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Rethinking the Classification of Credit Acquisitions Under Louisiana's Community Property Law

Dian Tooley Arruebarrena*

Although it has been ten years since the revision of Louisiana's matrimonial regimes law, it is not surprising that no court has determined how credit acquisitions should be classified under the new law. What may be surprising is that the pre-revision law on credit sales is less certain today than it was ten years ago. The reason for this uncertainty is the 1981 Louisiana Supreme Court decision, Curtis v. Curtis, which repudiated 120 years of credit sale jurisprudence and substituted an undesirable new test. Some of the jurisprudence rejected by Curtis needed to be re-evaluated, and perhaps discarded, but some of it was reasonable and should have been retained. Inasmuch as the revision has not changed the principles governing the classification of property as community or separate, the wholesale rejection in Curtis of Louisiana's jurisprudence dealing with credit transactions has rendered classification under the new law uncertain.

In part I of this article, the development of classification principles for credit sales up until the Curtis decision, including applicable pre-revision Civil Code provisions and supreme court decisions, will be analyzed. Part II entails a discussion of the Curtis decision. In part III, the current classification articles will be outlined, with an evaluation of several classification tests for their compatibility with these articles. Part IV examines those policies that classification laws should promote and assesses the extent to which selected classification tests advance those policies. Part V concludes that the test for classifying credit sales created by Curtis is undesirable, and that the portion of the repudiated jurisprudence that had established a valid classification scheme is preferable and should be reinstated.

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1. Louisiana's first important credit sale case was not decided until 36 years after the 1825 Code was effective. See infra text accompanying note 18.
2. 403 So. 2d 56 (La. 1981).
I. HISTORY OF CLASSIFICATION OF CREDIT ACQUISITIONS

A. The Reinvestment Doctrine

The matrimonial regimes title of the Civil Code does not expressly provide for the classification of property acquired in credit transactions. In fact, until 1912 the Code did not contain a single provision classifying property acquired with separate things as separate. Despite the absence of such a provision, the Louisiana judiciary, through the reinvestment doctrine, early recognized the ability of a spouse to acquire separate property during the marriage with separate funds. Under the reinvestment doctrine as recognized by Louisiana courts and the Spanish law upon which the doctrine is based, a spouse owning separate property could sell that property and "reinvest" the proceeds into other property. The property acquired through the reinvestment would be that spouse's separate property.

The reinvestment doctrine, sometimes called the principle of real subrogation, provided a limited exception to the rule that acquisitions during the marriage were community property. This general principle was set forth in the Civil Code, which classified as community:

the estates which [the husband and wife] may acquire during the marriage . . . by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase.

For the reinvestment doctrine to operate, there were two conditions: First, the reinvestment had to be bona fide, meaning that the acquisition really was a reinvestment of separate funds. Second, the spouse making the investment must have intended that the property acquired would become his or her separate property. Both spouses were required to demonstrate the intention to reinvest separate funds by taking title to


4. Savenat v. LeBreton, 1 La. 520 (1830).


6. Gonor v. Gonor, 11 Rob. 526, 528 (La. 1845); Rousse v. Wheeler, 4 Rob. 114, 118 (La. 1843); Terrell v. Cutrer, 1 Rob. 367, 369 (La. 1842) ("It is certainly of their essence . . . that it should be a bona fide re-investment of money under her control . . .").

7. Thus, reinvestment may differ from the 1912 provision by which things acquired with separate funds appear to be automatically classified as separate.
the property in the name of the reinvesting spouse. If title were placed in both spouses’ names, or if title to property acquired with the wife’s funds were placed in the husband’s name, reinvestment was precluded, and the property would be classified as community.

Whether the intention to reinvest had to be declared in the act of acquisition depended upon whether the acquiring spouse was a wife or a husband. Because the husband was head and master of the community, he had to declare in the act of acquisition that he intended the property to be separate and that he would pay for the property with his separate funds. This special rule, known as the double declaration requirement, evolved because of concern stemming from the husband’s broad management power. Absent a double declaration, the property was classified as community, regardless of the source of funds from which the property was paid.

The courts were more lenient toward wives and never required that the intention to reinvest be stated in the act of acquisition. If the act were silent about her intention, she was always free to adduce proof at a later date. The courts did require, however, that a wife administer

11. The first case to advert to the necessity for a special rule for husbands was Young v. Young, 5 La. Ann. 611 (1850), which stressed the need for the husband’s intention to be “distinct and clear.” The second case was Bass v. Larche, 7 La. Ann. 104 (1852), in which it was stated: [A]s he was the head of the community, the fact that he purchased in his own name, proves nothing in his favor. The evidence of his intention to purchase for his separate account, should be sufficient to throw the loss upon him in case the property purchased had diminished in value, or totally perished. Id. at 104. By 1859, the rule was intact. See Joffrion v. Bordelon, 14 La. Ann. 618 (1859).
13. The intent requirement never was a real barrier for a wife seeking to have property classified as separate. In one case the husband was holding the wife’s money until she directed him to invest it, and the court said that her instruction to him was a resumption of administration by her. See Terrell v. Cutrer, 1 Rob. 367 (La. 1842).
the separate property that she was reinvesting. Such a requirement was considered unnecessary for a husband because he managed both the community and his separate property. One court has suggested that the reason this requirement was imposed upon wives was to ensure that the revenues of their separate property would be separate, thereby guaranteeing a source of funds for the credit portion of the price. This explanation, while plausible when applied to credit sales, ignores the fact that the requirement was first imposed in Dominguez v. Lee, a case involving a cash sale. The explanation given by the Dominguez court for the requirement was that a wife's power to sell her separate property and invest the proceeds is corollary to her power to administer her separate property. Thus, she must administer her separate property in order to possess the right to reinvest separate funds.

B. The Pre-Curtis Credit Sale Jurisprudence

The first credit sale case in Louisiana was Bouligny v. Fortier, decided in 1861. The property in dispute was a plantation that the wife had acquired in her own name for $80,000. About $5,000 was paid at the time of the sale, and for the balance she assumed the payment of certain claims and executed her promissory notes. She asserted that the property was community because she did not have any separate funds for investment, and because she had acted through marital influence.

14. Unless the wife administered her paraphernal property "separately and alone," her husband was considered to be managing it. La. Civ. Code art. 2385 (1870). However, if a husband was administering his wife's separate property, the courts usually permitted her to prove that he was acting as her mandatary. See, e.g., Miller v. Handy, 33 La. Ann. 160 (1881).


16. 17 La. 295 (1841), see supra note 8. The requirement has frequently been imposed in cash acquisition classification disputes; see, e.g., Stauffer, Macready & Co. v. Morgan, 39 La. Ann. 632, 2 So. 98 (1887), including two relatively recent cash transaction cases where the only issue discussed was the necessity that the wife administer the separate property being reinvested. See Southwest Natural Production Co. v. Anderson, 239 La. 496, 118 So. 2d 897 (1960); Howell v. Harris, 18 So. 2d 668 (La. App. 2d Cir. 1944).

17. 17 La. at 299-300. The Louisiana Supreme Court made the following observation in 1861:

[It is now the well settled jurisprudence of this State, that the right of the wife to administer personally her paraphernal property and to alienate the same, ... implies the faculty of investing or re-investing her paraphernal effects.


19. The facts of Bouligny were quite complicated. The plaintiff was the holder of the last promissory note due who had the property seized and sold, and who bought it at the sheriff's sale. He sought to deduct from the price he owed the amount needed to discharge a mortgage granted by the wife five years after she bought the property. This was resisted by the wife, who asserted that she had rights to the property superior to
Noting that the reinvestment doctrine creates a limited exception to the general rule that acquisitions during the marriage are community property, the court identified two requirements for application of the doctrine to a credit acquisition by the wife:

[T]he wife is required, not only to prove that she had paraphernal effects at her disposal, but also that they were ample to enable her, reasonably, at least to make the new acquisition; otherwise the contract will be treated as a contract of the community. . . . The authority to invest, does not carry with it the unbounded liberty to run into wild and ruinous speculations. . . . We therefore conclude that it is against the policy of the law, and the spirit and letter of our system of legal community, to sanction contracts made by the wife, under pretext of investing her paraphernal effects, when, as in the case at bar, the amount invested bears no proportion to the value of the property substituted in its place. . . .

The first requirement mentioned by the court is the existence of "ample paraphernal effects" to permit her reasonably to make the acquisition. The second requirement mentioned is a certain relationship between the amount invested and the value of the property acquired. The court held that the property was community because the amount invested was disproportionate to the value of the property acquired. "The amount invested" is apparently a reference to the cash portion of the price, or downpayment. The court did not explain the type of relationship that must exist between the downpayment and the value of the property acquired in order for the acquisition to be classified as separate.

She claimed that her husband had received paraphernal funds during the marriage for which he had not accounted, which created a legal mortgage on her behalf satisfiable out of all community property, including the property at issue in the litigation. Her claim would be superior to that of the mortgagee because at that time the wife's legal mortgage attached when the property was acquired. See H. Daggett, The Community Property System of Louisiana 44-45 (1945).

An additional complicating factor is that the plaintiff was the wife's brother-in-law and had participated in the negotiations leading up to the sale. Furthermore, plaintiff was a member of a firm, apparently a partnership, which was the mortgagee at issue. Finally, the wife (and apparently the husband) had an account with plaintiff's firm, into which proceeds from various sources were deposited. The firm paid debts of various kinds from this account, including payments on this sale.


21. Nor did the court justify its creation of the large downpayment test. However, the court did state that its classification of the property as community is consistent with the result which would have been reached under French law. The court said that according
The "ample paraphernal effects" requirement was not expressly applied to the facts in *Bouligny*, which is understandable because both tests must be met for the property to be classified as separate. The failure to meet either test would result in classification of the property as community.

The two requirements created by *Bouligny* were advanced for different purposes. The court's threshold concern was to apply the reinvestment doctrine to credit sales. Hence, the first purpose was to extend that doctrine to credit acquisitions. The court's second purpose was to protect wives from "wild and ruinous speculations." The ample paraphernal effects test appears to have been created as an application of the reinvestment doctrine, while the large downpayment rule appears to have been imposed to protect wives from bad investments. Nonetheless, each requirement accomplishes its purpose to some extent.

The large downpayment requirement clearly protects wives from bad investments. A large downpayment reduces the risk that some amount might be owed after seizure and sale of the property for nonpayment of the debt. Thus, the large downpayment requirement practically insulates wives against personal liability in the event the deferred portion of the price is not paid. Yet the large downpayment rule is not unrelated to the reinvestment doctrine. The larger the downpayment, the more one is justified in concluding that the acquisition is a reinvestment of separate funds.

The ample paraphernal effects test is appropriate under the reinvestment doctrine, the doctrine that enabled spouses to convert separate property existing in one form into separate property in a different form.

to the French Civil Code and the French commentators, including Duranton, if the property acquired is worth more than double the separate funds invested, the property is community. Id. at 215. The court then said:

One of the reasons assigned by Duranton is, that should it be otherwise, a husband who had sold one of his estates for 6,000 fr. could acquire an estate of the value of 40,000 fr. or more, with the funds of the community, by simply declaring in the act, that the acquisition is made to replace his conveyed property. He would thus take the profits which the community might have otherwise derived from the acquisition; and this would be contrary to the principle of the Code, for he owes to the community all his industry, all the profits which he can derive from his speculations.

Id.

22. The large downpayment requirement thus serves a different function than the ample paraphernal effects requirement. Despite the expectancy of ample paraphernal funds with which to make the deferred payments, as from the revenues of a cotton farm, if the farm were to burn down, or if the price of cotton were to fall, the spouse would be unable to pay the price when due. Thus, the wife might be exposed to personal liability upon nonpayment. The large downpayment rule severely lessens that possibility by requiring that the downpayment be large enough to make the property sufficient security for the credit portion of the price.
A logical extension of this doctrine to credit acquisitions would be to require that the spouse possess enough separate funds for both the cash and deferred portions of the price. Otherwise, the transaction could not be characterized as a bona fide reinvestment of separate funds. This is exactly what the ample paraphernal effects test accomplishes. The ample paraphernal effects requirement protects wives from bad investments in a limited way. The rule requires that she be able to pay for the investment, thereby reducing the risk that she might become insolvent on account of the purchase.

The next credit sale case in Louisiana was Miller v. Handy,\(^2\) decided in 1881. The husband's creditors seized certain property as community property, and the wife intervened in the proceeding to assert its separate nature. She had acquired the property in her own name for $25,500, paying $8,500 cash and assuming the deferred payments. Although the court approvingly cited Bouligny, it did not expressly apply the large downpayment rule. Invoking the ample paraphernal effects test announced by Bouligny, the Miller court looked at the classification of the funds used for the downpayment and evaluated the probability that the wife could also satisfy the deferred payments out of her separate funds. Because the wife owned and administered other separate property whose revenues were adequate to meet the deferred payments, and because she was actually paying the installments with her separate funds, the court held that the property was her separate property.

The Miller opinion then acknowledged the following limitation upon a wife's freedom to purchase on credit: "The cash so invested should bear such fair proportion to the total price of the purchase, as to render it reasonably certain the property purchased would furnish sufficient security for the credit portion of the price."\(^2\) This limitation, a re-statement of the Bouligny large downpayment rule, was not expressly applied in Miller, although the court, by finding the property to be separate, impliedly must have found the requirement to have been met. Thus, the downpayment must have been considered large enough so that the property itself furnished security for the credit portion of the price.\(^2\)

Subsequent cases did not create new classification tests for credit acquisitions. Courts classifying property acquired on credit routinely applied the ample paraphernal effects test,\(^2\) but were inconsistent with

\(^2\) See, e.g., Succession of Franek, 224 La. 747, 70 So. 2d 670 (1953); Betz v. Riviere, 211 La. 43, 29 So. 2d 465 (1947); Rouyer v. Carroll, 47 La. Ann. 768, 17 So.
respect to the necessity that the large downpayment test be met for the property to be classified as separate. Few cases even mentioned the large downpayment test, and only three cases besides Bouilgny and Miller actually invoked the rule.


Interestingly, there have been three cases involving credit-only transactions. None even cited the large downpayment rule, although that rule would inevitably require that such property be classified as community. See Whittington v. Heirs of Pegues, 165 La. 151, 115 So. 441 (1927); Succession of Andrus, 34 La. Ann. 1063 (1882); Lotz v. Citizens Bank & Trust Co., 17 So. 2d 463 (La. App. 1st Cir. 1944).

28. See Fortier v. Barry, 111 La. 776, 35 So. 900 (1904); Jordy v. Muir, 51 La. Ann. 55, 25 So. 550 (1898); Magnolia Petroleum Co. v. Crigler, 12 So. 2d 511 (La. App. 2d Cir. 1942). However, classification of the disputed property did not hinge upon the application of the large downpayment test. In all three of these cases, the wife was unable to prove that she had paraphernal funds sufficient to permit her to pay the deferred portion of the price.

In Fortier v. Barry, 111 La. 776, 35 So. 900 (1904), the wife acquired two rental properties in her own name on the same day from different vendors. The sales price of the first property was $2,400, $350 of which was paid in cash. The wife executed a note for the balance of the price, payable one year from the sale. The wife acquired the second property entirely on credit for a price of $3,000. Although she did execute a demand note for the price, she agreed in the deed to pay ten percent of the principal annually.

Her husband's creditor sought to seize both properties and she intervened, asserting that they were her separate property. The court noted that of the total price of the two properties, she had paid only 6.5% in cash, pledging her credit for the balances owed. The only separate property owned by her at the time of the acquisitions was one rental property. The court looked to the expected revenues from these three properties, and concluding that the rentals from all properties (less expenses) were insufficient to discharge the obligations assumed in the sales, held the properties to be community. In Fortier neither the large downpayment requirement nor the ample paraphernal effects requirement appears to have been met.

Fortier is subject to criticism for lumping the two purchases together as though they were a single acquisition. Clearly the wife was in different positions vis a vis the two properties. She had not repaid a cent on the first property (the Breaux property), and the entire credit amount was overdue. However, she was apparently current in her re-payment of the price for the second property (the homestead property). Yet, the court attached no significance to the fact that she was successfully repaying the price of the homestead property. But see Succession of Lewis, 45 La. Ann. 833, 12 So. 952 (1893).

This criticism does not mean that the outcome should have been different even if the
The cases were also inconsistent with regard to the significance of the source of funds used to pay the credit portion of the price. In most cases finding the property to be separate, the spouse not only proved the availability of separate funds with which to pay the price, but actually used separate funds when the price fell due. By contrast, in most cases holding the property as community, the spouse not only failed to prove the availability of separate funds with which to pay the price, but also failed to pay the price with separate funds when the amount fell due. Where exceptions were made, the courts usually justified the outcome based upon the special facts of the case.

Two properties had been considered separately. The homestead property raises a serious policy question in community property law. The property was purchased entirely on credit, and at the time of the purchase the wife did not possess adequate separate funds with which to meet the deferred payments. Thus, under the reinvestment doctrine, this would not qualify as a bona fide reinvestment. This result should not be affected by the fact that the property being acquired will produce revenues which will provide a partial source of repayment. To say that the revenues of the property being acquired will be separate and therefore that the spouse possesses adequate funds with which to pay the credit portion is a circular argument. The revenues of the acquired property can be separate only if the acquired property is separate, and that will occur only if the transaction is a bona fide reinvestment of the spouse’s separate funds. A reinvestment is not bona fide if a spouse does not possess sufficient separate funds to meet both the cash and credit portions of the price.


In Succession of Lewis, 45 La. Ann. 833, 12 So. 952 (1893), there was scant evidence as to the existence of separate funds with which the wife might have met the deferred portion of the price. Nonetheless, at the time of the trial she had successfully paid two-thirds of the price with separate funds. Calling the situation unusual, the court held the property to be the wife’s separate property.

In Bailey v. Alice C. Plantation & Refinery Inc., 152 So. 2d 336 (La. App. 1st Cir. 1963), the wife proved the availability of separate funds with which to pay the price, but accidentally used community funds to pay the deferred portion of the price. The court held that the use of community funds through error had no effect upon the classification of the property. Id. at 342.

Another exception was a case where a wife bought property totally on credit. Whittington v. Heirs of Pegues, 165 La. 151, 115 So. 441 (1927). It was not shown that, at the time of the sale the wife had adequate separate funds with which to meet the deferred payments, and the property was held community despite the fact that she ultimately made payments out of her separate funds. The court appeared to base its holding both on the fact that she did not prove the availability of separate funds at the time of the sale and upon the fact that the purchase was entirely on credit. Id. at 155, 115 So. at 442 (quoting Succession of Andrus, 34 La. Ann. 1063 (1882)). The court justified disregarding the use of separate funds for classification purposes by invoking the principle that the status of property is fixed at the moment of acquisition.
The Code was amended in 1912 to provide that property acquired with separate funds is separate. Although this enactment did not sanction any discrimination between husbands and wives who claim property as separate, the 1912 amendment produced no discernable difference in the courts' approach. The courts continued to require the wife to prove that she was administering the separate property she was reinvesting even though this requirement was rendered unnecessary by the 1912 enactment. The large downpayment requirement and the ample paraphernal effects rule also continued to be cited without any discussion whether either might have been superseded by the 1912 amendment. The tests were inconsistent with the 1912 enactment to the extent their imposition was to protect wives from wild and ruinous speculations, inasmuch as no discrimination was permitted by that amendment. On the other hand, the tests were compatible with the amendment to the extent they were extensions of the reinvestment doctrine to credit acquisitions.

All of the cases discussed and cited in this section involve credit acquisitions by wives. As previously mentioned, husbands were subjected to the double declaration requirement. This requirement persisted until it was legislatively overruled by the 1980 matrimonial regimes revision, even though the requirement was also probably inconsistent with the 1912 amendment. Although there is no case that applied either the large downpayment test or the ample paraphernal effects rule to a husband's credit acquisition, there is no case that expressly refused to

32. See, e.g., Southwest Natural Production Co. v. Anderson, 239 La. 490, 118 So. 2d 897 (1960).

33. Courts required wives to prove administration of the separate property being invested as a prerequisite to application of the reinvestment doctrine, since the power to reinvest was viewed as a corollary to the power to administer. See supra text accompanying notes 14-17. In the absence of an express code provision on the subject, it was not unreasonable for the courts to view reinvestment as a right flowing from the power of administration. After the 1912 amendment to the Code, however, the power to reinvest received express sanction, and there was no longer any need for the courts to impose this additional requirement.


35. The double declaration requirement was imposed upon husbands to ensure that their intent to acquire separate property would be known at the time of the acquisition. See supra text accompanying note 11. The 1912 amendment did not specify that the intent to acquire separate property was a prerequisite to acquisition of separate property. Even if the intent requirement survived the 1912 amendment, there was no longer any basis for discriminating between husbands and wives in their attempts to prove property separate. Therefore, it is submitted that after 1912 husbands should not have been required to preserve their intent to acquire separate property in any specific form.

36. However, in Bass v. Larche, 7 La. Ann. 104 (1852), decided when the double declaration rule was still evolving, the court stated:
apply these rules to husbands. Cases involving husbands never reached the question of the applicable classification rule, most likely because of the onerous double declaration rule to which husbands alone were subjected.\textsuperscript{37} One can only speculate whether, in the absence of the double declaration rule, the courts would have applied either the large down-payment requirement or the ample paraphernal effects test to credit acquisitions by husbands.

II. THE CURTIS DECISION

A. The Legal Issues Addressed in Curtis

The primary issue in Curtis was the classification of rental property acquired by the wife in her own name. Of the $60,000 sales price, she paid $28,500 in cash out of her separate funds, and financed the $31,500 balance with a fifteen year mortgage. The rentals from the property were the exclusive source of the loan repayments. The husband had intervened in the purchase offer and the act of sale, declaring that the property was his wife's separate property, it was purchased with her separate funds under her administration and control, the community had no interest whatsoever in the property, and all payments would be made by his wife with her separate funds.

The trial court held the property to be community because community funds, the rentals, were commingled with separate funds to acquire the property. The court of appeal held the property to be 47.5\% separate and 52.5\% community, based upon the amount of funds each had contributed.\textsuperscript{38} The supreme court disagreed strongly with the ap-
process taken by the court of appeal, stating that Louisiana does not recognize mixed titles. After summarizing the jurisprudence on classifying credit acquisitions made by wives, the court repudiated it as discriminatory. The court then decided that the property was the wife's separate property because of the husband's declarations in the deed. Invoking the estoppel by deed doctrine created by the jurisprudence, the court held that because the husband had appeared in the act and declared the property to be his wife's separate property, he could not controvert his own declaration even as to the credit portion of the price. A subsidiary issue before the court was the classification of the rentals used to discharge the credit portion of the price. Liberally interpreting the requirements for a valid "declaration of paraphernality," the court concluded that the property's rentals were separate, and that the wife therefore owed no reimbursement.

B. Curtis' Credit Sale Analysis

In its classification discussion, the court acknowledged that husbands have been subjected to the double declaration rule, while wives have not. The court then noted that in credit acquisitions, wives have been subjected to two requirements: the ample paraphernal effects rule and the large downpayment rule. Asserting that the imposition of these rules was intended to prevent wives "from indulging in 'wild and ruinous speculations,'" the court repudiated the previous jurisprudence as discriminatory:

These judicially imposed restrictions on a wife's freedom to purchase on credit may have been justified in previous years when most women stayed home and did not have separate incomes. . . . Today, however, with an ever increasing number of women entering the work force, such restrictions are no longer supportable. . . . We believe that a married woman is entitled

40. See, e.g., Stewart v. Mix, 30 La. Ann. 1036 (1878) (one of first cases to apply the rule).
41. In so holding, the court clarified the estoppel by deed doctrine, while at the same time interpreting it favorably to the wife.
42. See La. Civ. Code art. 2386 (1870). The phrase "declaration of paraphernality" is often used to describe an act by which a spouse reserves the fruits and revenues of separate property as separate.
43. This portion of the opinion was severely criticized. See Note, Community Property—Characterization of Credit Purchases and the Effects of Estoppel by Deed, 56 Tul. L. Rev. 1051, 1062 (1982); Note, Curtis v. Curtis: An Unsettling Community Property Precedent, 28 Loy. L. Rev. 315, 331-32 (1982).
to purchase property on credit as an investment, and to avail herself of the same credit devices her husband can use. We do not believe that she should have to prove that she can use credit more wisely than he.\textsuperscript{44}

The \textit{Curtis} court announced a new test to replace the discarded large downpayment rule and ample paraphernal effects rule: if the wife uses separate funds for the cash portion of the price, the property will be classified as separate. She need not prove the existence of separate revenues with which she expects to pay the credit portion of the price, and if she later uses community funds to pay all or part of the credit portion, she will owe reimbursement for that amount.\textsuperscript{45} The court admonished in a footnote that the matrimonial regimes revision did not apply to the facts of this case, but that the new classification articles might yield a different result.\textsuperscript{46}

The court's intention was to afford wives the same freedom to acquire separate property on credit as husbands by repudiating jurisprudence perceived to discriminate against wives. While this goal of equality is laudable, the court's attempted implementation is flawed in two respects. First, husbands at that time were subjected to the double declaration requirement. Because the court did not impose this rule upon wives, the opinion could not produce equality between husbands and wives.

Second, the court's characterization of the credit sale jurisprudence as discriminatory is only partially correct. The repudiated jurisprudence sought to achieve two objectives—the protection of wives from wild and ruinous speculations and the extension of the reinvestment doctrine to credit acquisitions. The former purpose is discriminatory only to the extent that husbands are not equally protected. The second purpose is not discriminatory. While the \textit{Curtis} court's denouncement of the discriminatory objective served by the jurisprudence was proper, the discrimination could have been eliminated by extending these rules to husbands.

Additionally, since the court did not acknowledge that one objective of the jurisprudence was to apply the reinvestment doctrine to credit acquisitions, the court failed to consider whether that portion serving a valid classification function should be retained. Instead, the court erroneously concluded that both the large downpayment test and the ample paraphernal effects test should be discarded because they were created to protect wives from bad investments.

\textsuperscript{44} Curtis v. Curtis, 403 So. 2d 56, 58 (La. 1981).
\textsuperscript{45} Id. at 59-60.
\textsuperscript{46} Id. at 59 n.4.
The large downpayment test does have a relationship to the reinvestment doctrine. If extended to husbands, the test would not be discriminatory. However, because this test has been practically ignored by the courts and has never been adequately explained, the court was probably justified in abandoning it.

The ample paraphernal effects test is an appropriate extension of the reinvestment doctrine to credit acquisitions. If applied to husbands, the test would not be discriminatory and would not unreasonably limit credit acquisitions—it merely requires that a spouse be able to pay for property out of separate funds if that spouse wants the property to be classified as separate. The test should have been retained.

In place of the large downpayment test and ample paraphernal effects test, the Curtis court created a new test for classifying credit acquisitions that looks only to the source of funds used for the downpayment. This test is a radical departure from the established jurisprudence. The potency of the court's credit sale analysis is no doubt diluted by the presence of additional factors in cases that coalesce in producing the outcome. Nonetheless, the court repudiated the previous credit sale jurisprudence, and substituted a new test. The rule created by Curtis, which looks only to the source of downpayment in a credit sale, will be influential unless it is inconsistent with the matrimonial regimes revision, or unless it is repudiated for promoting an undesirable policy.

III. CURRENT CLASSIFICATION SCHEME

The matrimonial regimes revision contains the same broad presumption of community that existed in pre-revision law. Thus, in any classification dispute, there is a presumption that the property is community, with the burden on the spouse claiming the property as separate to prove that it is separate. Under pre-revision law this presumption was supplemented by the strong statement in the Code that all acquisitions during the marriage are community property. This statement

47. Only one case was found which indicated that classification of property in a credit acquisition should be based upon the source of the downpayment. See Blake v. Hackney, 1 La. App. 558 (2d Cir. 1925). This case cited no authority for its rule, and is inconsistent with the leading credit sale decisions of the Louisiana Supreme Court. Furthermore, the Louisiana Supreme Court as late as 1947 reaffirmed that the downpayment source is not dispositive of classification. See Betz v. Riviere, 211 La. 43, 29 So. 2d 465 (1947). But see K. Spaht & L. Hargrave, Matrimonial Regimes § 3.23, in 16 Louisiana Civil Law Treatise (1989).

48. The Curtis test has already been invoked in one recent credit sale case. See Lee v. Manning, 505 So. 2d 902, 904 (La. App. 2d Cir. 1987).


50. See supra text accompanying note 5.
has been suppressed; it has been substituted with the rule that things bought with community property are community.51

In addition, the Code states that property acquired with separate things is separate, and that property acquired with community and separate things is community unless the community things are inconsequential when compared to the separate things.52 These two classification principles are not innovations of the matrimonial regimes revision. The first principle, that property acquired with separate things is separate, has been codified since 1912, and was recognized even before that time through the reinvestment doctrine.53 The second principle, one variation of the commingling rule, while not expressly in the Code prior to the revision, has also been jurisprudentially recognized.54

Application of these classification principles hinges upon interpretation of the word "acquired." Assuming the meaning of the word has not changed with the revision, there are two principles created by the judiciary that assist in defining the concept of acquisition. First, acquisition of most property occurs at the point when title passes55 or ownership is otherwise obtained.56 Second, classification of property is fixed at the moment the property is acquired.57 Therefore, the only relevant facts are those in existence at the moment when title passes or ownership is otherwise obtained, and classification of property is determined by the situation of the spouse at that time. There is no

53. In the official comments to article 2341, this principle is called "real subrogation." See La. Civ. Code art. 2341 comment c.
54. The other variation of the commingling rule involves commingling of separate funds and community funds in a single bank account. Under the commingling doctrine, the account balance can be apportioned between one spouse's separate estate and the community under certain circumstances. See, e.g., Bruyninckx v. Woodward, 217 La. 736, 47 So. 2d 478 (1950). Apportionment of ownership is never permitted in the second type of commingling, which occurs when community and separate funds are mixed together and used to acquire property. Under the commingling doctrine, the thing acquired with the commingled funds is almost always classified as community, and ownership is never apportioned between a spouse's separate estate and the community. See, e.g., Succession of Hyde, 281 So. 2d 136 (La. App. 3d Cir. 1973).
In some prerevision commingling cases, any amount of commingling would result in the classification of the thing acquired as community. See, e.g., Succession of Schnitter, 220 La. 323, 56 So. 2d 563 (1951). In most bank account commingling cases, however, the account would not be classified as community if the community funds were inconsequential when compared to the separate funds. See, e.g., Slater v. Culpepper, 233 La. 1071, 99 So. 2d 348 (1957).
55. See, e.g., Kendall v. Kendall, 174 La. 148, 140 So. 6 (1932).
56. See, e.g., Crouch v. Richardson, 158 La. 822, 104 So. 728 (1925).
57. See, e.g., Succession of Franek, 224 La. 747, 70 So. 2d 670 (1953); Whittington v. Heirs of Pegues, 165 La. 151, 115 So. 441 (1927).
indication in the revision that either of these principles has been eliminated, although neither has been expressly codified.

In determining whether any test for classifying credit sales is consistent with the revision, its adherence to these principles must be evaluated. According to Curtis, if only separate funds are used for the downpayment in a credit transaction, the property has been acquired with separate funds, regardless of the source of the deferred payments. Curtis' "downpayment only" test, by focusing upon the point in time when title passes, and fixing classification at that moment, is consistent with both principles. However, the Curtis test disregards one critical fact: when property is bought on credit, the buyer has not only made the downpayment, but has become obligated to pay the credit portion of the price. Credit acquisitions are "acquired" not only with the downpayment but with the buyer's promise of repayment. By ignoring the anticipated source of repayment, the Curtis "downpayment only" test paints an incomplete and unrealistic picture of the concept of acquisition.58

The ample paraphernal effects rule repudiated by Curtis is also consistent with both principles because it focuses upon that point when ownership is obtained and fixes classification at that moment. Unlike Curtis' "downpayment only" test, however, the ample paraphernal effects rule does not ignore the deferred payments in classifying the property. Under the ample paraphernal effects rule, a spouse claiming that a credit acquisition is separate must prove not only that the downpayment was made with separate funds, but that the spouse had the reasonable expectation of meeting all deferred payments out of separate funds. The actual source of repayment of the credit portion of the price should not affect classification because under the traditional principles concerning acquisitions, classification of property is fixed at the moment title is transferred and is based upon facts then in existence.59 Thus, the ample paraphernal effects test more accurately and completely describes the concept of acquisition than does the downpayment only test adopted in Curtis.

A third possibility for classifying credit acquisitions under the revision is the "commingling" approach suggested by the Curtis court in a footnote.60 Employment of this approach would require the court to compare the total community and separate funds used, both for the downpayment and the deferred payments. Unless the community portion is inconsequential in comparison to the separate portion, the property

58. But see K. Spaht & L. Hargrave, supra note 47, at 77.
59. The pre-Curtis jurisprudence did not resolve this issue. See supra text accompanying notes 29-31.
60. See supra text accompanying note 46.
would be classified as community. Adoption of the commingling test for classifying credit acquisitions would constitute a dramatic departure from both traditional principles because the court would not be focusing on the point when ownership was acquired, nor would classification be fixed as of that moment. Furthermore, there is no indication that such a significant change in approach was intended by the matrimonial regimes revision.\textsuperscript{61} Perhaps the greatest pitfall in applying the commingling test to credit acquisitions is that ownership of the property could shift each time a payment is made. Neither ownership nor management of the property could be determined until the price has been fully paid. This result is certainly undesirable, as has been pointed out elsewhere.\textsuperscript{62}

Although the commingling approach alone is not recommended, it could be used in conjunction with either the \textit{Curtis} "downpayment only" test or the ample paraphernal effects test. Under the downpayment only test, if both community and separate funds are used for the downpayment, the property would be classified as community unless the community portion of the downpayment is inconsequential. Under the ample paraphernal effects test, the court would look to the source of the downpayment and to the expected source of repayment of the deferred portion of the price. If the acquiring spouse could not reasonably expect to make all payments out of that spouse's separate funds, the property would be classified as community unless the amount of community funds anticipated to be used is inconsequential.

A final\textsuperscript{63} possibility for classifying credit acquisitions could be to revert to the "mixed title" approach adopted by the court of appeal in \textit{Curtis}.\textsuperscript{64} This innovative approach, which was rejected by the Louisiana Supreme Court long before \textit{Curtis},\textsuperscript{65} has the same disadvantages as the commingling approach—ownership cannot be ascertained until the property is completely paid for, and ownership in the interim shifts with each installment.\textsuperscript{66}

\textsuperscript{62} See id.
\textsuperscript{63} Final in this context means the final approach which will be presented. There are many approaches which have been followed in other community property jurisdictions, such as the intent of the lender test used by California courts. See, e.g., Gudelj v. Gudelj, 41 Cal. 2d 202, 259 P.2d 656 (1953). The intent of the lender approach has been severely criticized, however. See, e.g., Young, Community/Separate Classification of Property Acquired on Credit by Spouses: Is There Logic in the California Law?, 8 Comm. Prop. J. 237 (1981); Comment, The Division of the Family Residence Acquired with a Mixture of Separate and Community Funds, 70 Calif. L. Rev. 1263 (1982); Comment, The Division of Property Purchased on Credit Under California Community Property Law: A Proposal for Reform, 17 Pac. L.J. 129 (1985).
\textsuperscript{64} See supra text accompanying note 38.
\textsuperscript{65} See Rousse v. Wheeler, 4 Rob. 114 (La. 1843).
\textsuperscript{66} It would be possible to modify the mixed title approach so as to align it with
In summary, both the Curtis "downpayment only" test and the "ample paraphernal effects" test are compatible with traditional principles created to assist courts in interpreting the concept of acquisition in the community property context. The ample paraphernal effects test is preferable because it describes more accurately what takes place when an individual purchases property in a credit acquisition. Nonetheless, because both are consistent with the current classification articles and the traditional principles, the courts will likely choose whichever classification principle advances the more desirable policy.

IV. The Policy That Should be Promoted

In the community property revision, sexual discrimination has been replaced by gender neutrality. In most instances this result was achieved by extending to the disadvantaged spouse the privilege or right previously given to the favored spouse. The courts must decide whether the liberal rule for wives created by Curtis should be extended to husbands, or whether wives should be subjected to a more stringent rule now that they have been given equal management.

If the Curtis "downpayment only" test is followed, both spouses will be permitted to acquire separate property by investing a small amount of separate funds without any expectation of further repayments out of separate funds. A spouse with a modest separate estate can augment that estate by knowingly diverting community funds, thereby depriving the other spouse of an ownership interest in the acquired property, and relegating him or her to a claim for reimbursement. Under the applicable reimbursement rule, the owning spouse who has diverted community funds to acquire separate property receives an "interest free loan" from the community, meaning that he owes no interest for his use of community funds and that he need not share any of the asset's appreciated value with his spouse. This result can be unfair in many instances.

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68. Why should a managing spouse ever be permitted to divert community funds to a separate venture and be liable only for the amount so diverted? The unfairness of the
Furthermore, regardless of the adequacy of the reimbursement remedy, the law should reasonably favor the community over the spouses' separate property, while at the same time respecting the integrity of the spouses' separate property. A rule of interpretation that condones and even encourages self-seeking by spouses is ill-advised. Therefore, the reimbursement remedy lies with the interest free loan concept, which strips the community of the investment value of the diverted funds. The interest free loan concept for reimbursement might be appropriate when a spouse is using separate funds for a community benefit, since such a rule would favor the community in that context. We might assume that a spouse who uses separate funds for a community purpose does so without any expectation of return except for the amount so used. But should the law penalize a spouse whose partner has diverted community funds by giving him or her, years later, only the amount so used? Such a law is not fair.

There is another unfairness in the reimbursement remedy that warrants mentioning. If the separate property for which the community funds were used is a home in which the family lives, the measure of reimbursement is even smaller. Under fairly settled jurisprudence (which has not however been sanctioned by the Louisiana Supreme Court) a distinction is drawn between the principal of a loan on the one hand and interest and insurance on the other. Reimbursement is owed only to the extent that community funds were used to discharge the principal of the loan. Reimbursement is not owed to the extent that community funds were used to pay interest or insurance. The theory of such cases is that the community should pay rent for use of a spouse's separate property, and interest/insurance payments should be equated with such rent. See, e.g., Willis v. Willis, 454 So. 2d 429 (La. App. 3d Cir. 1984).

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69. The writer feels as strongly about any Civil Code rule which encourages self-seeking by spouses, and therefore cannot resist deploring Article 2339, which permits either spouse to withdraw unilaterally the fruits of his separate property from the community by filing a declaration in the public records.

Under Spanish law, the fruits and revenues of both spouses' separate property were community. Pugh, The Spanish Community of Gains in 1803: Sociedad de Ganancias, 30 La. L. Rev. 1, 8 (1969). Louisiana altered the Spanish rule in the 1808 Digest by providing that the fruits of the wife's paraphernal property would remain separate if she administered the property herself. La. Digest of 1808 p. 334, art. 61. In 1944 the law was amended to provide that the fruits of the wife's paraphernal property would remain separate if she filed a declaration declaring them separate. 1944 La. Acts No. 286, § 1, amending La. Civ. Code art. 2386 (1870). In the matrimonial regimes revision gender neutrality was achieved by permitting husbands to reserve the fruits of separate property as separate by executing a declaration of paraphernality. La. Civ. Code art. 2339.

A declaration of paraphernality does not require notice to the other spouse, let alone his concurrence. It permits a spouse to be selfish and withdraw the revenues of his separate property from the community. Prior to the revision, the right given to the wife to withdraw her fruits from the community was a special privilege for wives who did not have managerial power. Wives were permitted to administer their paraphernal property and retain its fruits, perhaps as a cushion against bad management. The 1944 amendment altered the basis of the right but it remained a limited exception for the non-managing spouse.

Permitting both spouses to withdraw the fruits of their separate property from the community, as the revision does, changes substantially the basis of the right. It is no longer a special privilege extended to the nonmanaging spouse to allow the accrual of a cushion to protect against poor management. It is now a privilege for managing spouses to decide whether they wish to share. If either wishes to prevent sharing, then that spouse
“downpayment only” rule should not be applied to wives under the revision and should not be extended to husbands. Rather, because both spouses now possess equal management over the community, each should be subjected to a classification rule for credit acquisitions that minimizes self-seeking and reasonably favors the community.

The ample paraphernal effects test should be reinstated. This test minimizes those instances where a spouse can divert community funds into that spouse's separate estate because property will not be classified as separate unless the spouse can prove the reasonable expectancy of repayment of the deferred portion of the price out of separate funds. 70

Whether the law should reasonably favor the community over the spouses' individual estates is a policy decision that the courts must make. The judiciary has traditionally favored the community, 71 and will likely continue to do so unless another policy is more desirable. To determine which policy should be promoted in the classification of credit acquisitions, the courts will likely consider those policies that are promoted in the matrimonial regimes law under analogous circumstances.

If a spouse who owns separate immovable property builds a house or other construction thereon with community funds, the house will be his separate property, but he will owe reimbursement to the other spouse based upon the interest free loan standard. 72 While this result is consistent with the outcome under Curtis' "downpayment only" test, the former result is dictated by a strong policy promoting unity of ownership between the land and improvements thereon. This policy, which favors

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may do so, and need not notify the other spouse. Fruits of separate property are community only if a spouse feels generous or is ignorant of the law.

If one spouse has substantial separate property and earns little income, that spouse's separate estate is permitted to grow while the community might become insolvent. The prerevision law required the managing spouse to share so that the community would be enriched by the revenues which his separate property produced. Sharing has been diluted and self-seeking has been codified.

70. It is true that under this test the actual source of repayment of the credit portion of the price will not affect classification, so that a spouse is still free to divert community funds into that spouse's separate estate. See supra text accompanying note 59. While this might happen, the instances in which this is possible are severely limited since the spouse must prove the reasonable expectancy of repayment out of separate funds in order for the property to be classified as separate. Furthermore, a spouse who thereafter uses community funds to pay the deferred portion could be subjected to liability for bad faith or fraudulent management. La. Civ. Code art. 2354. The measure of loss to the other spouse should be the investment value of the money that has been diverted.

71. See Huie, Separate Claims to Reimbursement from Community Property in Louisiana, 27 Tul. L. Rev. 143, 143-44 (1953). Sometimes the judiciary has overzealously or unreasonably effectuated the policy when the spouse's separate claim could have been recognized.

the landowner and thereby recognizes land ownership as the superior property right, is totally absent in a credit sale arrangement. If a spouse mixes both community and separate funds to acquire something, the thing acquired would be community unless the community funds used were inconsequential. This classification rule, recognized long before the revision, reasonably favors the community over the spouses' separate estates. If the Curtis "downpayment only" test is followed, and a spouse is permitted to acquire a separate thing by using separate funds for the downpayment when that spouse inevitably must use community funds for the credit portion, then that spouse would be treated more favorably than one who commingled funds in a cash acquisition. There does not appear to be any justification for treating the credit sale situation more leniently, and the policy favoring the community should apply equally to both situations.

V. CONCLUSIONS

The credit sale cases decided before Curtis needed to be carefully scrutinized so that any jurisprudentially created rules failing to serve a valid classification function could be discarded. One objective of the pre-Curtis jurisprudence was discriminatory—to protect wives from "indulging in wild and ruinous speculation." The Curtis court's repudiation of this objective is commendable, but the court went too far by repudiating that portion of the jurisprudence that served a valid classification purpose. In place of the rejected jurisprudence, Curtis substituted a new test for classifying credit transactions, one which looks only to the source of funds for the downpayment to classify the property.

The test created by Curtis, the "downpayment only" test, while compatible with the current classification articles and with traditional precepts defining acquisition, is deficient in that its conception of acquisition is incomplete. The problem is that it ignores the source of repayment of the deferred portion of the price. Additionally, the policy promoted by the Curtis test is undesirable because it condones and even encourages self-seeking actions by spouses.

The discrimination effected by the repudiated jurisprudence could have been eliminated by extending the classification rules to husbands. Furthermore, despite a discriminatory objective, the jurisprudence promoted a non-discriminatory objective, extension of the reinvestment doctrine to credit sales. The rejected jurisprudence contained a reasonable classification rule: the property acquired is separate if the downpayment is made with separate funds, and if the spouse has the reasonable

73. See, e.g., Willets Wood Products Co. v. Concordia Land & Timber Co., 169 La. 240, 124 So. 841 (1929).
expectation of satisfying the credit portion of the price with separate funds. Like the *Curtis* "downpayment only" test, the ample paraphernal effects test is consistent with current classification rules and with traditional principles concerning acquisition. Furthermore, the ample paraphernal effects test reasonably favors the community over the spouses' separate estates, thus promoting a desirable policy. The courts should abandon the *Curtis* downpayment only test and reinstate the ample paraphernal effects test for classifying credit acquisitions.