

\textsuperscript{116}See Bruyninckx v. Woodward, 217 La. 736, 746, 47 So. 2d 478, 481 (1950): "The presumption in favor of the community provided by Article 2405 is rebuttable by the husband (as it is by the wife) in all cases, excepting his purchases of real property during the marriage. . . . Counsel for plaintiff do not suggest that the exception should be extended to the husband's purchases of movables." Compare Hule, \textit{Separate Ownership of Specific Property Versus Restitution from Community Property in Louisiana,} 26 \textit{TUL. L. REV.} 327, 460 (1952): "(1) earmarking of movables by a recital in the deed is necessary when there is a deed . . .; (2) . . . it will not be required that a deed be executed in order to put recitals in it; and (3) in the absence of a deed there is a rebuttable presumption that the husband's investments of his separate funds in movables are for the benefit of the community . . ." with Daggett, \textit{Policy Questions of Marital Property Law in Louisiana,} 14 \textit{LA. L. REV.} 528, 539-40 (1954): "In the case of the husband, it is well settled that in order to retain the separate character in a purchase of realty with separate funds he must give a double recitation in the deed to the effect that he is buying with his separate funds for his separate benefit. It is suggested that in purchasing stocks, bonds, or other movables that this recitation might be solemnly made before a notary and proper witnesses concurrently with the purchase of movables and a copy of the instrument attached to the evidence of title of the movables. It is possible that this device might be effective in a settlement between the spouses or their heirs at the termination of the community." See also Morrow, \textit{Matrimonial Property Law in Louisiana,} 34 \textit{TUL. L. REV.} 3, 16-17 (1959).

\textsuperscript{117}See Fleming v. Commissioner, 153 F.2d 361 (5th Cir. 1946), where separate ownership of stock by the husband was established by tracing to separate property owned over 30 years prior to suit.

\textsuperscript{118}Kittredge v. Grau, 158 La. 154, 103 So. 723 (1925). Succession of Hollier, 158 So. 2d 351 (La. App. 3d Cir. 1963), \textit{writs granted,} 160 So. 2d 231, takes a different approach. There a husband had owned a separate partnership interest, which partnership was several times dissolved by death of other partners during the husband's marriage. The court held the interest was now community property, largely because there was no showing that at the time of the formation of each new partnership that only the assets of the old partnership were involved. "The Kittredge case might apply to the instant suit if there had been a showing here that in every reorganization of the partnership . . . the decedent's interest in the old partnership was clearly his separate property, and the reorganization involved merely a transformation of interests from the old legal entity to the new one, without the acquisition of additional property or the expenditure of community funds." \textit{Id.} at 357. However, the court continued, indicating that any undivided profits or surplus involved in the reorganization would be community property, thus making the interest in the new partnership one acquired partly with community funds. See text accompanying note 112 \textit{supra.} Ordinary commingling rules would then make the new interest community property. See notes 196-206 \textit{infra}, and accompanying text. An affirmation of Hollier
zation causes a spouse to receive shares issued in lieu of separately owned stock, the new stock will likewise be separate property.\textsuperscript{119}

Courts have been vigilant to prevent transformation of other community assets into stock from defeating rights acquired under marital community law.\textsuperscript{120} Where a husband exchanged community immovables for their fair value equivalent in stock, it was held that the wife had no claim to the immovables, as she was protected by recognition of her ownership of one-half the stock.\textsuperscript{121} Where the husband's action is in fraud of her rights, she would have the additional protection of article 2404, an action against her husband's heirs and perhaps against the transferee.\textsuperscript{122} The wife's community rights prevail over corporate stock restrictions in close corporations.\textsuperscript{123} On the other hand, community property law will not be allowed to shield profits from improper stock transactions against the operation of prohibitive laws.\textsuperscript{124}

Cash dividends, either from separately owned or community owned stock, clearly enter the matrimonial community.\textsuperscript{125} Undoubtedly a stock split\textsuperscript{126} or stock dividend\textsuperscript{127} on community owned stock would likewise accrue to the community. Where separately owned stock has been split, and a greater number of

\begin{footnotes}
\item[119] Fleming v. Commissioner, 153 F.2d 361 (5th Cir. 1946); Succession of Hemenway, 228 La. 572, 83 So. 2d 377 (1955).
\item[120] See Oliphint v. Oliphint, 219 La. 781, 54 So. 2d 18 (1951).
\item[121] Succession of Geggan, 212 La. 574, 33 So. 2d 118 (1948).
\item[122] L.A. Civil Code art. 2404 (1870).
\item[123] Messersmith v. Messersmith, 229 La. 495, 86 So. 2d 169 (1956); see Oliphint v. Oliphint, 219 La. 781, 54 So. 2d 18 (1951); Wainer v. Wainer, 210 La. 324, 26 So. 2d 829 (1946).
\item[126] “Stock split” in this Comment is used in the sense of corporate action dividing each share into two or more, without capitalization of earned surplus. See Graham & Katz, Accounting in Law Practice § 81 (1938); Katz, Introduction to Accounting § 110 (1954).
\item[127] “Stock dividend” in this Comment is used in the sense of corporate action distributing surplus in the form of additional shares, in proportion to ownership of original shares. The result is to move the surplus funds to capital. See Graham & Katz, Accounting in Law Practice § 80 (1938); Katz, Introduction to Accounting § 110 (1954).
\end{footnotes}
new shares issued in place of the old, it has been decided that all of the new shares are separate property of the spouse who owned the stock.\textsuperscript{128} But, what is the result in relation to separately owned stock when, instead of making a cash distribution from surplus, the corporation capitalizes the surplus and issues it in the form of stock dividends? In the leading case of \textit{Daigre v. Daigre},\textsuperscript{129} the husband owned twenty shares of stock at the time of marriage. During the marriage the corporation declared stock dividends of 680 shares. In separation proceedings the wife claimed that the dividend shares were community property. In holding that the dividend shares fell into the separate estate of the husband, the court disposed of arguments based on all the general classification provisions of the Civil Code.\textsuperscript{130}

It was reasoned that the interest of the husband in the corporation remained exactly the same after the distributions as before: that the same assets were represented in the original shares plus their proportionate interest in the surplus account as in the additional number of shares which the husband now possessed.\textsuperscript{131} Since nothing in effect had been placed into the patrimony of the husband which he had not already owned, neither article 2334 nor article 2402 was applicable. Though article 2386 relates to fruits of the paraphernal property of the wife, the court also considered it, and determined that its reference to “dividends” applied to ordinary cash distributions, not to distribution of surplus in form of stock dividends.\textsuperscript{132}

\textit{Daigre} is clearly in line with most decisions,\textsuperscript{133} including income tax cases which have held stock dividends not taxable as income;\textsuperscript{134} yet general theories of community property, as well

\begin{itemize}
\item \textsuperscript{128} Succession of Hemenway, 228 La. 572, 83 So. 2d 377 (1955).
\item \textsuperscript{129} 228 La. 682, 83 So. 2d 900 (1955), followed, Succession of Hemenway, 228 La. 572, 83 So. 2d 377 (1955).
\item \textsuperscript{130} La. CIVIL CODE arts. 2334, 2386, 2402 (1870).
\item \textsuperscript{131} Cf. Succession of Quintero, 209 La. 279, 24 So. 2d 589 (1946).
\item \textsuperscript{132} This is the usual interpretation of the unmodified word “dividend.” See, \textit{e.g.}, Powell v. Maryland Trust Co., 125 F.2d 260 (4th Cir. 1942). However, several cases have ruled that “dividends” was broad enough to include stock dividends. See, \textit{e.g.}, Adams Elec. Co. v. Graves, 272 N.Y. 77, 4 N.E.2d 941 (1936); Empire State Dairy Co. v. Sohmer, 218 N.Y. 199, 112 N.E. 755 (1916); Rose v. Barclay, 191 Pa. 594, 43 Atl. 385 (1894).
\item \textsuperscript{133} See, \textit{e.g.}, Duncan v. United States, 247 F.2d 845 (5th Cir. 1957); Scofield v. Weiss, 331 F.2d 651 (5th Cir. 1942); Blaine v. Blaine, 83 Ariz. 100, 159 P.2d 876 (1945) (law provides profits of separate property remain as separate property); Tirado v. Tirado, 357 S.W.2d 468 (Tex. Civ. App. 1962); Johnson v. First Nat'l Bank, 206 S.W.2d 927 (Tex. Civ. App. 1947).
\item \textsuperscript{134} The leading case is \textit{Eisner v. Macomber}, 252 U.S. 189 (1920). For purposes of taxation, distinctions have been drawn between a stock dividend which works no change in the corporate structure, as in \textit{Daigre}, the same interest in the corporation being represented after the distribution by more shares of the
as peculiarities of stock dividends, may dictate a reconsideration. One basic principle of the Louisiana marital community is that it enjoys a right akin to usufruct over the separate property of the spouses.\textsuperscript{135} Through this principle the community is guaranteed sufficient capital to fulfill its purpose — providing an economic base for the family.\textsuperscript{136} Thus it is at least arguable that a stock dividend, distributed in lieu of a cash dividend, could be conceived as the equivalent of cash and treated as a fruit which ought to inure to the community. From an accounting standpoint, though the corporate structure is not affected by the normal stock dividend, the net result is the same as if the stockholders had been paid a cash dividend and all recipients had immediately reinvested the cash in additional shares of the same corporation.\textsuperscript{137} From general principles of community property law, it is evident that, had this transaction actually occurred, the new stock would belong to the community. Should such totally different consequences flow from two methods of accomplishing the identical object?\textsuperscript{138} It seems not. Additionally, the stock dividend method may effectively postpone the time when the corporation will be able to pay cash dividends, through reduction of its surplus account.\textsuperscript{139} If one spouse owns a controlling interest in a corporation, this effect would allow that spouse much freedom in determining his contribution to the community fund.\textsuperscript{140} This objection may not be serious since the spouse could
always sell the separate stock, and reinvest in other separate property.\textsuperscript{141} Further, \textit{Daigre} largely ignores the practical effect of declaration of a stock dividend: nearly always such a declaration by a corporation causes the marketability of the stock to be increased which, in turn, causes the market value, albeit not the book value, of the stock to rise, at least temporarily.\textsuperscript{142} An astute shareholder-spouse is thus presented the opportunity to sell part of the stock dividend (equal in value to, or less than, the total increase in the value of his holdings due to the market rise) thus converting it into separate cash, while retaining the same total amount of assets in his separate estate. The funds, though probably small in amount, would completely by-pass the community—a result probably not contemplated by the law. Some protection from blatant misuse of this last device is, however, afforded by the fact that any such sale would also result in reduction of the spouse's interest in the corporate ownership.\textsuperscript{143} It is submitted that Louisiana courts might profitably reconsider the \textit{Daigre} rule in search of a rule more appropriate to the community property system.

Since \textit{Daigre} is based in large part on federal tax cases recognizing that as a general rule stock dividends are not taxable income,\textsuperscript{144} it appears likely that when the stock dividend is one the federal courts would recognize as taxable, such as shares of

\textsuperscript{141} LA. CIVIL CODE art. 2334 (1874). However, if the property were sold and the proceeds reinvested in other separate property, the fruits therefrom would generally be available in the community fund.

\textsuperscript{142} GRAHAM & KATZ, ACCOUNTING IN LAW PRACTICE §79 (1938); see PATON, ACCOUNTANT'S HANDBOOK 1016 (3d ed. 1950); Note, 30 TUL. L. REV. 589, n.11 (1956).

\textsuperscript{143} Heavy reliance by \textit{Daigre} on Scofield v. Weiss, 131 F.2d 631 (5th Cir. 1942) shows the court may have been more worried about another possibility: "[W]e think it clear that under the settled jurisprudence of Texas, separate ownership of stock in a corporation may not be converted in part into community ownership by the device of declaring stock dividends. If this were so, a wife owning stock in a successful and prospering corporation might find the protection of her separate ownership taken away overnight and her property subjected to the claims of her husband's community creditors at any time that the directors decided to declare stock dividends. Nor is it any answer to say that the directors can do this by declaring cash dividends, for the two are not the same." \textit{Id.} at 632.

\textsuperscript{144} See note 134 supra.
a different character in the same corporation or shares of another corporation, the Louisiana court would hold these dividend shares fall into the community.

One additional problem faced by courts in relation to separately owned corporate stock is the classification of increases in value during the marriage. It is clear that appreciation in the value of stock would not in any case affect the ownership of the stock, but the appreciation may give rise to a potential claim for reimbursement through an accounting adjustment. The Louisiana Civil Code allocates such increases in value of separate property to the community only if the increase was due to "common labor, expenses or industry." Increase in the value of stock is difficult to fit into this concept, and in two cases the court has dismissed the possibility of its application. However, these holdings appear dubious when the stock is the husband's stock in a close corporation in which he also serves as a key employee, since the increase in value realistically is attributable at least in part to the husband's labor and industry. Under the general rules of community property applied to property other than stock, such increases would clearly give rise to a reimbursement claim. That the husband, as a key employee, receives a generous salary which inures to the community, should be totally irrelevant in determining whether reimbursement is due for increases in value of separately owned stock.

PENSIONS

The problem of pensions in community property law is surprisingly not a new one, though today it has assumed new importance as the sources and frequency of pension funds multiply. An early Spanish code, the Nueva Recopilación, pro-

147. See Note, 30 Tul. L. Rev. 589, 592 (1956).
149. Ibid.
151. La. Civil Code art. 2408 (1870); Daigre v. Daigre, 228 La. 682, 83 So. 2d 900 (1955).
152. But see Beals v. Fontenot, 29 F. Supp. 602, 604 (E.D. La. 1939): "The increase in value of the stock was due to the efforts of the corporation and there is no reason here to disregard the corporate fiction. . . . Beals [husband] was fully paid for his individual efforts." Compare note 140 supra.
posed a solution for governmental pensions. Since the sovereign could make gratuitous donations, just as any other individual, the donation would be separate property if made to one spouse individually, or community property if made to both. However, if the donation was related to service of the sovereign, the status of the fund donated would depend on whether the service was rendered with or without pay. It was reasoned that if the donee served without pay his support came from the community during the period of service, and the donation was intended to replace the community funds spent for support. On the other hand, if the pensioner received pay for his services, presumably it covered expenses of support, and the pension would be his separate property.\textsuperscript{155}

The Spanish rule was once recognized in Louisiana;\textsuperscript{156} however, its statutory basis was not carried into the Louisiana Civil Code, and as a practical matter the situation visualized — governmental service without pay — is unlikely to arise in modern society. Further, the Spanish rule was based on the theory that under some circumstances the governmental donation was gratuitous. This concept of pensions has been abandoned in America in favor of a theory more compatible with constitutional government: that a government pension is based on a moral obligation.\textsuperscript{157} Thus, an analogy of government pensions to donations seems inappropriate.

In contrast, pensions from private sources may be either a gratuity\textsuperscript{158} or an enforceable right which has accrued as a mat-

\textsuperscript{155} MATTENZA, COMMENTARIA (1597), transl. in ROBBINS, COMMUNITY PROPERTY LAWS 76 (1940). Whether the gift was considered made to the community or to one of the spouses individually, it was clear that the normal community property rule caused the fruits from the pension or gift to fall into the community. \textit{Ibid.}\textsuperscript{156} Hughey v. Barrow, 4 La. Ann. 248 (1849) (donation made during period when laws of Spain in force).\textsuperscript{157} See United States v. Realty Co., 163 U.S. 427, 441 (1896): "Payments to individuals, not of right or of a merely legal claim, but payment in the nature of a gratuity, yet having some feature of moral obligation to support them, have been made by the government... ever since its foundation." \textit{Accord,} Succession of Scott, 251 La. 382, 91 So. 2d 574 (1956); \textit{contra,} United States v. Brown, 110 F. Supp. 370 (S.D. Calif. 1952).\textsuperscript{158} Since many private pensions are granted by corporations, it seems arguable that these pensions ought to be classified as onerous transactions in order not to be ultra vires. See 6A FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2939 (1950): "It seems to be the rule that a private corporation has no power voluntarily to pay to a former officer or employee a sum of money for past services, which it is under no legal duty to pay, and which would not constitute a legal consideration for a promise to pay." Carrying this principle to its logical conclusion would have great effect on private pensions, since it would mean that all private pensions validly granted by corporations would
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ter of contract, express or implied. Courts consider whether the pensioner has a legal right to the pension, or whether such a right will accrue in the future, and, if neither, tend to classify the pension as a donation. In any event, this will prove largely a question of fact. Classification as a donation requires a decision whether the pension was granted to one spouse or to both: if the former, it is separate property, if the latter, property of the community.

Enforceable private pension rights and government pensions generally seem subject to the same rules. The general rule is well established that the time when the service was rendered for which the pension is granted determines the status of the pension funds. This rule is consonant with the principle of classification originally embodied in the Louisiana Civil Code, and has given little trouble when the services were wholly rendered either prior to or during marriage. In the former case the pension will be separate property of the pensioner, and in the latter property of the community. The actual time of payment of the funds would be irrelevant in determining their status; thus if the services were rendered wholly prior to marriage, the fact payment was made during marriage would not prevent the pension from being separate property.

More troublesome problems arise if the services for which the pension is granted have been rendered partly during and partly outside a marriage relationship. Where the services begin prior to marriage, continue into the marriage, and the pension becomes payable while the marriage still exists, it seems the presumption favoring classification of acquisitions during fall into the community, if the work which justified the pension was done during the existence of the community. However, no cases have been found which attempted to apply the principle and it may be dismissed. See Daigre v. Daigre, 228 La. 682, 83 So. 2d 900 (1955).

159. See, e.g., Daigre v. Daigre, 228 La. 682, 700-02, 83 So. 2d 900, 906-07 (1955) (on rehearing).

160. LA. CIVIL CODE art. 2334 (1870).

161. Id. art. 2402.

162. Succession of Lewis, 192 La. 734, 740, 189 So. 118, 120 (1939); Howard v. Ingle, 180 So. 248 (La. App. 2d Cir. 1938).


marriage as community property would by itself cause these funds to be classified as community property.\textsuperscript{165} It appears desirable, however, to allow the named pensioner to preserve as separate property the percentage of the pension representing the time for which services were rendered prior to marriage.\textsuperscript{166} Even if the fund was partly composed of actual deductions from wages, such proration would not deprive the community of its fair share.

Yet more difficulties arise when the marriage is dissolved by divorce or separation prior to the accrual of the pension right, part of the services supporting the eventual right to a pension having been rendered during the marital community. If it is certain that the pensioner will ultimately receive some benefit from the fund, without the necessity of continued services in order to qualify for a benefit, courts have generally taken the position that the pension right is subject to immediate division, just as other property of the community.\textsuperscript{167} The non-pensioner spouse will generally be satisfied for his share of the pension by taking an extra share of the present property of the community,\textsuperscript{168} to reimburse his share of the community for any deductions made from the pensioner’s salary.\textsuperscript{169} Should this method of division be inconvenient, the court would be justified in rendering a money judgment against the pensioner for the other spouse’s share of future payments.\textsuperscript{170} It appears irrelevant whether the pension fund actually has a present cash value, if it will necessarily become payable in the future, even though the date at which it will have value is uncertain.\textsuperscript{171} On the other hand, if the eventual right to the pension is conditioned on the pensioner continuing to serve in a certain occupation, it appears supportable to deny the non-pensioner any interest in the fund, by accounting between the spouses or otherwise.\textsuperscript{172} The rationale of the rule allowing adjustment between spouses when the fund is certain to accrue is that the pension

\textsuperscript{168} See note 167 supra.
\textsuperscript{169} Cf. Succession of Rockvoan, 141 So. 2d 438 (La. App. 4th Circ. 1962).
\textsuperscript{171} Messersmith v. Messersmith, 229 La. 495, 510, 86 So. 2d 169, 174 (1956).
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will reimburse the pensioner for deductions from his share of the community. When applied to the contingent pension funds, however, the same rule would have the undesirable effect of imposing a restraint on an individual's right to change his occupation at will. He would, in effect, be subjected to a form of involuntary servitude in order to prevent depletion of his patrimony. Even under the contingent pension funds, it seems just to allow the non-pensioner spouse adjustment in the amount of one-half of any community funds contributed to the plan, provided the potential pensioner could terminate his employment prior to accrual of pension rights, and demand his contributions from the fund.

Where the pension is either from a fund of the federal government or from funds contributed by employers and employees and held by the federal government additional factors may enter into the determination of classification of the proceeds. In other contexts, Free v. Bland rules that where federal law designates a certain person as the payee of a fund, under the supremacy clause of the Constitution, the federal law will supersede any inconsistent state property scheme. Free seems to lead to the result that state courts not only cannot render a valid judgment changing in part the payee of the pension the funds for which are held by the federal government, or requiring the payee to give over a part of whatever he receives from the fund, but also they are precluded from taking the funds into account


174. The uncertainty involved is illustrated by the trial court judgment in the case later reported as Kirkham v. Kirkham, 335 S.W.2d 393 (Tex. Civ. App. 1960). The judgment, as quoted in Johnson, Retirement Benefits as Community Property in Divorce Cases, 15 BAYLOR L. REV. 284 (1963), follows: "The retired Pay Account of Defendant, is hereby divided 30% to Plaintiff and 70% to Defendant as to said Account and all future payments and benefits therefrom. A certified copy of this Decree shall be filed with the . . . Finance Center, U.S. Army . . ., and shall authorize such Federal Agency to divide said pay account in the proportions herein set out as fully and completely as if said Defendant had made a lawful allotment of said account in favor of Plaintiff as provided in the regulations relating thereto and as provided in this Decree.

"If Federal Statute or regulation prevent the direct payment to Plaintiff of her share in such retired pay account as and when payments are made, then, in that event, the Plaintiff is hereby awarded a sum of money equal to thirty percent (30%) of the gross monthly retired service pay of Defendant at such times and when monthly payments are received by him from said retired pay account as a money judgment against Defendant, and for her recovery of which execution may issue in case of nonpayment; or, enforcement of this award and judgment may be had in any manner provided by law for the collection of Plaintiff's share of said retired pay account and all payments and benefits accruing thereunder."

175. 369 U.S. 663 (1962).
in adjusting the shares in the community of the separated spouses.\textsuperscript{176} However, the uncertain extent of Free’s present application may justify a state court in making whatever adjustment it deems necessary, short of changing the payee of the fund.\textsuperscript{177} It appears that the interest of the federal government in having its obligees defined and not subject to change would prevent state courts from taking the latter step.\textsuperscript{178}

The general classification of insurance proceeds is elsewhere considered,\textsuperscript{179} but one case is particularly relevant to the present discussion. In \textit{Easterling v. Succession of Lamkin}\textsuperscript{180} the decedent had taken out disability insurance while still unmarried. Then he married, suffered disability, and subsequently died. Under well-established jurisprudence, a life insurance policy taken out in the same manner would be the separate property of the insured.\textsuperscript{181} However, the court distinguished life insurance from disability insurance on the ground that the latter had no value until the insured became disabled, and that disability payments were intended to be in lieu of wages.\textsuperscript{182} Since wages earned at the time of disability and thereafter would have been community property, the disability benefits were treated likewise. Though the court’s distinction of life and disability insurance may be questionable,\textsuperscript{183} the result of \textit{Easterling} appears

\textsuperscript{176} Compare Allen v. Allen, 363 S.W.2d 312 (Tex. Civ. App. 1962). Here, at time of divorce, husband was receiving a pension under the Railroad Retirement Act of 1935, ch. 812, § 14, 49 Stat. 973 (1935). The fund under the Act was held by the Treasury of the United States, and was composed of contributions from the employer and the employee. Apparently the husband’s contributions had come from his salary during the marriage, a sum which is normally community property. The court decided the wife has no future interest in the fund, on the ground of congressional intent that only the named pensioner was to have an interest in the fund. However, the court did indicate the future payments could be taken into consideration in dividing the estate. This latter suggestion may now be precluded by Free. See notes 38-50 supra, and accompanying text. See also Perryman v. Toakin, 283 P.2d 298 (Cal. App. 1955), which involved the Civil Service Retirement Act, ch. 195, § 11, 41 Stat. 619 (1920). The court found the federal law did not indicate any certain person who was to take the fund. In light of such a finding, it would seem the Free rule would be inapplicable.

\textsuperscript{177} See discussion of present extent of Free rule at notes 38-50 supra.


\textsuperscript{180} 211 La. 1089, 31 So.2d 220 (1947).

\textsuperscript{181} See, e.g., Succession of Lewis, 192 La. 734, 189 So. 118 (1939).

\textsuperscript{182} Compare 1 De Funiak, \textit{Principles of Community Property} § 68 (1943).

\textsuperscript{183} Easterling v. Succession of Lamkin, 211 La. 1089, 1103, 31 So.2d 220, 225 (1947) (dissent): “[T]he right to receive the disability benefits of a disability insurance policy is an incorporeal thing even before the disability of the
sound. At least part of the premiums were paid with community funds, and thus the situation seems analogous to the private pension to which the pensioner has a contractual right. It is submitted that the fact the insured intended the benefits to stand in lieu of wages should be given weight by the courts.

One case, however, casts doubt on the above analysis of Easterling by indicating that workmen's compensation benefits payable to an injured wife do not fall into the community, as would her wages for the same period. One possible resolution of the two cases lies in consideration of the analogy between workmen's compensation benefits and the separate nature of the wife's claims to damages for personal injury. Instead the court based the decision on the peculiar nature of the act under which recovery was sought. The rationale is surprising since the court recognized that one purpose of the workmen's compensation statute is to provide subsistence when earning capacity is diminished—a purpose indistinguishable from that of disability insurance. Whether the court would reach the same result if a husband claimed workmen's compensation benefits as his separate property appears doubtful. It seems better for the court to recognize that compensation benefits should be treated in the same way as wages: if wages paid at the same time as the compensation benefit in question fall into the community, the benefit should likewise be community property.

On the other hand, if the compensation benefits in question are death benefits, it appears that the beneficiary would take the payments as his or her separate property. Obviously, the right to the payments does not accrue until the death of the workman, and the same event which gives rise to the right to benefits also dissolves the community.

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186. See Morrow, Matrimonial Property Law in Louisiana, 28 Tul. L. Rev. 3, 44 (1959), where it is properly stated such would be a startling conclusion.
187. See 1 de Funiaq, Principles of Community Property § 68 (1943).
189. See McKay, Community Property § 491 (2d ed. 1925).
190. It should be noted that the suggested result is analogous to the result in
COMMINGLING OF COMMUNITY AND SEPARATE PROPERTY

Failure of the spouses to discriminate carefully between their separate property and community property in the funds utilized for the purchase of additional property, in the composition of bank accounts, or in the operation of separate or community businesses gives rise to myriad problems of classification, which may be conveniently grouped under the term “commingling.” In general, commingling may be defined as a blending of movables, belonging to separate owners, so that the parts belonging to each cannot be distinguished.

The strong presumption favoring the community is fully operative in commingling problems, and places the burden of proving that separate property is involved in any transaction on the person asserting the separate nature of the disputed property. Even if it is shown that separate property is involved, the theory of commingling may still dictate that the

the areas of health and accident insurance, see notes 180-183 supra, and accompanying text; classification of the character of proceeds of life insurance policies payable to a named beneficiary other than the insured’s estate, see Comment, 17 LA. L. REV. 810 (1957); and the likely result in classification of recovery by claimants under a wrongful death action (not a survivorship action, which may present other problems), see LA. CIVIL CODE 2315 (1870), as amended.

191. See 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 61 (1943): “This presumption of the Spanish law that the property which the husband and wife had should be presumed common necessarily arose in the case of intermingled properties, and such intermingled properties were considered community properties where they were so mixed that it could not be known to which of them they belonged and neither could prove his or her right of ownership. . . . In our own community property states this intermingling of the properties of the spouses and the intermingling of community with separate property may result in the whole being considered community property, the mode of handling having been such as to render it impossible to distinguish which is which. It is obligatory upon the husband as the one having the management of the community property, to keep the community and separate property segregated, and he must assume the consequences for failure to do so.”

The problem may be even more acute in other community property states than in Louisiana. In addition to problems of mixed titles, discussed at note 198 infra, most of the other states, unlike Louisiana, recognize the fruits of separate property as separate property. On the other hand, all the community property states recognize the “toil and talent” of the spouses as community property. This raises grave problems when one or both of the spouses add their “toil or talent” to the separate estate and produce fruits therefrom. How are these fruits to be classified? See McKay, COMMUNITY PROPERTY § 312 (2d ed. 1925).

192. See McKay, COMMUNITY PROPERTY § 308 (2d ed. 1925).

193. E.g., Coney v. Coney, 220 La. 473, 56 So.2d 841 (1951); Cameron v. Rowland, 215 La. 177, 40 So.2d 1 (1949); Succession of Manning, 107 La. 456, 31 So. 862 (1902). See generally LA. CIVIL CODE arts. 2334, 2386, 2402, 2405 (1870); 1 De FuniaK, PRINCIPLES OF COMMUNITY PROPERTY § 51 (1943); McKay, COMMUNITY PROPERTY § 323 (2d ed. 1925).

194. E.g., Coney v. Coney, 220 La. 473, 56 So.2d 841 (1951); Cameron v. Rowland, 215 La. 177, 40 So.2d 1 (1949) (indicating testimony of wife not enough); Succession of Manning, 107 La. 456, 31 So. 862 (1902).
disputed property is community property. Exceptionally, commingling may not be operative if the amount of community property involved in any transaction is insignificant when compared with the separate property involved.196

Acquisitions and Other Transactions During Marriage with Mingled Funds

The problem of commingling in relation to the acquisition of property is largely one of proof. To establish that an acquisition during marriage is separate property, the husband or wife, or those asserting rights under either, must prove that separate funds were used to pay the purchase price.196 At first Louisiana courts seemingly required that no community funds be mingled in the price paid, in order that separate ownership be shown.197 This early termination of fund tracing has the advantage of preventing mixed titles (ownership in both one spouse and the community) by vesting ownership in the community when any community funds, except perhaps insignificant amounts, are used to pay the price.198 It appears that the spouses would re-

195. See McKay, Community Property § 308 (2d ed. 1925).
197. See Huie, Separate Claims to Reimbursement from Community Property in Louisiana, 27 Tul. L. Rev. 143 (1953). In Succession of Schnitter, 220 La. 323, 56 So.2d 563 (1951), a deed in the wife’s name recited a consideration of $2800, of which it was proved that $2500 came from her separate estate. The wife could not prove the source of the $300 balance, so the presumption in favor of the community dictated a decision that this had been paid from community funds. The result was that the property belonged to the community. Accord, Betz v. Riviere, 211 La. 43, 29 So.2d 465 (1947); Houghton v. Hall, 177 La. 237, 148 So. 37 (1933) (dictum). In Succession of Hollier, 158 So.2d 351, 358 (La. App. 3d Cir. 1964), writs granted, 160 So. 2d 231, the court said: “The law also is settled that when separate funds and community funds, even though distinguishable and not commingled, are used in making up the consideration paid for property acquired during the existence of the community, the property so purchased becomes community property, although the community may be indebted to the separate estate for the amount of separate funds used in making of the purchase.” Cf. Succession of Land, 212 La. 109, 31 So.2d 609 (1947), where the court emphasized that the major part of the purchase price had been paid with community funds.
198. See note 159 supra. See also Huie, Separate Ownership of Specific Property Versus Restitution from Community Property in Louisiana, 26 Tul. L. Rev. 427, 428 (1952): “In . . . most of the other American community property states the ownership tracing principle has been widely extended. . . . Property paid for in part with separate funds and in part with community funds is owned by a mixed title, partly separate and partly community. . . .

“Louisiana, on the other hand, adhering more closely to the civil law, has confined ownership tracing within relatively narrow limits. A claim for reimbursement or restitution from community assets, rather than a claim to ownership of specific property, is more likely to be the form in which the separate
ceive adequate protection through recognition that there must be a knowing use of community funds,199 and when community funds are thus used, the community would incur a liability to the separate estate from whence came the balance of the funds.200 It follows that even if the purchase was clearly begun with the use of separate funds, later use of community or mingled funds to complete the payment of the price would prevent a finding that the acquisition is separate property.201

However, following an earlier indication of dissatisfaction with the above principles,202 the recent case of Graves v. United States Rubber Co.203 may cast serious doubts on their application, and may indicate that Louisiana courts are willing to liberalize the standard of proof. There the wife maintained a separate bank account, which came to contain large deposits of both community and separate funds. She purchased immovable property for her separate estate, and the court apparently accepted as proof that she had used separate funds to pay the price the fact that the account had contained more than enough separate funds to meet the price.204 Though such an approach

estate of a spouse is preserved.”

See also McKay, Community Property § 317 (2d ed. 1925).


200. Succession of Hemenway, 228 La. 572, 83 So. 2d 377 (1955). The success of the reimbursement claim in preventing unjust enrichment will be considered in subsequent sections. See notes 225-246 infra, and accompanying text.


203. 237 La. 505, 111 So. 2d 753 (1959).

204. A similar result was reached in Giamanco v. Giamanco, 131 So. 2d 159 (La. App. 3d Cir. 1961), where the husband and wife maintained only one bank account, that of the community. The amount on deposit therein belonging to the community was small, and husband deposited over $60,000 of separate funds. Thereafter he drew $34,500 from the account to pay the cost of improvements on his separate estate. “[T]here is no way to show with absolute certainty . . . that these funds were used to pay construction costs. However, when we take into consideration that the total costs of construction were only $34,500, it is most reasonable that at least this amount came from plaintiff's [husband] separate money.

“The Court realizes full well, and the bank statements indicate, that there was considerable commingling of the proceeds of the five sales listed above in this bank account with other funds in substantial amounts, the source of which is not explained in this record. It must be presumed that these other funds belonged to the community. However, despite this fact it is the opinion of the Court that plaintiff has shown with reasonable certainty under the facts . . . that at least $34,500 of the total of the $60,265 in proceeds from sales of the plaintiff's separate property was used to construct the original restaurant building.” Id. at 166.

Accord, Succession of Land, 212 La. 103, 81 So. 2d 609 (1947); Succession of Blades, 127 So. 2d 263 (La. App. 4th Cir. 1961). Compare Slater v. Culpepper, 129 So. 2d 449 (La. App. 2d Cir. 1961) (wife made donation from com-
may give rise to great administrative difficulties not presented by the prior arbitrary rule, it seems the new approach will be accepted by Louisiana courts.²⁰⁶ It may be suggested that the **Graves** approach will be utilized, and properly so, whenever the court can be shown adequate records so that the amount of separate and community funds can be ascertained with accuracy at all times.²⁰⁶ The existence of such records will prevent any unjust enrichment of either spouse at the termination of the community.

It has been decided that where loans have been made from commingled funds, the amounts repaid or due will be community property²⁰⁷ and in **Magnolia Petroleum Co. v. Crigler**²⁰⁸ the same result followed, even though the loan was made from separate funds, when the debt was novated and a new note given therefor, representing both the debt to the separate estate and debts due to the community. **Graves** may dictate a reappraisal of these holdings, with the result that if adequate records are maintained to determine what part of the funds belong to the community and what part to the separate estate of one spouse, the separate ownership will not be destroyed.

**Commingling in Bank Accounts**

Understandably, commingling problems most frequently arise out of bank accounts. Two situations are presented: where purchases have been made from commingled accounts, governed by the rules set forth in the preceding section, and where ownership of the commingled fund itself is in dispute. Only the latter situation is here considered.

Of course, merely retaining a separate account during marriage, without making any deposits, will not of itself cause the

²⁰⁵. See note 204 *supra.*
²⁰⁶. Compare Stephens v. Colfax Bank & Trust Co., 148 So. 456 (La. App. 2d Cir. 1933), where a wife had inherited and deposited in defendant bank a sum of $110, thereafter depositing in the same account sums of community property greater than the original deposit, and making withdrawals exceeding the amount of her inheritance. The court said: "The separate property being mingled in confusion with the community property, and the common fund having been checked against by deceased in excess of the amount of the separate funds, plaintiffs have failed to discharge the burden" of proving the balance of the account is separate. *Id.* at 457.
²⁰⁸. 12 So. 2d 511 (La. App. 2d Cir. 1942).
fund to become that of the community.\textsuperscript{209} On the other hand, if the account is that of the wife and she fails to file the declaration required by article 2386,\textsuperscript{210} the addition of any interest to the account will pose the commingling problem, since the interest would be the property of the community.\textsuperscript{211} Similar results would follow if interest is added to the husband's separate account, as he is given no such advantage as that of the wife under article 2386.\textsuperscript{212}

As a general proposition, it may be said that \textit{indiscriminate} mingling of separate and community funds will cause the bank account to be classified as community property.\textsuperscript{213} In addition to those deposits which are clearly property of the community, deposits which are not identified as separate property will be treated as community property in deciding whether there has been a mingling of funds.\textsuperscript{214} The courts will consider whether the amount of community funds allegedly mingled with separate funds is relatively great when compared with the sum of separate funds involved. Thus, in the leading case of \textit{Succession of Land},\textsuperscript{215} where the separate funds of the wife in the account totaled over $250,000 and the community funds consisted of several salary payments deposited in the same account, the court summarily ruled that the insignificant percentage of community funds would not warrant designation of the account as property of the community.\textsuperscript{216} But, in accord

\textsuperscript{209} Abraham v. Abraham, 230 La. 78, 87 So. 2d 735 (1956); cf. Richer v. Richer, 179 La. 1, 153 So. 1 (1934).
\textsuperscript{210} LA. CIVIL CODE art. 2386 (1870), as amended.
\textsuperscript{211} Compare Slater v. Culpepper, 233 La. 1071, 99 So. 2d 348 (1957) (on rehearing), \textit{with} Abraham v. Abraham, 230 La. 78, 87 So. 2d 735 (1956).
\textsuperscript{212} See LA. CIVIL CODE art. 2402 (1870).
\textsuperscript{214} Cameron v. Rowland, 215 La. 177, 40 So. 2d 1 (1949) (testimony of wife alone will not prove separate nature of deposit); Smith v. Brock, 200 So. 342 (La. App. 2d Cir. 1946). See also Slater v. Culpepper, 223 La. 1071, 99 So. 2d 348 (1957) (on rehearing); Abraham v. Abraham, 230 La. 78, 87 So. 2d 735 (1956); Bruyninckx f. Woodward, 217 La. 736, 47 So. 2d 478 (1950).
\textsuperscript{215} Cameron v. Rowland, 215 La. 177, 40 So. 2d 1 (1949) (testimony of wife alone will not prove separate nature of deposit); Smith v. Brock, 200 So. 342 (La. App. 2d Cir. 1946). See also Slater v. Culpepper, 223 La. 1071, 99 So. 2d 348 (1957) (on rehearing); Abraham v. Abraham, 230 La. 78, 87 So. 2d 735 (1956); Bruyninckx f. Woodward, 217 La. 736, 47 So. 2d 478 (1950).
\textsuperscript{216} See Odom v. Odom, 121 So. 2d 8, 10 (La. App. 2d Cir. 1960); \"The law contemplates that when separate funds are mixed with community funds, they only become a part of the community when such separate funds are no longer capable of identification. When only a relatively small amount of the deposit is community it will be considered inconsequential and insufficient to constitute commingling and does not warrant the designation of the checking account as community property.\" \textit{Accord}, Succession of Hollier, 158 So. 2d 351 (La. App. 3d Cir. 1964); Succession of Blades, 127 So. 2d 263 (La. App. 4th Cir. 1961);
with *Graves*, even though the mingling be considerable, if the person asserting the separate nature of the account can trace the funds to his separate estate, the court will generally apportion the account.\(^{217}\) The standard of proof is high, and a mere inference from the fact the spouse had separate funds at the beginning of the community will not be sufficient to overcome the presumption favoring the community.\(^{218}\)

Even though the account in which the separate funds are deposited be clearly classified as a community account, in contrast with the facts of *Succession of Land*, it seems that the separate nature of the funds would not be destroyed, especially if adequate records are maintained to allow tracing of the funds or indication is made of the separate nature of the funds at the time of deposit.\(^{219}\) Thus in *Talbert v. Talbert*\(^{220}\) transfer of funds from a separate account into a community account, and shortly thereafter withdrawing a sum identical to the deposit to pay a separate debt, was not a use of community funds.

It seems sound to allow mingling even of great amounts without destruction of the separate nature of bank accounts, if the funds in the account remain traceable. On the other hand, where the parties have made it impossible to separate the sources of the funds, albeit the community deposits are relatively small, there can be little quarrel in classification of the account as community property. However, the courts should remain vigilant to prevent one spouse from consciously destroying the other’s separate ownership of an account by fraudulently depositing community funds therein.\(^{221}\) To help the court pro-

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\(^{217}\) *Graves v. United States Rubber Co.*, 237 La. 505, 111 So. 2d 752 (1959) (distinguishable on facts). In *Slater v. Culpepper*, 233 La. 1071, 99 So. 2d 348 (1957) (on rehearing), a community deposit of $1300 in relation to separate funds of $66,800 was insufficient to characterize the entire fund as community. See also MCKAY, *COMMUNITY PROPERTY* § 308 (2d ed. 1925).

\(^{218}\) *Chariton v. Bailey*, 12 So. 2d 646 (La. App. 1st Cir. 1943).


\(^{220}\) *Cf. Bailey v. Alice C. Plantation*, 152 So. 2d 336 (La. App. 1st Cir. 1963); see MCKAY, *COMMUNITY PROPERTY* § 309 (2d ed. 1925): "[W]here the husband takes the wife's separate funds, deposits them with the funds of the community, till there has come to be a complete confusion so far as the deposit is considered, is there not a strong equity in favor of compensation to the wife separately or her heirs for the wife's funds handled by the husband in this way?"
tect the rights of both spouses, tracing should be allowed beyond the mingled account, as in *Graves*, solely on the basis of whether adequate records are maintained.

*Destruction of Separate Ownership by Commingling Other Than in Bank Accounts*

One of the more surprising effects of the community property system is that separate ownership of movables other than money may be destroyed by indiscriminate commingling. This result is most easily observed when a spouse owns a separate business (and inventory) at the time of marriage, or acquires one as his separate property during marriage. During the operation of the business, the inventory will change in composition, until most or all of the inventory will have been acquired during the marriage with community funds. On such facts, it has been decided that the entire stock will belong to the community, except items proved to be parts of the original inventory, and hence, not acquired with community funds. The separate estate is presumably protected by a claim for reimbursement at the termination of the community.

On the other hand, since immovables are not consumed in

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222. *Labat v. Labat*, 232 La. 627, 95 So. 2d 129 (1957); *Menhert v. Dietrich*, 36 La. Ann. 390 (1894); *Werner v. Kelly*, 9 La. Ann. 60 (1854). See *Vining v. Beatty*, 161 So. 2d 298, 301 (La. App. 2d Cir. 1964): "While the burden of proof was upon plaintiff to establish . . . the paraphernal character of the property seized, it is conceivable that some portion of the stock of merchandise originally purchased may have remained on hand until the time of the seizure. If such were true, the property has not been identified or pointed out. Whatever merchandise remained, if any, became mingled with and unidentifiable from merchandise subsequently obtained and which, having been acquired from the profits of the business, became community property. . . ."

"The original separate property, having become commingled with property acquired by the fruits or earnings of such separate property, which is analogous to the mixing or commingling of the separate funds of one of the spouses with funds constituting a community asset, must be termed community property. In view of the presumption in favor of the community, the burden of proving the separate derivation of any property lies with the spouse asserting the same. . . . No proof having been offered as to the identity of the separate property, if any, such property has lost its identity and may now be considered community property."

*But see Succession of Solis*, 119 So. 768 (La. App. Orl. Cir. 1929), where the court was faced with facts similar to *Vining*, except that the separate merchandise had belonged to the husband. Apparently on evidence that the value of the merchandise now held was equal to that originally owned separately, the court held that the stock was still separate property. Compare *Joly v. Weber*, 35 La. Ann. 806 (1883).

use, they should remain the separate property of the original owner:224 there is no possibility that the thing will be so confused with community property that it cannot be identified and specifically restored to the owner at the termination of the community.

Reimbursement225

Obviously, under some of the circumstances set forth above, the husband or wife will frequently be unable to prove separate ownership of a particular item. In general, when separate funds or property are lost because of commingling, the spouse who is deprived of ownership will have a claim for reimbursement.226 However, as a practical matter, the ultimate chances of success may depend largely on which spouse is making the claim.

Wife's Claims

In compensation for property lost by commingling, the wife has an unqualified right of restitution from the funds of the community.227 This fact clearly shows that reimbursement is the corollary of tracing of funds to prove ownership: where the latter is cut off, the former begins.

Of course, the wife must first show that she in fact once had separate funds,228 but this alone will not entitle her to reimbursement.229 The wife must show that the funds were either delivered to the husband, or expended for the benefit of the community.230 It has been suggested that liberal standards

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225. Full treatment of the complex subject of reimbursement is beyond the scope of this Comment. For a very thorough development of this subject, see Hulie, Separate Claims to Reimbursement from Community Property in Louisiana, 27 Tul. L. Rev. 143 (1953). The theories set forth by Hulie are reflected in the present section of this Comment.
226. See Succession of Hemenway, 228 La. 572, 592, 83 So.2d 377, 384 (1955): “[I]t is well to observe that whenever separate funds have been used in the acquisition of an asset which, by operation of law, has the status of community property, the community is indebted to and must reimburse the separate estate to the extent that it has been benefited.” See generally Note, 33 Tul. L. Rev. 244, 246 (1958). See also McKAY, COMMUNITY PROPERTY § 322 (2d ed. 1925).
229. See note 228 supra.
230. E.g., Succession of Schnitter, 220 La. 322, 56 So.2d 563 (1951); Suc-
of proof should be observed when commingling relegates the wife to a reimbursement claim.\(^{231}\) This suggestion seems a worthy one, for the wife does not have the broad powers of control and management over the community property vested in the husband, and she may not be in position to effectively prevent commingling from taking place.\(^{232}\)

**Husband’s Claims**

Contrary to the claims of the wife, the husband’s claim may be exercised only after the termination of the community.\(^{233}\) Prior to dissolution of the marital community, the husband’s property or funds which have fallen into the community must be considered as an irrevocable contribution of capital to the community estate.

As a starting point, the husband must show that he once had a separate estate.\(^{234}\) Yet mere proof of this fact, and evidence that the husband no longer owns all or a part of the separate estate once owned, will not establish the claim for reimbursement from the community.\(^{235}\) It has been repeatedly affirmed that no law guarantees the integrity of the separate estate of the spouse at the date of dissolution of the community.\(^{236}\) Perhaps this is a reflection that, as head and master...
of the community, the husband is in a position to meet a greater burden of proof; at least, he has the power to keep his property and that of the community apart, or to keep sufficient records to trace his separate property.\footnote{237} Thus, the husband has to prove that the expenditure of his separate funds benefited the community estate,\footnote{238} and further, some cases have indicated that he may have to prove that the community still was receiving the benefit of the contribution at the date of its dissolution.\footnote{239}

Although many just claims were probably lost, a relatively high standard of proof remained workable, perhaps avoiding fraudulent practices,\footnote{240} until the decision in \textit{Succession of Provost}.\footnote{241} In that case the court unfortunately equated the standard of proof necessary for the husband to establish his claim

\footnote{237} See \textit{Succession of Ferguson}, 146 La. 1010, 1043, 84 So. 338, 349 (1920) (dictum): "The husband, being master of the community and also master of his own estate, may invest the funds of either at his pleasure. If he thereby acquires property, it is presumed to belong to the community; but, if he makes a loss, there is no presumption that he lost the funds of the community. So that, if, at a given time, a married man has $50,000 of funds his separate property, and $50,000 of community funds, and he thereafter dies, leaving property worth only $50,000, and acquired during the existence of the community, the whole of it is presumed to have been acquired with the funds of, and to belong to, the community, and the mere inference, however reasonable it might appear, that he had invested and lost the funds of the community and his separate funds in equal proportions, would be inadmissible. His heirs would be obliged to rebut the presumption, established by law, that all the effects so left, belonged to the community, and prove, affirmatively, not that the decedent had had separate funds, and that they were no longer to be found, but that he had invested them in the particular property found in his succession."

\footnote{238} See also \textsc{i} de PuniaK, \textit{Principles of Community Property} § 61 (1943).


\footnote{240} \textit{Succession of Bell}, 194 La. 274, 193 So. 645 (1940); \textit{Munchow v. Munchow}, 136 La. 754, 67 So. 819 (1915); \textit{Ohanna v. Ohanna}, 129 So.2d 249 (La. App. Orl. Cir. 1962); cf. \textit{Succession of Provost}, 190 La. 30, 181 So. 802 (1938); \textit{Succession of Ferguson}, 146 La. 1010, 84 So. 338 (1920). However, in many cases the court has allowed a reimbursement claim without apparent inquiry into whether the property was still on hand at the dissolution of the community. See cases cited in Huie, \textit{Separate Claims to Reimbursement from Community Property in Louisiana}, 27 Tul. L. Rev. 143, 157, n.70 (1953).

\footnote{241} See Huie, \textit{Separate Claims to Reimbursement from Community Property in Louisiana}, 27 Tul. L. Rev. 143 (1953). See also \textit{Vicknair v. Terracina}, 168 La. 417, 419, 122 So. 276, 277 (1929), where, quoting from the trial court, it was said: "[I]t is to be remembered that it is incumbent upon the husband to be most circumspect and accurate in proof of claims against the community. He is the head and master thereof. In a very real sense, both the wife and her financial interests are at his mercy. . . . \textit{To accept his own unsatisfactorily supported assertions would be to place wives at an unfair disadvantage.}" (Emphasis added.)

\footnote{240} 190 La. 30, 181 So. 802 (1938).
for reimbursement with the proof necessary to negative a finding of commingling of community and separate property.\textsuperscript{242}

Since reimbursement had been considered a remedy when there was in fact commingling, it is a startling proposition that the existence of the disease itself prevents application of the cure. It was arguable that \textit{Provost} was modified the next year following its rendition.\textsuperscript{243} but later decisions have reaffirmed the \textit{Provost} ruling.\textsuperscript{244}

There is reason to believe that \textit{Provost} will not be rigidly applied when the husband both owes a debt to the community and claims a reimbursement from the community. In \textit{Abunza v. Oliver},\textsuperscript{245} a husband had deposited separate funds in a commingled bank account, having previously withdrawn a larger amount to pay separate debts. The court allowed a set-off between the two debts, while at the same time affirming \textit{Provost}. This may be an indication of dissatisfaction with the rule of the latter case.

The doctrine of commingling is a salutory one, preventing

\textsuperscript{242} \textit{Id.} at 50, 181 So. at 809: "The plaintiffs have not averred any specific use of these separate funds for the benefit of the community, but have depended upon the general proposition that the funds were commingled with community funds, and thereby the community became the beneficiary. The very fact that the petition alleges that the funds were commingled with the funds of the community and were used for its benefit, negatives the proposition that there was any specific use of the separate funds for any provable advantage of the community, and for this reason, the trial judge considered the fact pleaded of a specific amount as belonging to the separate estate as admitted."

... the trial judge held that some of the claims which the plaintiffs contend belonged to the separate estate fell properly within the community. If such be not the case, plaintiffs cannot recover these claims, because of the commingling of the separate funds so claimed with the funds of the community, first, for the reason that, although plaintiffs have shown the collection of these funds by the husband, they have failed to show that they \textit{were actually used for the benefit of the community}; secondly, for the reason that, had plaintiffs shown that the commingled funds were actually used for the benefit of the community, they could not recover, because of the impossibility of proof by plaintiffs, as to which part of the funds belonged to the community, and as to which part of the funds belonged to the separate estate of the decedent." \textit{Id.} at 52, 181 So. at 809.

\textsuperscript{243} \textit{Compare Succession of Cormier, 52 La. Ann. 876, 27 So. 293 (1900) which is distinguishable from \textit{Provost} on the ground that specific use of the funds was proved.}

\textsuperscript{244} \textit{Thigpen v. Thigpen, 231 La. 206, 233, 91 So.2d 12, 22 (1956): "[W]e conclude that, when the proceeds of these policies ... were received by defendant [husband], they were his separate property. However, these funds were deposited in the community bank account and an inspection of this account reveals that they were commingled with community monies to such an extent that it would be practically impossible to deduce that the separate funds, when spent, had been used to enhance the community." Accord, \textit{Abunza v. Oliver, 230 La. 445, 88 So.2d 815 (1956).}"

\textsuperscript{245} \textit{230 La. 445, 83 So.2d 815 (1956).}
many difficult administrative problems for Louisiana courts. However, if it is to remain acceptable, its corollary, the re-imbursement claim, must not be abrogated. It is submitted that the admittedly broad powers of the husband to manage the community property should not be taken to impose upon him a higher standard to prove a reimbursement claim than that required from the wife.246

Commingling of Livestock

A series of cases have developed peculiar rules of restitution, when the commingled property consists of livestock. Under the section of the Civil Code relative to usufruct there are particular rules concerning the obligation of a usufructuary to restore cattle at the termination of the usufruct.247 Further, article 2372248 provides in relation to the wife's dowry, that when it consists of "herds or flocks" the husband has to deliver the whole number of cattle he originally received. Largely influenced by these provisions, the courts have in the livestock cases clearly committed themselves to holding that the community is a sort of usufructuary.249 Thus where one of the spouses brings a number of cattle into the marriage, at its dissolution that person is entitled to take from the common herd the same number of cattle which he or she brought into the marriage even though none of the original cattle remain.250 It is obvious from the cases that the standard of proof required for reimbursement of livestock brought into marriage is less than that

246. See generally Succession of Bell, 194 La. 274, 193 So. 645 (1940); Succession of Cormier, 52 La. Ann. 876, 27 So. 293 (1900) (from syllabus by court) ("No fixed rule or standard as to the extent or sufficiency of evidence necessary to establish a claim of that character can be formulated. Each case must rest on its own peculiar state of facts."); Succession of Kidd, 51 La. Ann. 1157, 26 So. 74 (1889).
247. LA. CIVIL CODE arts. 592, 593 (1870).
248. Id. art. 2372.
249. See Huie, Separate Ownership of Specific Property Versus Restitution from Community Property in Louisiana, 26 Tul. L. Rev. 425, 435 (1952): "In determining the rights and obligations between spouses and the community the courts have evidently felt free to use only those rules of the law of usufructs that they deem suitable, but they have recognized the analogy to a usufruct and have at times found in the law of usufructs the solution to community property problems.... Undoubtedly the analogy to a usufruct can be given controlling effect whenever the law of usufructs furnishes a desirable solution to the particular problem, but since the courts have sometimes applied the usufruct rules and sometimes not, the extent to which those rules are controlling can be determined only by a detailed study of each problem."
required in situations where reimbursement is handled by credits against the community fund.251

SEPARATE AND JOINT BANK ACCOUNTS

The importance of separate and joint bank accounts in a community property system is obvious from the previous discussion of commingling. Very early, most states judicially recognized the right of the wife to deal with bank accounts in her own name,252 and even prior to the general emancipation acts,253 Louisiana legislatively recognized a married woman's right to open a separate bank account, as if she were unmarried.254 Shortly thereafter, statutory provisions were added to govern joint deposits and give protection to the bank who honored a survivorship provision in the deposit arrangement.255 There was nothing to prevent the two depositors from being members of a conjugal union.

It is clear that merely depositing community funds in a separate account does not affect the nature of the funds,256 any

251. See, e.g., Talbert v. Talbert, 199 La. 882, 7 So.2d 173 (1942). The husband testified that he owned approximately 250 head of cattle at the date of marriage and his testimony was corroborated by that of other witnesses. This was held sufficient to allow him to take a like number from the community at its dissolution. In Succession of Andrus, 131 La. 940, 60 So.2d 623 (1913), it was recognized that all the spouse could show was that he or she had once owned a certain number of cattle, which were devoted to the use of the community. This was sufficient. In Wimbish v. Gray, 10 Rob. 46 (La. 1845), the court (in syllabus) said: "[W]here the community is dissolved by the death of the husband, and the cattle brought by the wife into the marriage, are shown to have increased, she will be entitled to claim as her separate property a number equal to that brought by her into the marriage. Nor is it necessary that she should identify any of the cattle as those which belonged to her at the time of the marriage. If the whole herd do not die, the husband is bound to make good the number of the dead out of the new born cattle." Query: would not the new-born cattle belong to the community, as "fruits"?

252. See McKay, Community Property § 745 (2d ed. 1925).


254. La. Acts 1896, No. 63, § 1, now appearing as La. R.S. 6:28 (1950) : "A married woman may open accounts in the different national or state banks of Louisiana, and deposit money, checks, notes, and other funds therein, and may withdraw the same by check or otherwise and without the assistance or intervention of her husband in the same manner and under the same conditions as if she was (sic) a femme sole or unmarried woman."


256. Howard v. United States, 40 F. Supp. 697 (E.D. La. 1941); DeMaupassant v. Clayton, 214 La. 812, 38 So.2d 791 (1949); Cameron v. Rowland, 215 La. 177, 40 So.2d 1 (1949); Drewett v. Carnahan, 188 So. 103 (La. App. 2d Cir. 1938); cf. Succession of Iper, 180 La. 656, 157 So. 380 (1934); Marlett v. Citizens' State Bank & Trust Co., 180 La. 387, 156 So. 426 (1934); Levert v. Hebert, 51 La. Ann. 222, 25 So. 118 (1899); Succession of Tanner, 24 So.2d 642 (La. App. 1st Cir. 1946) (dissenting opinion); Demasi v. Whitney
more than merely depositing separate funds in a community account destroys their separate nature. However, even though depositing community funds in a separate account of the wife does not affect the community's ownership, it may effectively withdraw them from the control of the husband. The court reasoned that since married women were given the authority by the legislature to draw checks upon and withdraw from accounts in their own names, the bank must remain free from conflicting claims of the husband. Otherwise, the bank would be forced to investigate the source of all deposits made by married women — a burden which would certainly operate to deprive married woman of the benefit of the legislation. Under these peculiar facts, the husband is totally without remedy, since he cannot sue the bank, nor can he sue the wife without seeking dissolution of the marriage. Similarly, when community funds are deposited in the name of the wife alone, they cannot be seized by community creditors in an action to which the wife has not been named a party.

Joint bank accounts between spouses have been equally troublesome. Usually, the deposit arrangements provide that the funds are payable to either party or to the survivor. The withdrawal and survivorship provisions are valid insofar as the bank is concerned, and it is protected in paying the deposit to either named depositor or to the survivor. One joint de-


257. See text accompanying notes 222-226 supra.

258. LaCaze v. City Bank & Trust Co., 31 So. 2d 891 (La. App. 2d Cir. 1947).


261. La. R.S. 6:32 (Supp. 1963) : "A. When a deposit is made in any bank . . . under the name of two or more persons, payable to each of such joint depositors, this deposit or any part of it, or any interest or dividend on it, may be paid to any such joint depositor, whether the other joint depositor or depositors be living or not, and the receipt or acquittance of the person paid is a full release and discharge of the bank . . . for any payment made. . . ."

"B. . . . [I]f one of such joint depositors seeks to prevent payment to another . . . the party seeking so to do must give notice in writing, signed by him and delivered to the . . . bank. . . ."

"C. After the receipt of such notice from one or more of such joint depositors, the bank may refuse to honor any check, draft, or demand upon the said deposit or by any of the joint depositors, including the one or ones requesting, as aforesaid, the stopping of payment, unless all of the joint depositors upon the said account join in drawing such draft or check or demand for payment or other withdrawal of any of the funds.

"D. In the event any bank shall have received a notice in writing required
 depositor may give notice to the bank not to pay out to another joint depositor, and in this event the bank is protected in dishonoring checks and prohibiting withdrawals from the account. However, it appears that even after the notice, the bank could pay to one joint depositor, and still be free from liability. The parties would then have to adjust their rights between themselves—an action which, in relation to married joint depositors, is barred during the marriage. The present law in relation to joint deposits between married persons is probably contrary to the case of Le Rosen v. North Central Texas Oil Co., which turned on a finding that when a deposit was made to the joint account of husband and wife, the depositary had an obligation to account to both of them.

In Sub-section B hereof, such bank shall be relieved of responsibility to each and every one of the joint depositors upon the account or deposit in question for failure or refusal to honor any check or draft or demand for payment or withdrawal unless the action is taken by all of the parties in whose names the account or deposit stands.

Similar statutes have been enacted in relation to institutions other than banks. See, e.g., La. R.S. 6:751 (1950) (building and loan associations); id. 6:663-664 (credit unions). See also id. 6:751.1 (Supp. 1964); id. 9:1513 (Supp. 1964).

Northcott v. Livingood, 10 So. 2d 401, 405 (La. App. 2d Cir. 1943): "[T]his act simply vests in the depositary bank a discretion in cases falling within its terms; such bank 'may' pay the deposit to the survivor or survivors or not as it sees fit. If it does make payment to the survivor or survivors no recourse thereafter may be had upon the bank for having done so. This does not mean that by such a payment the right of ownership in whole or part to the deposit of the heirs of a deceased or recourse against the one to whom payment is made are to any extent abridged or affected. It simply means that when the bank makes such a payment to the survivor or survivors it is fully protected for having done so, and thereafter all right to the amount thus paid are relegated to future action, if any, among the legal owners or claimants thereof."

Succession of Turner, 24 So. 2d 642, 648 (La. App. 1st Cir. 1946) (dissent): "[T]he bank owing the amount of the deposit on the death of either joint depositor could have paid the deposit to the survivor, and so far as the bank was concerned, it would have been relieved of further liability, regardless of the fact that the fund would have remained a community asset. . . . For the purpose of paying the deposit to the survivor the bank would have been fully discharged from further liability. . . . But the payment of the amount of the deposit to the survivor would not affect the ownership of the money so paid."

In LeRosen the husband had leased community lands for mineral exploration, under an "unless" lease which provided for payment of delay rentals to be made to the account of the husband. The lessee made the payments, but deposited them in the joint account of husband and wife. In an action brought by the husband to cancel the lease for nonpayment of delay rentals, the lessee contended that the rental was community property, and that deposit in the joint account placed the funds under the control of the husband as much as if they have been deposited in a separate account. Both the court of appeal and the Supreme Court failed to agree with the lessee, on the ground the depositary was obligated to account to the wife for the funds. "Under the law a married woman is authorized to deposit money or other funds in bank and to withdraw the same
Even under the current law, it would seem that deposits in a joint account of a married couple would be presumed to be community property. Thus separate creditors of the wife cannot rely on the fact that funds have been deposited in such a joint account, and their claims may be defeated by a showing that the funds represent community property, which cannot be seized for her debts.

It is settled that joint deposits with survivorship provisions do not affect the requirements for a valid donation, either inter vivos or mortis causa.

Kenneth D. McCoy, Jr.

NATURE OF THE WIFE'S INTEREST DURING THE EXISTENCE OF THE COMMUNITY

INTRODUCTION

Characterization of the exact nature of the wife's interest during the existence of the community has proved to be an arduous task. In Arnett v. Reade, Justice Holmes stated: "It is not necessary to go very deeply into the precise nature of the wife's interest during the marriage. The discussion has fed the flame of juridical controversy for many years." In numerous attempts to settle the matter, jurists have described the wife's interest as residuary, inchoate, dormant, as a hope or expectancy, and as absolute ownership of one-half of the com-

without the authorization of her husband. . . The bank, under the terms of the deposit, was obligated to account for the fund to plaintiff's wife as well as to plaintiff." Id. at 975-76, 126 So. at 443. Accord, Clingman v. Devonian Oil Co., 188 La. 310, 177 So. 59 (1937).

LeRosen has subsequently been overruled on another point, Jones v. Southern Natural Gas Co., 213 La. 1061, 36 So. 2d 34 (1948), but would appear to stand on the question of payment to joint accounts. It is significant, however, that the provisions discussed in the text at notes 261-263 supra were enacted subsequent to LeRosen and seem to negate the assumption in LeRosen that the depositary is obligated to account to all of the joint depositors. See Note, 12 Tul. L. Rev. 465, 466 (1938).

LeRosen and Clingman are severely criticized in Daggett, Policy Questions on Marital Property Law in Louisiana, 14 LA. L. REV. 528, 534 (1954).


269. Vercher v. Roy, 171 La. 524, 131 So. 658 (1930); cf. Succession of Mulqueeny, 156 So. 2d 317 (La. App. 4th Cir. 1963), cert. denied, 157 So. 2d 234.

1. 220 U.S. 311, 319 (1911).