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THE SPANISH COMMUNITY OF GAINS IN 1803: *SOCIEDAD DE GANANCIALES*

Nina Nichols Pugh*

Introduction

The publication of the de la Vergne copy of the Digest of 1808 with Moreau Lislet's source notes removes the last shred of doubt that the matrimonial regimes existing in Louisiana at the time of its purchase by the United States were Spanish in origin and nature.¹ This makes it even more imperative to examine the

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

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

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

Comm. = COMMENTARIES

D. = DIGEST OF PANDECTS

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

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

FEB. CONT. = FEBRERO, LIBRERIA DE ESCRIBANOS (1739); *Contratos, Trata de*

FEB. JUL. = FEBRERO LIBRERIA DE ESCRIBANOS; *Juicos, Trata de* (1739)

Gomez = GOMEZ, COMMENTARIUM AD LEGES TAURI (1701)

L. ESTILO = LEYES DE ESTILO

L. TORO = LEYES DE TORO

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

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

N.R. = NOVISIMA RECOMPILACION

NUEVA R. = NUEVA RECOMPILACION

PART. = LAS SIETE PARTIDAS

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

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

1. A copy of *A Digest of the Civil Laws Now in Force in the Territory of Orleans* (1808) containing on interleaves the manuscript source notes of the co-drafter Moreau Lislet was discovered in recent years in the hands of the family of the deceased Charles E. de la Vergne of New Orleans. See Pascal, *A Recent Discovery: A Copy of the "Digest of the Civil Laws" of 1808 with marginal source References in Moreau Lislet's Hand*, 26 LA. L. REV. 25-27 (1966); Dainow, *Moreau Lislet's Notes on Sources of the Louisiana Civil Code of 1808*, 19 LA. L. REV. 43 (1958); Franklin, *An Important Document in the History of American Roman and Civil Law: The de la Vergne Manuscript*, 33 TUL. L. REV. 35 (1958); Franklin, *Libraries of Edward Livingstone and of Moreau Lislet*, 15 TUL. L. REV. 401, 404, n.10 (1941). The de la Vergne family consented to the reprinting of this copy of the Digest in a limited edition, which soon will be released jointly by the Law Schools of Louisiana State University and Tulane University. On one side of the interleaves Moreau Lislet listed the "actual" sources of the Digest article by article; on the other side he listed section by section citations to various corresponding legislative and doctrinal materials in other civil law systems. The sources given for articles 3.5.63-3.5.85, which are in the Section "Of the Partnership or Community of Acquets and Gains" are almost

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

I. NATURE AND COMPOSITION OF THE COMMUNITY

Under the Spanish law prevailing at the time that Louisiana was ceded to the United States, a community of gains, or *sociedad de gananciales*, came into existence with a valid or a putative marriage,² unless the parties had contracted previously against such a regime.³ The actual beginning of the community dated from the time of the cohabitation of the parties,⁴ when they were

entirely Spanish. There is an occasional reference to Pothier in several articles regarding the acceptance or renunciation of the community by the wife, but even here the references are usually in addition to the Spanish citations. Neither the French *Code Civil* nor any *projet* of it, all of which were available to the redactors of the Digest, were cited even once. The de la Vergne volume, therefore, provides convincing proof that the Spanish law was the principal source of Louisiana's community system under the Digest of 1808. The few changes made by the Civil Code of 1825 did not alter the basic pattern of this system.

2. Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 4 & 5; Azevedo, Comm. to same law, nos. 1, 2, 5; Feb. Jul. 1.1.4.1.33; 1.1.4.4.87.

3. FUERO JUZGO, 4, 2, 17; PART. 4.11.24; L. TORO 55; Llamas y Molina, Comm. to same law, nos. 8, *et seq.*; Matienzo Comm. to N.R. 10.4.1, Gloss I, nos. 58, 67.

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

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

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

4. FUERO REAL. 3.3.1; L. ESTILO 205; NUEVA R. 5.9.2; N.R. 10.4.1; Matienzo, Comm. to same law, Gloss I, nos. 41, *et seq.*; Azevedo, Comm. to same law, nos. 4 (even if the husband had not carnally known the wife) & 14; Feb. Jul. 1.1.4.1.2. *Cf.* Sp. Civ. CODE art. 1393.

presumed to have begun to work and share together.⁵ The community continued, even despite the physical separation of the parties,⁶ so long as they intended to maintain a marital union. Since it was the living together which was the basis of the sharing, the community ceased when the spouses began to live separate and apart with no intention of preserving the marriage.⁷ Sharing in community gains by the innocent party continued, however, where there was an enforced separation due to the fault of one of the parties.⁸

In Spanish legal concept the spouses were deemed to have formed a partnership⁹ by their marriage, the capital of which was represented by their separate patrimonies and energies. All acquisitions, fruits, profits, and gains of whatever nature, which resulted from the work, industry and skill of either or both of the spouses fell into the common fund¹⁰ to be held between them until the dissolution of their marriage by death¹¹ or separation of bed and board,¹² at which time the spouses, or the surviving spouse and the heirs of the other, would share equally in the gain realized¹³ as well as in debts incurred during the marriage

5. Feb. Cont. 1.1.22.242.

6. N.R. 10.4.1; Matienzo, Comm. Gloss I, nos. 43, 45 *et seq.*; Azevedo, Comm. to same law, no. 14; Feb. Jui. 1.1.4.1.2; 1.1.4.2.48.

7. Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 56 & 57; Azevedo, Comm. to same law, no. 14.

8. Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 45-55; Azevedo, Comm. to same law, no. 14. *See also* text accompanying note 220 *infra*.

9. Matienzo, Comm. to N.R. 10.4.1, Glosses I-III; Azevedo, Comm. to same law, no. 20, *et seq.*; Matienzo, Comm. to N.R. 10.4.2, Gloss I; Gutierrez, *Quaestio CXVIII*, no. 5, *et seq.*; Matienzo, Comm. to N.R. 10.4.8, Gloss I, no. 7. Although most of the above-cited writers speak in terms of a general partnership, Azevedo and Llamas y Molina refer to it as universal. Azevedo, Comm. to N.R. 10.4.4, no. 1; Llamas y Molina, Comm. to N.R. 10.4.8, no. 46. For distinctions between *sociedad conyugal* and *sociedad convencional* see Feb. Jui. 1.1.4.4.87. For fundamental character of *sociedad de gananciales* see 5 CASTAN TOBENAS, DERECHO CIVIL ESPAÑOL, pt. I, at 196-208, especially 206-08 (1954).

Even today the Spanish consider the regime of community of gains in terms of a partnership and provide that where the special rules of the *sociedad de gananciales* are silent, the general rules of partnership will apply (Sp. Civ. Code art. 1395). *Contra*, LA. Civ. Code art. 2807.

10. FUERO REAL. 3.3.1, 2; NUEVA R. 5.9.2-3, 5; N.R. 10.4.1-2, 5; Feb. Cont. 1.1.22.241; Feb. Jui. 1.1.4.1.1-43. For exceptions which do not fall into the common fund see Feb. Cont. 1.1.22.242-50; Feb. Jui. 1.1.4.2.44-72.

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

11. *See* notes 184, 190 *infra*.

12. *See* notes 225-39 *infra*.

13. FUERO REAL. 3.3.1; NUEVA R. 5.9.2; N.R. 10.4.1; Matienzo, Comm. to N.R. 10.4.6, Gloss II, no. 2; Feb. Jui. 1.1.4.1.1-4, 6, 38. This was in contradistinction to the earlier law under which the spouses shared in proportion to the amount of goods they brought into marriage. *See* FUERO JUZGO. 4.2.17.

and relating to it.¹⁴ In the words of Matienzo the partnership was based on "the fact of their undivided habit of life ordained by both natural and divine law, the fact of the mutual love between husband and wife, which should be encouraged. . . ."¹⁵

Assets

Excluded from the *sociedad de gananciales* were all assets of the spouses at the time of marriage.¹⁶ For the wife this meant all of her separate assets, dotal, paraphernal, and other. For the husband it meant his separate patrimony. Even assets the acquisition of which had been begun before marriage, but not completed until after marriage, remained the separate assets of the spouse initiating the acquisition process,¹⁷ with the right of reimbursement for the purchase price or expense supplied.¹⁸

A usufruct reunited with the naked ownership of the particular asset after marriage became the separate asset of the naked owner,¹⁹ because its acquisition had been begun prior to marriage. By the same principle an asset which was acquired by prescription during marriage belonged to the community or to one of the spouses, depending upon whether title by prescription had begun to run before marriage or after.²⁰

An asset sold by a spouse preceding marriage with the right of repurchase (*retractus*) became the separate asset of the spouse exercising the right of repurchase after marriage.²¹ If the asset had increased in value in the meantime, the separate patrimony enjoyed the profit. If community funds were used for repurchase, the spouse or the heirs of the spouse who had exercised the right owed the other spouse reimbursement for one-half of the funds actually expended.²²

14. FUERO REAL. 3.20.14; L. ESTILO 207. See also notes 141-42 *infra*.

15. Comm. to N.R. 10.4.1; Gloss I, no. 13. See also Feb. Jul. 1.1.4.2.48. Cf. Feb. Jul. 1.1.4.4.87.

16. FUERO REAL. 3.3.3.; NUEVA R. 5.9.4, 5; N.R. 10.4.3, 4; L. ESTILO 203; Feb. Jul. 1.1.4.1.4.

17. Gutierrez, *Quaestio* CXVI, nos. 1 & 2; Azevedo, Comm. to N.R. 10.4.1, nos. 16, 23, 24. Matienzo, Comm. to same law, Gloss I, no. 87.

18. Gutierrez, *Quaestio* XCVI, no. 2; Azevedo, Comm. to N.R. 10.4.1, no. 16.

19. Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 87-92; Azevedo, Comm. to same law, no. 23; Gutierrez, *Quaestio* CXVI, no. 1; Feb. Cont. 1.1.22.248; Feb. Jul. 1.1.4.1.9.

20. Azevedo, Comm. to N.R. 10.4.1, no. 24.

21. Gutierrez, *Quaestio* CXVI, no. 2; Feb. Jul. 1.1.4.1.23. Cf. Gutierrez, *Quaestio* CXVI, no. 3; Azevedo, Comm. to N.R. 10.4.1, no. 23; Feb. Jul. 1.1.4.1.23; See also Feb. Jul. 1.1.4.1.13.

22. Gutierrez, *Quaestio* CXVI, no. 3; Feb. Jul. 1.1.4.1.23. See also Feb. Jul. 1.1.4.1.13.

All acquisitions by lucrative title, such as legacies, inheritances, or donations to either spouse individually, also were excluded from the common fund,²³ although their fruits were not.²⁴ Gifts to both spouses, however, fell into the common fund.²⁵ That portion of remuneratory gifts in excess of the value of the service rendered became the separate asset of the donee.²⁶

Just as all assets acquired prior to marriage remained separate, so too all debts incurred by either spouse prior to marriage remained the separate obligations of the spouse incurring them.²⁷

Earnings

Since the *sociedad de gananciales* was built upon the labor and industry of the contracting partners, all earnings, acquisitions, and gains resulting therefrom, or obtained by onerous exchange for things so acquired, became community assets.²⁸ No distinction was made between the earnings of the husband

23. Fuero Juzgo. 4.2.17; Fuero Real. 3.3.1; 3.12.8; Nueva R. 9.5.2; N.R. 10.4.1 & 2; Matienzo, Comm. to N.R. 10.4.1, Gloss IV; Comm. to N.R. 10.4.2, Glosses II-IV, Gloss VI, no. 1; Azevedo, Comm. to same law, nos. 6-10; Azevedo, Comm. to N.R. 10.4.3, nos. 2, 6-12; Gutierrez, *Quaestio* CXX, nos. 1-14; Feb. Cont. 1.1.22.244. See also Feb. Jui. 1.1.4.1.25.

See the following cases in which land grants by the Spanish government in Louisiana were held to be the separate asset of the husband: M. & F. Gayoso de Lemos v. Garcia, 1 Mart.(N.S.) 324 (1823); L. & F. Frique v. Hopkings, 4 Mart.(N.S.) 212 (1826); Heirs of Rouquier v. Executors of Rouquier, 5 Mart.(N.S.) 98 (1826); Hughey v. Barrow, 4 La. Ann. 248 (1849).

24. Azevedo, Comm. to N.R. 10.4.5, no. 2; Feb. Jui. 1.1.4.1.11.

25. FUERO REAL. 3.3.1; NUEVA R. 5.9.2; N.R. 10.4.1; Matienzo, Comm. to same law, Gloss IV, nos. 1 & 2; Llamas y Molina, Comm. to N.R. 10.4.10, nos. 22, 24-26; Feb. Cont. 1.1.22.241. See also Feb. Jui. 1.1.4.1.25.

26. Matienzo, Comm. to N.R. 10.4.2; Gloss VI, nos. 2-7. "Military property," or *bienes* given to the husband in view of his military service to the king, seems to have fallen into the same category, although differentiation was made on the basis of whether or not the husband was in receipt of pay while serving the king. If he served the king at the expense of the community of gains, all his military acquisitions became assets of the community. If he were being paid by the king, however, while engaged in military service, all *bienes* acquired in war or given to him by the king became his separate assets. FUERO REAL. 3.3.2; NUEVA R. 5.9.3 & 5; N.R. 10.4.2 & 5.

See also Matienzo, Comm. to N.R. 10.4.2, Gloss V, and Gloss VI, nos. 8-9; Gutierrez, *Quaestio* CXIX, *Quaestio* CXX, no. 15; Azevedo, Comm. to N.R. 10.4.3, nos. 13 & 14; Llamas y Molina, Comm. to N.R. 10.4.10, nos. 19, 21 & 23; Feb. Cont. 1.1.22.244; Feb. Jui. 1.1.4.1.19-20.

27. FUERO REAL. 3.20.14; L. ESTILO 207; Feb. Cont. 1.1.22.241. See notes 120-24 *infra*.

28. FUERO REAL. 3.3.1, 2; NUEVA R. 5.9.2, 3; N.R. 10.4.1, 2; Gutierrez, *Quaestio* CXX, no. 3.

and wife.²⁹ If one spouse were richer than the other,³⁰ if one spouse had no income at all,³¹ the spouses nevertheless shared equally. The wife was permitted to share in the earnings of her husband, to the extent of one-half, because her services and contributions to the partnership were deemed to be of equal value to his,³² whether or not she earned a salary equal to her husband's or offered income from her patrimony equal to his.

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

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

Acquisitions

Everything acquired by either spouse after marriage was presumed to belong to the community of gains until it had been proved to be a separate asset of one of them.³⁶ *All purchases made after marriage*³⁷ with community funds³⁸ became commu-

29. FUERO REAL. 3.3.3; NUEVA R. 5.9.4; Llamas y Molina, Comm. to N.R. 10.4.6, no. 15.

30. Matienzo, Comm. to N.R. 10.4.1, Gloss I, no. 8.

31. Matienzo, Comm. to N.R. 10.4.5, Gloss IX, no. 1; Feb. Jul. 1.1.4.1.3.

32. Matienzo, Comm. to N.R. 10.4.1, Gloss I, no. 8.

33. See text accompanying note 6 *supra*.

34. Gutierrez, *Quaestio* CXX, no. 3.

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

36. L. ESTILO 203; NUEVA R. 5.9.1; N.R. 10.4.; Matienzo, Comm. to same law, Gloss II, nos. 1 & 2; Azevedo, Comm. to same law, no. 1; Llamas y Molina, Comm. to N.R. 10.4.6, no. 7; Feb. Jul. 1.1.4.1.4. Cf. SP. CIV. CODE art. 1407; LA. CIV. CODE art. 2405.

37. FUERO REAL. 3.3.1; NUEVA R. 5.9.2; N.R. 10.4.1 ("*Toda cosa que el marido y muger ganaren o comparen, estando de consumo. . .*"); Matienzo, Comm. to N.R. 10.4.1, Gloss II, nos. 1 & 3; Gutierrez, *Quaestio* CXVII, nos. 1 & 3.

Cf. SP. CIV. CODE art. 1401(1); LA. CIV. CODE art. 2402. See 9 MANRESA, art. 1401.

38. Feb. Jul. 1.1.4.1.6.

nity acquisitions by onerous title, since they resulted ultimately from the labor, industry, and skill of the marital partners.³⁹

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

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

39. FUERO REAL. 3.3.1 & 2; NUEVA R. 5.9.2, & 3; N.R. 10.4.1 & 2; Azevedo, Comm. to N.R. 10.4.3, no. 1; Llamas y Molina, Comm. to N.R. 10.4.6, nos. 3, 12, & 17. See also SP. CIV. CODE art. 1401(2).

40. FUERO REAL. 3.3.2; NUEVA R. 5.9.3; N.R. 10.4.2; Feb. Jui. 1.1.4.1.7. Cf. SP. CIV. CODE art. 1396(4); LA. CIV. CODE art. 2334.

41. Feb. Jui. 1.1.4.1.7.

42. FUERO REAL. 3.4.11; Matienzo, Comm. to N.R. 10.4.1, Gloss II, nos. 4 & 6; Azevedo, Comm. to same law, no. 16; Gutierrez, *Quaestio* CXVII, no. 1; Feb. Jui. 1.1.4.1.7; cf. SP. CIV. CODE art. 1396(3).

43. V CASTAN TOBENAS, *DERECHO CIVIL ESPAÑOL*, pt. 1, at 212-13 (1954). For a modern discussion of subrogation principle, which has not varied from the ancient, see 9 *MANRESA* 568-70.

44. Matienzo, Comm. to N.R. 10.4.1, Gloss II, nos. 4 & 6; Gutierrez, *Quaestio* CXVII, no. 1; Feb. Jui. 1.1.4.1.7. See also FUERO REAL. 3.4.11.

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

45. Matienzo, Comm. to N.R. 10.4.1, Gloss II, no. 6; Gutierrez, *Quaestio* CXVII, no. 2. See also Feb. Jui. 1.1.4.1.18.

In general it may be said that the classic principle of acquisition used by the ancient Spanish to determine the nature and ownership of assets was that of acquisition by lucrative or onerous title.⁴⁶ Was the item under consideration acquired by the labor and industry and productive efforts of the spouses or of one of them, or with assets themselves so acquired; or was it acquired by gift, succession, inheritance, or similar device? In ancient Spain it was not the time of the acquisition alone which determined the nature of the item, but also the source of the acquisition.

Fruits

Consistent with the assumption that the separate patrimonies of the two spouses formed part of the capital for the marital partnership, the Spanish held that the fruits from both spouses' separate assets fell into the common fund.⁴⁷ Contrary to the provisions of Louisiana law⁴⁸ the fruits of the Spanish wife's *paraphernalia* fell into the community whether she managed them or whether her husband did.⁴⁹ There was no distinction in this respect between the non-dotal assets of the wife and those of her husband under ancient Spanish law.⁵⁰

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

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

46. See ESCRICHE, *DICCIONARIO, Lucrativo and Oneroso*. See also Matienzo, Comm. to N.R. 10.4.6, Gloss II, no. 2; Llama y Molina, Comm. to same law, nos. 3, 17; Azevedo, Comm. to 10.4.2, 3, no. 2; Asso y Manuel, *INSTITUTES*, 1.7.5.1.

47. FUERO REAL. 3.3.3; NUEVA R. 5.9.4, 5; N.R. 10.4.3, 5. Matienzo, Comm. to N.R. 10.4.3, Glosses I and II, no. 1.

48. LA. CIV. CODE arts. 2386, 2402, 2407.

49. Azevedo, Comm. to N.R. 10.4.3, no. 22.

50. This principle was said by de Funiak to have derived from earlier Visigothic laws and customs of parts of Europe and to have been based upon the idea that, while retaining actual ownership of their separate assets, the partners to a marriage used them unselfishly for the benefit of their mutual undertaking—the marriage. 1 DE FUNIAK § 71, and text accompanying note 42 *supra*.

51. Matienzo, Comm. to N.R. 10.4.5, Gloss V, nos. 1 and 2; Azevedo, Comm. to N.R. 10.4.3, nos. 16-19.

52. Matienzo, Comm. to N.R. 10.4.5, Gloss V, no. 3; Azevedo, Comm. to 10.4.3, nos. 19-21; Gutierrez, *Quaestio* CXVI, no. 4; Feb. Jul. 1.1.4.1.8, 10.

53. Matienzo, Comm. to N.R. 10.4.1, no. 88; Azevedo, Comm. to same law, no. 8; Gutierrez, *Quaestio* CXVI, no. 1; Feb. Jul. 1.1.4.1.18.

were the fruits and income from it. If improvements were made on a separate asset with funds derived from the conversion of other separate assets of the same spouse, the enhanced value was not shared by the spouses in that case either.⁵⁴ On the other hand where improvements were made, or the value of a spouse's separate asset enhanced through the expenditure of common funds or through the industry and labor of one or both of the spouses, the community was owed reimbursement by the separate patrimony upon dissolution.⁵⁵ The building erected on the separate property became the asset of the spouse owning the land upon which it had been built.⁵⁶ The other spouse and his or her heirs were entitled to reimbursement, however, at the rate of one-half the cost of the building⁵⁷ rather than one-half the increased value.

Fruits of things acquired during marriage, the ownership of which was not shared by the spouses, such as royal offices,⁵⁸ fell into the common fund to be shared between the spouses, just as in the case of notarial or purchased offices (*castrenses* or *quasi-castrenses*).⁵⁹

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

54. FUERO REAL. 3.4.11.

55. FUERO REAL. 3.4.3. & 9; Azevedo, Comm. to N.R. 10.4.1, no. 8; Comm. to N.R. 10.4.5, no. 4; ASSO Y MANUEL, INSTITUCIONES 1.7.5.2; Feb. Jul. 1.1.4.3.73-75.

56. Azevedo, Comm. to N.R. 10.4.5, no. 4; ASSO Y MANUEL, INSTITUCIONES 1.7.5.2. Accord: LA. CIV. CODE, arts. 498, 504, 506-508. Contra, SP. CIV. CODE art. 1404.

If the improvements consisted of vineyards, for example, instead of buildings, the vineyards themselves were divided in half, with half being retained by the owner of the ground on which they were planted, and the other half going to the spouse or his heirs. FUERO REAL. 3.4.3, 9; Feb. Jul. 1.1.4.3.74-75; ASSO Y MANUEL, INSTITUCIONES 1.7.5.2.

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

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

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

59. Matienzo, Comm. to N.R. 10.4.5, Gloss IV, nos. 1-6, 8; Azevedo, Comm. to same law, nos. 3, 5; Gutierrez, *Quaestio* CXIX, no. 7; Feb. Cont. 1.1.22.244; Feb. Jul. 1.1.4.1.14-15, 21-22. But see Azevedo, Comm. to N.R. 10.4.3, no. 20.

funds except where derived from the conversion of a particular separate asset into cash, or by inheritance or donation during marriage.

Delicts

Spanish law anciently made provision for compensation for injuries to the person or assets of another to the extent that the person had been injured or the assets damaged or destroyed.⁶⁰ Although the husband originally was required to represent his wife in suit for her injuries,⁶¹ from the time of the sixteenth century onward, the wife could sue for her own injuries without the assistance of her husband.⁶² The husband continued to sue for losses to the community, however, including losses resulting from injuries to the wife, as will be discussed more fully later.⁶³

Compensation for injuries to the partnership, whether for damage to persons or things, fell into the common fund.⁶⁴ Damages for injuries to the person or honor of one of the spouses, however, became the separate asset of the injured person,⁶⁵ either on the principle of acquisition by lucrative title, since the damages acquired in the injury action were not acquired by the labor and industry of the spouse, or on the principle of real subrogation, inasmuch as the damages could have been considered as given in exchange for the injury. If the injury deprived the partnership of the injured person's earnings or services, it too was thought to have suffered compensable damage,⁶⁶ for which the husband sued in his capacity as head of the community of gains. The expenses of the injury such as the doctor's bills, medicines, etc., also were considered an expense of the community,⁶⁷ properly recoverable by the husband.

Under Spanish law a person was barred by his own fault

60. PART. 7.9.1, 6, 9; 7.15.2, 3, 6-28.

Although the Roman *delictus* was roughly equivalent to our "tort," implying a wrong to person or property for which an action for damages would lie, the ancient Spanish *delito* was defined as "every bad act done or committed willfully by one to the damage (*dano*) or discredit (*deshonra*) of another." It included what would be considered today a crime, in which case it would have been called *delito verdadero* (a real or true wrong), or *mal-fetria* (an offense).

61. PART. 7.9.9.

62. L. TORO 55; Llamas y Molina, Comm. on same law, no. 17.

63. See text accompanying note 176 *infra*.

64. PART. 7.15.2. Asso y Manuel, *Instituciones* 1.7.5.2.

65. PART. 7.9.6. See also PART. 7.34.22; L. TORO 77, N.R. 5.9.10; Feb. Jul. 1.1.4.2.44-45.

66. PART. 7.15.2.

67. Matienzo, Comm. to N.R. 10.4.2, Gloss VII, no. 1.

from recovery for damage to himself.⁶⁸ There is nothing to indicate, however, that the fault of one spouse was ever attributed to the other to bar an action for injuries under any "husband and wife are one" theory.⁶⁹ There was no obstacle,⁷⁰ therefore, to a wife's suit against her husband for any delict, including that of theft.⁷¹ Damages recovered became her separate asset on principles set forth above. The husband likewise could sue his wife for delicts, but not for theft.⁷²

Damages recovered in wrongful death actions,⁷³ well known to Spanish law and dating back to the Roman law,⁷⁴ also would have constituted community assets where recovered for the loss of the husband or wife.

Other

Life insurance, workmen's compensation, social security benefits, retirement pensions and annuities,⁷⁵ investment in corporation stocks and bonds, and other similar developments of modern life either did not exist or were not common in 1803; hence commentary upon them by the ancient Spanish scholars cannot be found.

II. OWNERSHIP AND MANAGEMENT

Ownership

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

68. PART. 7.15.6.

69. PART. 7.34.18. Cf. Feb. Cont. 1.1.22.241.

70. See notes 168, 171 *infra*.

71. PART. 7.14.4.

72. PART. 3.2.5; 7.14.4; Feb. Jui. 1.3.1.1.28.

73. PART. 7.15.3, 27. See also discussion of Roman and Spanish texts (import misunderstood) in briefs of counsel, *Hermann v. New Orleans & C. Ry.*, 11 La. Ann. 5 (1856).

74. D. 9.2.11 (slaves); D. 9.3.5.4, 5; See also VOET, COMMENTARIUS AD PANDECTAS, 9.3.4 (1778).

75. For life annuities and annual pensions, considered to be in the nature of donations, see Llamas y Molina, Comm. to N.R. 10.4.10, nos. 25 & 26. No. 27 immediately following would seem to imply that a pension to which a spouse had contributed during his or her working years might be considered *bienes gananciales*, since it was a product of their labor acquired while they were married. Cf. ASSO Y MANUEL, INSTITUCIONES, 1.7.5.2.

one-half of the *gananciales* which vested *ipso iure* at the moment the assets were acquired and even without delivery.⁷⁶

Whereas the wife owned⁷⁷ equally with her husband, he, as "business manager"⁷⁸ of the partnership, actually administered the community of gains. For this reason the husband of ancient Spain and the *sociedad* were identical in the eyes of all third persons, even as they are today in Spain.⁷⁹ In the Spanish concept the wife "had" (Spanish "*ayan*" from the Latin "*habere*") the *gananciales* in the sense of owning and possessing them; but she did not "hold" (Spanish "*tiene*" from the Latin "*tenere*") them. The husband, who was said "to have and to hold" the *gananciales*, was empowered to act in regard to them. He was described as "*in actu*" (in control) as well as "*in habitu*" (in present interest). The wife was only "*in habitu*" or "*in habitu et in creditu*" (in present interest as creditor) in regard to the *bienes gananciales*, but no less a co-owner.⁸⁰

The wife's right to own and possess one-half of the *gananciales* included the right to all possessory remedies,⁸¹ such as the right to acquire, retain, and to recover possession of them. These actions were not exercisable by her before the dissolution of the community of gains,⁸² however. Authority is ample to the effect

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

For misconception as to wife's ownership due to reliance upon a mistaken interpretation of Febrero see 1 DE FUNIAK §§ 98, 99.

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

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

79. See, e.g., 9 MANRESA 8, 150-51, 529, 540, 635, 637, 655, and 687.

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

81. Matienzo, Comm. to N.R. 10.4.1, Gloss III, nos. 20-23; Azevedo, Comm. to same law, nos. 19-21. See also Feb. Jul. 1.1.4.1.32.

82. Matienzo, Comm. to N.R. 10.4.1, Gloss III, no. 18; Gutierrez, *Quaestio* CVIII, nos. 14-17; Llamas y Molina, Comm. to N.R. 10.4.8, no. 82; Matienzo, Comm. to N.R. 10.4.8, Gloss II, no. 2 (moiety appertains to wife upon dissolution). See also Feb. Jul. 1.1.3.2.60; Feb. Jul. 1.1.4.1.30-32; Feb. Jul. 1.1.4.2.63; and *ESCRACHE, DICCIONARIO, Bienes Gananciales*, at 87, col. 2; 1 MANRESA, arts. 59-63, especially at 393.

that the wife as co-owner of the *gananciales* could have been sued⁸³ for her half share⁸⁴ of the common debts. It is probable, however, by analogy to the possessory actions, that suit could not have been brought against the wife until the community of gains had been dissolved, when the wife was said for the first time to possess "*in actu*," as well as in "*in habitu*."⁸⁵

Husband's administration

The husband's administration of the ganancial assets was considered full and general,⁸⁶ but subject to certain exceptions. He could make a moderate gift⁸⁷ and sell or dispose onerously of the *gananciales* without his wife's consent;⁸⁸ but he could not alienate or dispose of the community assets in fraud of his wife.⁸⁹ Nor could he dispose by last will and testament of more than his share of the *gananciales*,⁹⁰ inasmuch as testation looks forward to a future time at which the husband would no longer have the power to dispose of the whole of them.⁹¹ The wife could object to certain transactions and refuse to share in them;⁹² but this specific renunciation by the wife was not given effect until after the dissolution of the community of gains.⁹³

83. Matienzo, Comm. to N.R. 10.4.1, Gloss III, no. 16.

84. Matienzo, Comm. to N.R. 10.4.2, Gloss VII, no. 2; Azevedo, Comm. to N.R. 10.4.9, no. 18.

85. Matienzo, Comm. to N.R. 10.4.1, Gloss III, no. 18; Feb. Jul. 1.1.3.2.60.

86. NUEVA R. 5.9.5; N.R. 10.4.5; Matienzo, Comm. to same law, Gloss VI; Azevedo, Comm. to same law, nos. 8-21; Gutierrez, *Quaestio* CXXI; Feb. Jul. 1.1.4.1.29-30; Feb. Jul. 1.1.4.2.64-66. Cf. PART. 3.2.5 (husband given administration of wife's estate to supply his wants, when he stood in need, on condition to furnish her with what was necessary, according to her fortune and rank).

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

87. Feb. Jul. 1.1.4.2.65-66. Although much debated at one time, the gift-making power of the husband was resolved in his favor; see Matienzo, Comm. to N.R. 10.4.5, Gloss VI, nos. 3-11, 14-17; Gutierrez, *Quaestio* CXXI, Llamas y Molina, Comm. to L. Toro 53, nos. 9-10; Feb. Jul. 1.1.4.2.64-65; Feb. Cont. 1.1.22.245 (wry comment justifying husband's gift-making power in view of wife's prodigality). See also 1 DE FUNIAK § 121.

88. L. ESTILO 205; NUEVA R. 5.9.5; N.R. 10.4.5; Matienzo, Comm. to same law, Gloss VI, no. 2; Azevedo, Comm. to same law, no. 7; ESCRICHE, *DICCIONARIO, Bienes Gananciales*, at 87, col. 2; Feb. Jul. 1.1.4.1.29.

89. L. ESTILO 205; NUEVA R. 5.9.5; N.R. 10.4.5; Matienzo, Comm. to same law, Gloss VI, no. 2; Gloss VII; Azevedo, Comm. to same law, nos. 17-18; Llamas y Molina, Comm. to L. Toro 60, no. 10; Feb. Cont. 1.1.1.22.245; Feb. Jul. 1.1.4.1.30. Cf. PART. 5.10.13.

90. L. TORO 16, NUEVA R. 5.9.7; N.R. 10.4.8; Matienzo, Comm. to same law, Gloss I; Azevedo, Comm. to same law, nos. 1-12; Llamas y Molina, Comm. to same law, nos. 1-89; Feb. Cont. 1.1.1.22.250.

91. Azevedo, Comm. to N.R. 10.4.5, no. 15.

92. Matienzo, Comm. to N.R. 10.4.1, no. 60; Matienzo, Comm. to N.R. 10.4.9, Gloss I, no. 2.

93. 9 MANRESA 536-37.

Similarly the wife's action for her husband's fraud or for his acts prejudicial⁹⁴ to her share of the ganancial assets was available only after dissolution of the community of gains,⁹⁵ upon proof of the wrongful intent to defraud her.⁹⁶ If the husband's share of the *gananciales* in the hands of the heirs were insufficient to cover the amount of which the husband had defrauded her, the wife could have proceeded by action of nullity or rescission against the assets fraudulently alienated by the husband and then in the hands of third persons; but not otherwise.⁹⁷

The husband's power of administration was further limited by the fact that he was obliged to indemnify the wife upon dissolution for any losses resulting from his acting as surety for a third person.⁹⁸ The wife indeed shared in the losses as well as in the profits of the *sociedad*;⁹⁹ yet any losses due to debauchery, gambling, and dissolute living, where so excessive as to suggest wrongful intent and fraud, were not allowed to penalize the wife's share of the *gananciales*.¹⁰⁰ Just as in the case of other prejudicial acts by the husband, the wife's action for the husband's losses due to suretyship of third persons, gambling, or dissolute living, was reserved for accounting procedures at the dissolution of the *sociedad*.¹⁰¹

Wife's administration of her separate assets

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

94. For definition of "acts prejudicial to the wife" see 9 MANRESA, arts. 1412-1416, at 641-42, which seem to support the implications of Feb. Cont. 1.1.1.22.245. See also 9 MANRESA 665.

95. Feb. Cont. 1.1.22.245 (by implication); Feb. Jui. 1.1.4.1.30; Feb. Jui. 1.1.4.2.63, 65-66. See also 9 MANRESA 641-42, 665-66, 687-88; 28 ENCICLOPEDIA JURIDICA ESPAÑOLA 895 (1910).

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

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

See also 9 MANRESA arts. 1412-1416, at 641.

97. Feb. Cont. 1.1.22.245; Feb. Jui. 1.1.3.1.49; Feb. Jui. 1.1.4.2.63; Asso y MANUEL, INSTITUCIONES 1.7.5.2. The law remains the same today. See 9 MANRESA arts. 1412-1416, at 641-46.

98. Azevedo, Comm. to N.R. 10.4.5, nos. 18, 20, 21; Gutierrez, *Quaestio CXXVIII*, nos. 1-4; Feb. Jui. 1.1.4.2.68-69.

99. See, e.g., Matienzo, Comm. to N.R. 10.4.1, Gloss I and Gloss VII, nos. 1 & 2.

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

101. Matienzo, Comm. to N.R. 10.4.5, Gloss VI, nos. 7 & 12; Gutierrez, *Quaestio CXXI*, nos. 7 & 8; Feb. Jui. 1.1.4.2.68-69.

interfere in any way with her husband's administration of it during its existence was in direct contrast to her capacity to administer her separate assets (*propios bienes*) which she had not placed under the administration of her husband specifically and in writing¹⁰² as *paraphernalia*.¹⁰³ Even when she administered her separate assets herself, it was still necessary for her husband to authorize most of her contracts and all of her appearances in court in regard to her patrimony,¹⁰⁴ but this requirement of authorization seems to have been a mere formality,¹⁰⁵ easily obtained by court order, if the husband appeared reluctant to give it.¹⁰⁶ Any contracts made by the wife without her husband's or the court's authorization, which in fact benefited her, were considered valid contracts.¹⁰⁷

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

102. PART. 4.11.17; ASSO Y MANUEL, INSTITUCIONES 1.7.2; Feb. Jul. 1.1.3.1.43; Feb. Cont. 1.1.2.1.11. In case of doubt the married woman was presumed to have retained administration of her *bienes*. Feb. Jul. 1.1.3.1.42. According to Castan Tobenas the most frequent situation was that in which the wife merely let her husband administer her *paraphernalia* without giving him the administration formally and in writing. See V CASTAN TOBENAS, DERECHO CIVIL ESPAÑOL, pt. 1, at 356 (1954). This is probably what is meant by Azevedo in his Comm. to N.R. 10.4.3, no. 22.

Cf. SP. CIV. CODE art. 1384 and LA. CIV. CODE arts. 2384-2386. In Louisiana the presumption has always been directly contrary to that of Spain. If there is doubt, the husband is presumed to administer the wife's *paraphernalia*. See Breaux v. LeBlanc, 16 La. Ann. 145 (1861); Hall & Lisle v. Wyche, 31 La. Ann. 734 (1879); Bank of Coushatta v. Coats, 170 La. 163, 127 So. 587 (1930).

For general discussion of administration of *paraphernalia* see 9 MANRESA, art. 1384, at 471-83; V CASTAN TOBENAS, DERECHO CIVIL ESPAÑOL pt. 1, at 355-68 (1954).

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

104. L. TORO 54-56, NUEVA R. 5.3.1-3; N.R. 10.20.10 and N.R. 10.1.11-12, corroborating FUERO REAL. 1.11.8; 3.18.5; 3.20.13 (no authorization needed by wife for individual acts in trade, once permission had been given to be engaged in trade which, according to Gloss of Montalvo 3.20.13 was due to the fact that she was engaged in man's work); Matienzo, Comm. to N.R. 10.4.1, Gloss II, no. 2; Feb. Cont. 1.1.5.75-76; 2.4.4.109; Feb. Jul. 1.2.1.1.27; SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, art. 482. (1851).

See also ESCRICHE, DICCIONARIO, *Mujer Casada*, at 245, col. 2; 9 MANRESA, art. 1384, at 475-81 (particularly for discussion of L. TORO 55 as limiting administrative rights given married women by PART. 4.11.17).

Cf. SP. CIV. CODE arts. 59-63, 65-66 (incapacity of married woman said by Manresa to be deduced from husband's duty of protection. 1 MANRESA 404) and LA. CIV. CODE arts. 121-135 (now superseded by LA. R.S. 9:101-105 so far as the married woman over eighteen and not interdicted is concerned).

105. L. TORO 57; NUEVA R. 5.8.4; N.R. 10.4.13. See 1 DE FUNIAK 319-20.

106. Cf. ESCRICHE, DICCIONARIO, *Bienes Extra-dotales*, at 84, col. 2 (if the husband denies the authorization, the judge cannot compel it).

107. L. TORO 58; NUEVA R. 5.3.5; N.R. 10.1.14; L. TORO 55, Comm. by Llamas y Molina, nos. 6 & 7; SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, art. 483 (1851). See also text accompanying notes 133-136 *infra*.

applied to the administration of dowry.¹⁰⁸ Consequently, in the event of the husband's mismanagement of her *paraphernalia* the wife could avail herself of the same action prevailing in the case of the mismanagement of her dowry. Even during marriage the wife could require her husband judicially to surrender her *paraphernalia* (or her dowry) to her, place it in the hands of some third person, or give security so that he would not alienate it.¹⁰⁹ If the wife had reason to know of her husband's mismanagement of her *paraphernalia* or dowry and failed to take action against him, prescription began to run against her, because she was presumed to have consented to his mismanagement by her silence.¹¹⁰ The principal remedy of the wife, however, both in the case of *paraphernalia* and of dowry, was to take action on the tacit mortgage which she held on her husband's entire patrimony, including his separate assets and his share of the *gananciales*, for the amount of her separate assets which he administered or had received as dowry.¹¹¹

108. PART. 4.11.17; Feb. Jui. 1.1.3.1.43. It did not enjoy the same privilege which the dowry had, however. See Azevedo, Comm. to N.R. 10.4.3, No. 23; GOYENA, FEBRERO, 1.1.5.10.268 (1844). Cf. SP. CIV. CODE arts. 1367-81, 1391.

109. PART. 4.11.29. Cf. SP. CIV. CODE arts. 225-29, 1433 (action for civil interdiction in case of prodigality), LA. CIV. CODE arts. 2387, 2391, LA. R.S. 9:291 (1950) (action for restitution of paraphernal effects) and LA. CIV. CODE art. 2425 (action for separation of property when dowry is in danger). But see V CASTAN TOBENAS, DERECHO CIVIL ESPAÑOL, pt. 1, at 356 (1954), which indicates that today the right of administration given by the wife to the husband in the marriage contract cannot be withdrawn, because it would vary the marriage contract, which is now forbidden.

LA. CIV. CODE art. 2425, together with article 2430, has been interpreted to authorize the wife, not only to sue for the return of her dowry, but also to sue for a complete dissolution of the community. See, e.g., Davock v. Darcy, 6 Rob. 342 (La. 1844) (wife allowed to sue for separation of property to protect future earnings even though she had no dowry and no claim against her husband at the time); Childers v. Johnson, 6 La. Ann. 634 (1851); Robertson v. Conyngham, 9 La. Ann. 268 (1854) (no suit by wife possible without claim against husband); Snoddy v. Brashear, 13 La. Ann. 469 (1858); Burns v. Thompson, 39 La. Ann. 377, 384, 1 So. 913, 919 (1887). Even in pre-codification days a suit for separation of property was interpreted as a suit for dissolution of the community. See Labbe's Heirs v. Abat, 2 La. 553 (1831).

110. PART. 3.29.8; SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, art. 1409(5) (1851); Feb. Cont. 1.2.1.39. See also Feb. Jui. 3.3.2.170-71.

111. PART. 4.11.17; N.R. 10.4.2, Azevedo, Comm. nos. 22-24; Matienzo, Comm. to same law, Gloss VII, no. 6; Matienzo, Comm. to N.R. 10.4.3, Gloss II, no. 2; Azevedo, Comm. to N.R. 10.4.9, nos. 16, 17; Feb. Cont. 1.2.1.11, 50-54; Feb. Jui. 1.1.3.1.42 (wife had no privilege or preference, however).

Cf. SP. CIV. CODE arts. 1362, 1384; 9 MANRESA 392-94, 696; LA. CIV. CODE arts. 2376, 2390. See Cassou v. Blanque, 3 Mart.(O.S.) 390 (La. 1814); Dreux v. Dreux's Syndics, 3 Mart.(N.S.) 239 (La. 1825); DeGruy v. St. Pe's Creditors, 4 Mart.(N.S.) 404 (La. 1826) (no privilege, however).

See also notes 263-264 *infra*.

Wife's acts of administration relating to community assets

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

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

III. OBLIGATIONS AND LIABILITIES OF HUSBAND AND WIFE

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

*A. Fuero Real, 1255 A.D.
Book 3, Title 20, Law 14*

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

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

112. N.R. 10.4.9, Llamas y Molina, Comm. no 16. See also notes 143-144 *infra*.

113. PART. 6.16.13; L. TORO 54.59, Comm. by Llamas y Molina; ASSO Y MANUEL, INSTITUCIONES 1.2.1.3-4; SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, art. 42 (1851); SP. CIV. CODE arts. 1436, 1441; 9 MANRESA, 661-62. Cf. LA. CIV. CODE art. 64 (wife has similar rights only in case of declared absence of husband).

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

115. The text and the translations of these laws are from 2 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY (1943), and are based on the scholarship of Lloyd M. Robbins of San Francisco, California.

Translation

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

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

B. Leyes de Estilo, 1310 A.D.

Law 207.

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

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

Translation

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

Every debt that husband and wife have contracted in common, let them likewise pay it in common. And that is to say, that the debt that the husband contracts, although the wife

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

C. Novisima Recopilacion, 1805 A.D.

Book 10, Title 11. De las Deudas y Fianza.

Law 2

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

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

Translation

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

We, order, that for any undertaking or obligation that the husband shall contract in whatever manner, or for whatever reason, the wife shall not be bound, nor her properties. And we order, that for the debts that the husband shall owe, or for the security or pledge that he shall contract, the wife shall not be

charged, even though the debts are for our¹¹⁶ rents, taxes or legal claims. (Originally Laws 7 and 8, Title 3, Book 5, of the Nueva Recopilacion, promulgated in 1567, Law 7 of which was promulgated by Don Juan in 1387 and Law 8 of which was continued from the Laws of Toro, of 1505, which in turn was probably based on Law 5, Title 18, Book 3, of the Fuero Real of 1255.)

Law 3.

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

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

Translation

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

Henceforth, the wife cannot bind herself as surety for her husband, even though he states and alleges that such debt¹¹⁷ is converted to the benefit of the wife; and likewise we order that when husband and wife bind themselves jointly or severally, the wife shall not be liable for anything, unless it be proved that such debt was converted to her benefit, in which event we order that she be liable pro rata to the extent of such benefit; but if that which was converted to her benefit was anything that the husband was bound to supply her, such as clothing, food, and other necessaries, we order that as to this she shall not be liable in any way; it being understood that the aforesaid

116. I.e., the Crown's. 2 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, 24 (1943).

117. That is, the proceeds for which the debt was incurred. *Id.* at 25.

does not apply where the said joint undertaking and obligation was for money for our¹¹⁸ rents, taxes¹¹⁹ or claims against her. (Originally the 61st Law of Toro, promulgated by the Cortes at Toro in 1505, and continued as Law 9, Title 3, Book 5, of the Nueva Recopilacion of 1567.)

Ante-nuptial debts

Certain general principles may be drawn from these laws. First, as between the spouses, all debts contracted before marriage were chargeable only to the spouse contracting or incurring them.¹²⁰ If the husband, as administrator, with full use of the ganancial assets, voluntarily paid any of the debts which he or his wife had contracted before marriage, their respective patrimonies, including their share of the ganancial profits, would have been debited upon dissolution with the amount paid in satisfaction of ante-nuptial debts.¹²¹ Even though the husband and the community were identical in the eyes of third persons, nothing has been found either in the ancient Spanish authorities or in the early Louisiana decisions to indicate whether ante-nuptial creditors could have proceeded against the common assets during marriage for satisfaction of their credits,¹²² except in the case of legal charges as set forth below.

Under ancient Spanish law the legal obligation to support one's parents or children of a former marriage was considered an ante-nuptial debt inasmuch as the obligation arose prior to the existing marriage.¹²³ As an ante-nuptial debt the obligation of support was properly chargeable to the spouse whose parents or children were being supported. If this spouse's patrimony were insufficient, or if monies were not available to discharge this obligation since all fruits of the separate patrimonies fell into the common fund, payment could be made voluntarily from the common fund in satisfaction of the obligation of support. Upon dissolution the other spouse or his heirs could seek reimburse-

118. *See id.* at 24.

119. *Pechos*—taxes paid to the Crown by those who did not belong to the nobility.

120. Feb. Jui. 1.1.3.3.69.

121. Azevedo, Comm. to N.R. 10.4.9, nos. 20, 21; Gutierrez, *Quaestio CXXIX* Feb. Jui. 1.1.6.1.1; 2.

122. *See* 5 SANCHEZ-ROMAN, vol. 1, at 848, which raises the question of the value of the right given to ante-nuptial creditors to collect at dissolution. *See also* Feb. Jui. 1.1.3.3.69.

123. Gutierrez, *Quaestio CXXIX*; Matienzo, Comm. to N.R. 10.4.2, Gloss VII, no. 10. PART. 4.19.2 (a natural right); *accord*, Feb. Jui. 1.1.3.3.73-75.

ment for one-half the cost of the support of the parents or children during the marriage.¹²⁴

Separate debts contracted during marriage

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

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

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

124. Gutierrez, *Quaestio* CXXXIX. See Feb. Jul. 1.1.3.3.74-75.

125. Gutierrez, *Quaestio* CXXVIII, no. 4.

126. N.R. 10.11.2, Feb. Jul. 1.1.4.2.69. For modern definition of "personal debts," which probably has not changed from the ancient, see 9 MANRESA arts. 1385-1386, at 487.

127. Gutierrez, *Quaestio* CXXVIII, nos. 1-4. See also text accompanying notes 98, 100-101 *supra*.

128. Azevedo, Comm. to N.R. 10.4.10, nos. 15-17, 20; Matienzo, Comm. to same law, Gloss III; Llamas y Molina, Comm. to same law, nos. 29, 38-40; Matienzo, Comm. to N.R. 10.4.11, Gloss III; Llamas y Molina, Comm. to same law, nos. 10-14.

129. PART. 5.12.2.

130. D. 16.1; C. PAULI SENTENTIAE 2.11.

to renounce this law in her own favor.¹³¹ Later, under the Sixty-First Law of Toro,¹³² the wife was specifically prohibited from acting as surety for her husband, although she was permitted to contract jointly and solidarily with him for obligations benefiting her separate patrimony¹³³ and to act as surety where taxes and debts of the Crown were involved. If the benefit for which

131. PART. 5.12.3. Cf. *LaCroix v. Coquet*, 5 Mart.(N.S.) 527 (La. 1827).

132. Although a matter of much controversy over the centuries, it seems that the prohibition against the wife's acting as surety for her husband was not renounceable. See *Llamas y Molina*, Comm. on L. Toro 61, nos. 59-62, 72-77, 85, 87; *ALVAREZ POSADILLA*, Comm. on L. TORO 61.

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

Whether in reliance upon Febrero or upon other Spanish commentators, it is clear that, until prohibited by article 2412 of the Code of 1825, Louisiana courts did recognize the right of a married woman to renounce the prohibition against her acting as surety for her husband, provided that she did it expressly. See *Beauregard v. Piernas*, 1 Mart.(O.S.) 281 (La. 1811); *Brogner v. Forstall*, 3 Mart.(O.S.) 577 (La. 1815); *Bourcier v. Lanusse*, 3 Mart.(O.S.) 581 (La. 1815) (case decided on another point); *Chapillon v. St. Maxent*, 5 Mart.(O.S.) 166 (1817). See also *Treme v. Lanoux's Syndics*, 4 Mart.(N.S.) 230 (1826) (discusses all the above-cited cases, although decided on another point); and *Gasquet v. Dimitry*, 9 La. 592, 604 (1836) (dissent by J. Martin reveals his understanding of the Spanish law and of the early Louisiana law as permitting the renunciation by the married woman of the prohibition against acting as surety for her husband).

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

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

133. L. Toro 61; *NUEVA R.* 5.3.9; *N.R.* 10.11.3. See *Azevedo*, Comm. to *N.R.* 10.3.4, nos. 11-12. See also *Feb. Jul.* 1.1.3.3.68.

The rule that the contracts of a married woman when contracting as a principal would be valid only when they were proved to have enured to her own separate benefit and did not provide those things which her husband was already obligated by marriage to provide her has always been the law in Louisiana from earliest times, even though after the passage of Act 200 of 1855 it became unnecessary to prove her acts when properly made. See, e.g., *Chapillon v. St. Maxent*, 5 Mart.(O.S.) 166 (La. 1817); *Durnford v. Gross*, 7 Mart.(O.S.) 465 (La. 1820); *Lombard v. Guilliet*, 11 Mart.(O.S.) 453 (La. 1822); *Laves v. Chinn*, 4 Mart.(N.S.) 388 (La. 1826); *Perry v. Gerbeau*, 5 Mart.(N.S.) 14 (La. 1826); *Brandegge v. Kerr*, 7 Mart.(N.S.) 64 (La. 1828); *Sowell v. Cox*, 10 Rob. 68 (La. 1845); *Beauregard v. Her Husband*, 7 La. Ann. 293 (1852).

the wife contracted were in the form of food, clothing, or other necessities which the husband was required by the law of marriage to supply his wife,¹³⁴ she could seek reimbursement from him at dissolution of the regime.¹³⁵ If the wife discharged the obligation and if it were discovered subsequently that it had enured to the husband's separate benefit, she could demand indemnification from him in this instance also.¹³⁶ It is clear that the husband could bind himself solidarily with the wife for her separate obligation,¹³⁷ despite the fact that she could not bind herself for his.

As mentioned earlier,¹³⁸ it was only in limited instances that the separate patrimonies of the spouses actually had liquid funds with which to satisfy separate debts. As a result separate debts contracted during marriage very often were paid voluntarily with common funds, with the proper spouse's share of the ganancial profits being debited with them in the final accounting.¹³⁹ The whole matter of separate debts was of far less importance to the Spanish, however, because separate assets were used for the common benefit. Most transactions, although concerning the separate patrimony, in reality benefited the marital partnership and became its obligation.¹⁴⁰

Common debts

Since the Spanish *sociedad de gananciales* was built upon a theory of complete equality of benefit and mutuality of obligations, it was logical that the spouses should have shared equally in the debts incurred during marriage¹⁴¹ and contracted for its benefit.¹⁴² This principle prevailed whether the husband acted alone or together with his wife¹⁴³ or whether the wife acted in

134. PART. 3.2.5; SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, art. 56 (1851).

135. L. TORO 61, NUEVA R. 5.3.9; N.R. 10.11.3; Feb. Jui. 1.1.3.2.59.

136. Azevedo, Comm. to N.R. 10.3.4, no. 16.

137. L. TORO 61; NUEVA R. 5.3.9; N.R. 10.11.3.

138. See text accompanying notes 59-60 *supra*.

139. See notes 121, 124 *supra*. Cf. N.R. 10.4.2; Matienzo, Comm., Gloss VII, no. 6; and N.R. 10.4.3.

140. 1 DE FUNIAK § 160 at 450.

141. See Matienzo, Comm. to N.R. 10.4.2, Gloss VII, no. 1. Azevedo, Comm. to N.R. 10.4.3, no. 13; Feb. Cont. 1.1.22.241; Feb. Jui. 1.1.4.2.70. *But see* Llamas y Molina, Comm. to N.R. 10.4.8, nos. 47-51.

142. FUERO REAL. 3.20.14; Matienzo, Comm. to N.R. 10.4.1, Gloss III, no. 16; Matienzo, Comm. to N.R. 10.4.2, Gloss VII, no. 1; Llamas y Molina, Comm. to N.R. 10.4.8, no. 47; Gutierrez, *Quaestio* CXXVIII, no. 3; *Quaestio* CXXIX, no. 1; Azevedo, Comm. to N.R. 10.4.9, nos. 15-16.

143. L. ESTILO 207; Matienzo, Comm. to N.R. 10.4.2, Gloss VII, no. 2; Feb. Jui. 1.1.3.3.68.

her own name with the authorization of her husband, express or tacit, or as his mandatary.¹⁴⁴ These were the "common debts" for which, generally speaking, the "common assets" were liable.¹⁴⁵

In the ancient Spanish law there was no prohibition against the husband and wife contracting together¹⁴⁶ or obligating themselves jointly or solidarily in their common interests.¹⁴⁷ If they obligated themselves solidarily, either spouse could be compelled by third parties to pay the entire debt out of his separate assets;¹⁴⁸ but as to each other, each spouse remained liable for half only.¹⁴⁹ Contrary to the general rule that the wife was not personally liable on common debts so far as third persons were concerned,¹⁵⁰ creditors of the husband could obtain execution against the wife's separate assets where the debt had been contracted for support of the wife and where both the community assets and the husband's separate assets proved insufficient.¹⁵¹ Recovery was allowed in this instance, probably, for reasons completely apart from the matrimonial regime. Inasmuch as the wife had actually received the benefit of the husband's obligation, it seemed just that she should pay it, if able, rather than make the creditor suffer.¹⁵²

Renunciation

If the spouses had contracted against a community of acquets and gains before or at the time of marriage,¹⁵³ the wife did not become liable for the common debts. Nor did she become liable

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

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

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

147. L. ESTILO 207. See also Feb. Jui. 1.1.3.3.68.

148. L. ESTILO 207. Feb. Jui. 1.1.3.3.68. Cf. La. Digest of 1808, bk. 3, tit. 5, art. 85.

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

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

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

152. Cf. SP. CIV. CODE arts. 1362, 1385-86, and LA. CIV. CODE, arts. 2389, 2395, 2435, bearing in mind that in both Spain and Louisiana today husband and wife owe each other mutual economic support (SP. CIV. CODE, arts. 56, 142-53; LA. CIV. CODE art. 119).

153. See text accompanying note 3 *supra*.

for the common debts at the time of dissolution¹⁵⁴ if she renounced her right to share in the profits. The wife had the right to renounce not only at the time of marriage and upon its dissolution, but also *during* marriage,¹⁵⁵ even though this renunciation would be in effect a donation,¹⁵⁶ and donations were strictly forbidden between the spouses.¹⁵⁷ Once the wife had accepted the community; however, she became bound by her decision.¹⁵⁸

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

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

155. Matienzo, Comm. to N.R. 10.4.1, Gloss I, no. 60; Matienzo, Comm. to N.R. 10.4.9, Gloss I, no. 2; Llamas y Molina, Comm. to same law, no. 2; Gutierrez, *Quaestio* CXXVI, especially no. 1; Feb. Jul. 1.1.4.2.53-60. ESCRICHE, *DICCIONARIO, Bienes Gananciales*, at 88, col. 2. Renunciation during marriage was acknowledged in early Louisiana, too. See *Labbe's Heirs v. Abat*, 2 La. 553, 565 (1831).

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

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

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

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

157. PART. 4.11.4-5.

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

159. Gutierrez, *Quaestio* CXXVII, no. 4; Llamas y Molina, Comm. to N.R. 10.4.9, no. 18.

160. Matienzo, Comm. to N.R. 10.4.9, Gloss I, no. 6; Azevedo, Comm. to same law, nos. 5, 9-10; Gutierrez, *Quaestio* CXXVI, no. 5 and *Quaestio* CXXVII; Llamas y Molina, Comm. to same law, nos. 13-17, 19.

time;¹⁶¹ therefore, he remained personally liable for common debts at all times and despite the wife's renunciation during marriage.

The right of the wife to renounce during marriage and the right of either spouse to use separate funds and assets for the benefit of the community between them, thereby subjecting these assets to the possibility of being changed in nature, in reality permitted the spouses the right to vary their matrimonial agreements. The right to vary the marriage contract after marriage derived from the Roman law and prevailed widely in ancient Spain,¹⁶² although it is prohibited there today,¹⁶³ and has been prohibited in Louisiana since 1808.¹⁶⁴

Partnerships

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

161. Llamas y Molina, Comm. to N.R. 10.4.9, no. 16. It was specifically provided under the Louisiana Digest of 1808 that the wife who had obligated herself jointly with her husband remained bound toward those creditors, but with the right to reimbursement from the husband or his heirs, if she renounced. La. Digest of 1808, bk. 3, tit. 5, art. 85.

162. D. 23.4.1; D. 23.3.72(2.). See also 9 MANRESA, arts. 1319, 1320 at 144.

163. SP. CIV. CODE arts. 1319-1320.

164. La. Digest of 1808, bk. 3, tit. 5, art. 85, now LA. CIV. CODE art. 2329.

165. FUERO REAL. 3.20.13; SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, art. 482 (1851).

166. This rule is stated clearly in SP. CÓDIGO DE COMERCIO art. 5 (1829). No specific statement to this effect has been found in the older Spanish sources, but presumably the wife engaged in trade was considered as acting with her husband's consent, for the Spanish wife owed her husband obedience. SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, art. 38 (1851). Montalvo's Gloss to FUERO REAL. 3.20.13, stating that the wife engaged in trade is not required to obtain her husband's permission to every act of trade because she was engaged in man's work, is not inconsistent. He is addressing his comment to the need for protecting third persons dealing with the wife and not toward the question of whether or not she may be a public merchant without her husband's permission.

gains.¹⁶⁷ Thus the husband and wife in the ordinary community of gains were powerless to vary the net results of their matrimonial regime by entering into a commercial partnership.

Remedies

Just as husband and wife were able under the ancient Spanish law to acquire contractual liability against each other, so they were able to sue each other in satisfaction of it.¹⁶⁸ As already noted the wife could sue her husband in regard to her dowry and her *paraphernalia* administered by him.¹⁶⁹ There is no evidence, however, to indicate that the wife could sue her husband in regard to her ganancial interest until dissolution.¹⁷⁰

A wife's suit against her husband for any delict, including theft, was permissible.¹⁷¹ Husbands' suits against wives for delicts were permitted, also, but did not extend to theft.¹⁷²

Since a delict was a personal matter attributable to the fault of an individual, no delict of either spouse to a third person could be held to injure the innocent spouse or his share of the *gananciales*.¹⁷³ As mentioned below,¹⁷⁴ where the delict was committed against the Crown, it could proceed, even during marriage, to confiscate as delictual damages the interest of the spouse at fault in the *gananciales*,¹⁷⁵ provided that his separate assets were insufficient to satisfy the claim. In the case of wrongs against private individuals they might have to await dissolution and a final

167. Cf. LA. CIV. CODE arts. 131, 1786.

168. PART. 3.2.5; ESCRICHE, DICCIONARIO, *Mujer Casada* 244. See also Llamas y Molina, Comm. to L. TORO 55, no. 17.

169. See text accompanying note 109 *supra*.

170. Presumably La. Code of Practice art. 105 (1805) was intended to reflect the Spanish rules of suits between husband and wife when separated in property, or in regard to their separate capitals, but not their common assets. The Louisiana article has been severely distorted by the jurisprudence (leading case, Carroll v. Carroll, 42 La. Ann. 1071, 8 So. 400 (1890)) and later by the legislature (La. R.S. 9:291 (1960)) under the direction of the Louisiana State Law Institute, which apparently completely misunderstood the basic principles involved and forbids suits between husband and wife no matter what the matrimonial regime between them, except in the cases of legal separation, divorce, separation of property, and suit by the wife for recovery of her paraphernal assets.

171. PART. 7.14.4.

172. PART. 3.2.5; 7.14.4; Feb. Jui. 1.3.1.1.28.

173. PART. 5.10.7, 13; 7.34.18, 22; L. TORO 77; NUEVA R. 5.9.10; N.R. 10.4.10; Matienzo, Comm. to same law, Gloss II; Azevedo, Comm. to same law, nos. 1-7, 11-20; Llamas y Molina, Comm. to same law, nos. 1-2, 16-18, 29-43; Matienzo, Comm. to N.R. 10.4.2, Gloss VII, no. 11; Feb. Cont. 1.1.22.243; Feb. Jui. 1.1.4.2.44-45; ASSO Y MANUEL, INSTITUCIONES 1.7.5.2. Cf. SP. CIV. CODE art. 1410; 9 MANRESA art. 1410 at 623-25.

174. See text accompanying note 252 *infra*.

175. See note 252 *infra*.

determination of ganancial assets before they could execute their claims against the wrong-doer, if his separate assets were not adequate to meet his claims during marriage; but never could the ganancial interest of the innocent spouse be prejudiced by the other's delictual acts.

If the obligation being sued on had enured to the benefit of the marital partnership, the husband was the proper person to sue or be sued,¹⁷⁶ whether the obligation was for a delict, a matter of reviving a prescribed debt, a mortgage signed by husband and wife, or some other matter directly affecting the affairs of the community.

Creditors of existing obligations relating to the community of gains might have sued to set aside fraudulent transfers of ganancial assets made by the husband within one year from the day they were informed of them, provided that they could prove that the person receiving the assets, if a major, knew that the debtor had alienated them maliciously.¹⁷⁷ Donations *inter vivos* or *mortis causa* by the spouses also were subject to attack under the same conditions as in the case of fraud of the creditors' rights.¹⁷⁸

All losses to the separate things of the respective spouses were to be borne ultimately by the community,¹⁷⁹ except in the case of the fault of the owner.¹⁸⁰ If the husband used ganancial funds to improve his or his wife's separate asset, with the result that the improvement became a part of the separate asset,¹⁸¹ an accounting could be obtained upon dissolution, with the right of reimbursement in the community.¹⁸² It is not clear whether common creditors had any remedy under these circumstances before dissolution; certainly in the case of the improvement's becoming a part of the wife's separate asset, they did not.

Priority of creditors

The question of priority of creditors did not arise until dissolution; hence it will be treated elsewhere.¹⁸³

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

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

178. *Id.*

179. See notes 261-264 *infra*.

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

181. See note 56 *supra*.

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

183. See text accompanying notes 268-278 *infra*.

IV. DISSOLUTION

Death was the principal cause of the dissolution of the *sociedad de gananciales*.¹⁸⁴ Renunciation by the wife during marriage also might effect a dissolution. Separation from bed and board, which the Spanish called "divorce," confiscation of the assets of one of the spouses, and forfeiture by the wife due to her own misconduct, all interrupted or suspended the community of gains, but did not prevent future sharing on a different basis. There is no evidence of a complete dissolution of the community of gains without a complete dissolution of the marriage by death, except in the rare instance of a wife's renunciation *during* marriage. Dissolution of the community due to the husband's mismanagement was not possible as it is in Louisiana today.¹⁸⁵

Death: testamentary disposition

Spouses might make testamentary dispositions to each other as well as to third persons from their own shares of the ganancial assets,¹⁸⁶ subject to the rights of creditors and to the limitations of the Spanish laws on forced heirship.¹⁸⁷ Where the testator attempted to leave specific community assets to the descendants or other heirs, the legacy was valid only as to the testator's share in the asset. The surviving spouse might consent to the validity of the entire legacy, however, if it were not prejudicial, and accept reimbursement from some other ganancial asset to the extent of one-half the value of that particular piece.¹⁸⁸

Death: intestate succession

In the case of intestate successions the deceased's share of the ganancial assets and liabilities passed automatically to his or her heirs who accepted the succession.¹⁸⁹ In the case of the wife, it was not necessary for her to accept it before her share of the *gananciales* passed to her heirs, because she had already owned it prior to death.¹⁹⁰ The heirs of the wife could renounce

184. See 9 MANRESA 668.

185. LA. CIV. CODE arts. 2425, 2430; See also 1 DE FUNIAK § 129.

186. L. TORO 16; NUEVA R. 5.9.7; N.R. 10.4.8.

187. FUERO JUZGO. 4.4.1; FUERO REAL. 3.12.7; 3.5.10; PART. 6.7.2, 12; L. TORO 6, 9, 10 and 23; NUEVA R. 5.8.1; N.R. 10.20.1; Matienzo, Comm. to N.R. 10.4.8, Gloss II; SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, arts. 975-979 (1851); Feb. Cont. 1.1.14.169; Feb. Jul. 2.2.1.2.21-32.

188. Gutierrez, *Quaestio* CXXI, no. 6.

189. See note 192 *infra*.

190. Gutierrez, *Quaestio* CXXXIII, no. 1; Matienzo, Comm. to N.R. 10.4.5, Gloss IX, nos. 2 and 3; Azevedo, Comm. to N.R. 10.4.6, no. 4; and Comm. to N.R. 10.4.8, no. 4.

the community without renouncing her succession, but not vice versa. The heirs of the husband, however, did not have the privilege of renouncing his share of the community of acquets and gains¹⁹¹ separately from his succession; but they could repudiate his entire succession,¹⁹² including his one-half share in the community assets and liabilities.

Death caused an instantaneous cessation of the formerly existing *sociedad de gananciales*¹⁹³ which could not be continued between the surviving spouse and the heirs of the other. If, however, these parties retained the community assets undivided in their hands, their inaction and course of conduct might create the presumption that an ordinary partnership (*sociedad*) had been formed tacitly among them.¹⁹⁴ If the heirs of the deceased were minors under fourteen years of age, they were without the legal capacity to contract a partnership. At the age of fourteen, with their tutors or curators consenting,¹⁹⁵ or when they reached the full age of majority at twenty-five,¹⁹⁶ the heirs could either consent to the existing arrangement, which thereupon constituted it a partnership, or they could ask for a partition.¹⁹⁷ Any profits accumulated during this period of ownership in indivision were shared equally between the surviving spouse and the heirs.¹⁹⁸ Whether or not a partnership were so established, the new co-

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

192. Under ancient Spanish law, deriving from the Roman, a succession was held in abeyance until the heirs accepted it tacitly or expressly. See PART. 6.6.11. See also Feb. Cont. 3.14.1.1.; Feb. Jul. 1.1.1.2.108-110. SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, arts. 1267-1269 (1851). DOMAT, CIVIL LAW TREATISE 2.1.1.1.14 (Wm. Strahan transl. 1722). This same principle prevailed in Louisiana under La. Digest of 1808, bk. 3, tit. 6, art. 74 until the doctrine of *le mort saisit le vif* was adopted from the French by LA. CIV. CODE arts. 934, 935, 940-943 (1825); cf. SP. CIV. CODE, arts. 988-1004; 7 MANRESA 339-351.

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

194. Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 9, 11, 16, 19, 23-29, 34; SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, art. 58 (1851); Feb. Jul. 1.1.4.4.86, 90-94, 97-98, 102-103; Feb. Jul. 1.1.6.2.41. See also Feb. Cont. 3.9.1.13.

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

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

196. PART. 6.16.12; Feb. Jul. 1.1.4.4.95.

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

198. Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 20-21; Azevedo, Comm. to same law, no. 15; Feb. Jul. 1.1.4.4.98.

owners had the obligation of completing any unfinished business begun before death, sharing in its profits and losses.¹⁹⁹

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

Succession administration

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

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

199. Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 20-21; Gutierrez, *Quaestio* CXXX; Feb. Jul. 1.1.4.4.86, 99-100.

200. LA. CIV. CODE art. 916.

201. FUERO JUZGO. 4.2.13 & 14. Llamas y Molina, Comm. to N.R. 10.4.7, nos. 19, 20. Cf. SP. CIV. CODE arts. 834-839.

For surviving spouse's obligation to preserve during a second marriage *bienes* acquired from the other spouse by lucrative title see FUERO JUZGO. 3.1.6; 4.4.2; FUERO REAL. 3.2.1; PART. 5.13.26; L. TORO 15; SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, arts. 237(2), 1203, 1209 (1851).

202. Feb. Jul. 1.1.1.2.42. In *Juictos* 1.1.6.2.46 Febrero states very clearly that the wife may reintegrate her dowry and deduct it immediately from the mass without the necessity of any inventory or partition.

203. Feb. Jul. 1.1.3.3.77.

spouse and the heirs of the deceased became possessed of the assets and liabilities of the former community of gains immediately upon its dissolution,²⁰⁴ subject only to the right of the wife or her heirs to renounce.²⁰⁵ The widow's exercise of possessory and other actions in regard to her share of the former community assets and liabilities was recognized²⁰⁶ without any requirement of a prior settlement or liquidation or adjudication or designation of the widow or anyone else as administrator.

The community assets and liabilities had to be determined before the decedent's succession was finally settled, for these or a part of these might form a part of the succession; yet no statement to this effect exists in the ancient Spanish legal writings.²⁰⁷ In all probability the distribution of assets and payment of debts was handled informally by the heirs and surviving spouse without the aid of a judicially appointed administrator,²⁰⁸ except in the case of an insolvent or vacant succession. This, of course, did not prevent an aggrieved heir²⁰⁹ or creditor²¹⁰ from petitioning for partition and asking judicial determination of ownership and rights. Anyone alleging an asset to be separate had the burden of proof.²¹¹

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

204. See notes 189, 190 *supra*. The transmission of rights to the formerly existing community of acquets and gains is to be distinguished from the transmission of inheritances, for which see note 192 *supra*.

205. Gomez, Comm. to L. Toro 53, no. 76.

206. See notes 81, 82 *supra*.

207. Feb. Jul. 1.1.3.3.77. See also 5 MANRESA, art. 657, at 277, which, in a discussion of partition procedures, confirms the fact that legislation on the subject is still deficient, but that in practice the community assets and liabilities must be determined, although not necessarily liquidated, prior to a settlement of the whole succession. *Accord*, V CASTAN TOBENAS, DERECHO CIVIL ESPAÑOL pt. 1, at 244 (1954) (as to practical procedures).

208. DE FUNIAK describes this as a "taking over" of the community property. 1 DE FUNIAK, § 205, at 582. See also Feb. Jul. 2.2.1.1.1. For modern practices probably reflective of traditional procedures see V CASTAN TOBENAS, DERECHO CIVIL ESPAÑOL 239 (1954).

That this was the practice in Louisiana until 1825 is confirmed by Comment, 23 TUL. L. REV. 384-85 (1949), and Oppenheim, *One Hundred Fifty Years of Succession Law*, 33 TUL. L. REV. 43, 55 (1958).

209. PART. 6.15.2. The heir had ten years in which to claim the estate judicially of the one in possession; twenty years, if he were out of the country (PART. 6.14.7). Heirs, of course, were required to pay the debts of the deceased and of his succession. Feb. Jul. 1.1.1.2.43; SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, art. 1339 (1851). If accepting by inventory the property of the deceased became liable to the creditors insofar as it was sufficient (Part. 6.6.7).

210. PART. 6.15.2, 10. Feb. Jul. 1.1.1.2.107. See also SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, arts. 1308, 1336 (1851).

211. Matienzo, Comm. to N.R. 10.4.4, Gloss I, no. 3; Azevedo, Comm. to same law, no. 3.

heirs, by court order, to accept or reject the community within one hundred days of death, or less within the discretion of the judge.²¹² If the wife, or her heirs, accepted the community of gains, either informally by the exercise of some possessory action, or formally as a result of judicial order, she then became liable for her share of the debts contracted during marriage.²¹³ The wife, who was a major of twenty-five years of age or over, who accepted was not allowed to change her mind thereafter.²¹⁴

Renunciation

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

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

Divorce, annulment, and separation

An absolute divorce which completely dissolved the marriage was impossible under Spanish law.²²⁰ It was possible, however,

212. Matienzo, Comm. to N.R. 10.4.9, Gloss I, no. 8; Llama y Molina, Comm. to same law, No. 17. See also Feb. Jul. 1.3.1.3.170.

213. Matienzo, Comm. to N.R. 10.4.9, Gloss I, no. 8, Azevedo, Comm. to N.R. 10.4.9, nos. 15 & 18. See also Feb. Jul. 1.1.3.2.60.

214. Azevedo, Comm. to N.R. 10.4.9, nos. 12, 13.

215. L. Toro 60; NUEVA R. 5.9.9; N.R. 10.4.9. See Commentaries thereon by Matienzo, Azevedo, Gutierrez, and Llamas y Molina; Feb. Jul. 1.1.4.2.57-61. See also text accompanying notes 153-164 *supra*.

216. Feb. Jul. 1.1.3.1.6. See also 9 MANRESA art. 1394 at 535.

217. See text accompanying note 212 *supra*.

218. Matienzo, Comm. to N.R. 10.4.9, Gloss I, no. 9; Azevedo, Comm. to same law, nos. 12-13; Llamas y Molina, Comm. to same law, no. 17.

For acknowledgment that in early Louisiana renunciation during marriage constituted a dissolution of the community see Labbe's Heirs v. Abat, 2 La. 553, 565 (1831).

219. See note 214 *supra*.

220. PART. 4.10.1.

to have a marriage annulled for reasons of impediment.²²¹ This constituted a complete dissolution of the marriage and of the resulting *sociedad de ganancias*. Even though the annulled marriage was considered as never having existed, sharing by the spouse in good faith from the time of the solemnization of the marriage until its dissolution was permitted on the theory of the marriage having been a putative one.²²²

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

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

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

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

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

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

226. Feb. Cont. 1.1.22.242.

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

228. *Id.*

to our modern day system of alimony awarded on the basis of fault.²²⁹

If the wife were at fault instead of the husband, the whole situation was reversed. The husband continued to share the wife's acquisitions, but the wife ceased to have any right in acquisitions by the husband, including those acquired before the separation.²³⁰ If the wife's adultery were the basis of the separation, she lost her dowry²³⁰ and marriage deposit (*arras*)²³² as well as her half of the acquets and gains.²³³ In the case of a legal separation due to one spouse's fault it is seen that the advantages of the community ceased as to the guilty party, but it continued to exist as to the innocent spouse despite the legal separation until death dissolved the marriage.²³⁴

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

Abandonment and separation in fact

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

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

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

231. PART. 7.17.15; 7.25.6; Matienzo, Comm. to N.R. 10.4.1, Gloss I, no. 55.

232. FUERO REAL. 4.5.5; PART. 7.17.15; Matienzo, Comm. to N.R. 10.4.1, Gloss I, no. 55.

233. Matienzo, Comm. to N.R. 10.4.1, Gloss I, no. 55.

234. See 9 MANRESA 777. Cf. 9 MANRESA 668.

235. SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO art. 31(6) (1851).

236. PART. 4.10.2; Matienzo, Comm. to N.R. 10.4.1, Gloss I, no. 56; Azevedo, Comm. to same law, no. 14.

237. PART. 4.10.2; Matienzo, Comm. to N.R. 10.4.1, Gloss I, no. 56.

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

239. Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 56 and 57.

date of abandonment.²⁴⁰ After a voluntary separation sharing on a non-mutual basis continued, grounded on fault, just as in the case of a legal separation.²⁴¹

Forfeiture by wife

If the wife were guilty of adultery, or lived wantonly, and voluntary separation occurred, she forfeited her dowry,²⁴² her marriage deposit (*arras*),²⁴³ and all her share in the community profits acquired and yet to be acquired.²⁴⁴ Reconciliation with and forgiveness by the husband brought about a restoration to the wife of her dowry, and *arras*, and her ganancial rights, but it was necessary that the reconciliation be effected within two years of the acts of adultery.²⁴⁵

The misconduct of the wife within the year following her husband's death was penalized similarly if she lived dissolutely, wantonly, extravagantly, lustfully, or scandalously. Misconduct by the widow caused her to lose her share of the ganancial profits which passed to her husband's heirs.²⁴⁶ Even after the year of mourning the misconduct of the widow would cause her to lose any legacies bequeathed her by her husband.²⁴⁷ A single act of fornication, unless it were notorious, would not cause the widow to lose her share of the ganancial profits,²⁴⁸ but a single act of fornication within the year of mourning would cause her to lose any legacies from her husband.²⁴⁹ The widow's separate assets were not affected by her misconduct,²⁵⁰ nor was her dowry forfeited,²⁵¹ as in the case of voluntary or legal separation due to the wife's adultery.

240. Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 45, 49-52, 55. *See also* Feb. Jui. 1.1.4.2.51.

241. Matienzo, Comm. to N.R. 10.4.1, Gloss I, nos. 53 and 54; Azevedo, Comm. to same law, no. 14.

242. *See note 231 supra.*

243. FUERO REAL. 3.2.6. *See also note 232 supra.*

244. *See note 233 supra.*

245. PART. 7.17.15. *See also* Feb. Cont. 3.13.1.6.

246. NUEVA R. 5.9.5; N.R. 10.4.5; Matienzo, Comm. to same law, Gloss VIII, nos. 1, 2, 7; Azevedo, Comm. to same law, nos. 22-24; Gutierrez, *Quaestio CXXII*. *See also* PART. 4.12.3.

247. Matienzo, Comm. to N.R. 10.4.5, Gloss VIII, no. 6.

248. Matienzo, Comm. to N.R. 10.4.5, Gloss VIII, no. 7; Gutierrez, *Quaestio CXXII*.

249. Matienzo, Comm. to N.R. 10.4.5, Gloss VIII, no. 6.

250. Matienzo, Comm. to N.R. 10.4.5, Gloss VIII, no. 19.

251. Matienzo, Comm. to N.R. 10.4.5, Gloss VIII, nos. 8-12, 18.

Confiscation

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

Administration following separation, abandonment, and confiscation

The ancient Spanish law and the ancient Spanish commentators are silent as to the administration of the assets and liabilities of the spouses following separation of bed and board or voluntary separation by reason of abandonment, which suggests that there was no change in administration, the husband continuing to administer the assets of both husband and wife.²⁵⁵ The language of Matienzo in stating that the wife separated from the husband due to his fault no longer acquired for him²⁵⁶ suggests that the innocent wife's acquisitions after separation became her separate assets. If this be true, she probably administered her own acquisitions, even though her separated husband still administered all of his own acquisitions falling into the community of gains in which she continued to share.²⁵⁷

There is no doctrinal treatment of administration following

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

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

254. See 5 SANCHEZ-ROMAN, vol. 1, at 848-49. But see SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, art. 59 (1851).

255. Cf. SP. CIV. CODE arts. 73(5), 1435 (separation granted at instance of husband). See also 9 MANRESA art. 1435 at 771-72.

256. Comm. to N.R. 10.4.1, Gloss I, no. 53.

257. Cf. SP. CIV. CODE arts. 73(4), 1436. See also 9 MANRESA art. 1436; V CASTAN TOBENAS, DERECHO CIVIL ESPAÑOL, pt. 1 at 259 (1954).

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

Priority of creditors

After dissolution of the community of gains by death or annulment the capital of each of the two spouses was ascertained,²⁶¹ made whole from the community, if need be, and set aside.²⁶² Since the wife held a tacit mortgage on the husband's entire patrimony²⁶³ for the amount of her dowry and her *paraphernalia* administered by her husband, her capital was made whole from the husband's capital, if necessary.²⁶⁴ Assum-

258. Cf. SP. CIV. CODE art. 73(4). See also 1 MANRESA art. 68 at 430-31, arts. 73-74 at 444; V CASTAN TOBENAS, DERECHO CIVIL ESPAÑOL, pt. 1 at 356 (1954), right of administration given in marriage contract cannot be withdrawn).

259. See text accompanying note 109 *supra*.

260. See note 256 *supra*; cf. text accompanying note 257 *supra*.

261. Azevedo, Comm. to N.R. 10.4.1, no. 12; Matienzo, Comm. to N.R. 10.4.3, Gloss II, no. 2; Matienzo, Comm. to N.R. 10.4.4, Gloss II, no. 3; Azevedo, Comm. to N.R. 10.4.9, no. 17; Feb. Jui. 1.1.3.1.1.

262. Azevedo, Comm. to N.R. 10.4.1, nos. 11 and 12; Matienzo, Comm. to N.R. 10.4.2, Gloss VII, no. 6; Comm. to N.R. 10.4.3, Gloss II, nos. 2, 3; Azevedo, Comm. to N.R. 10.4.9, nos. 16 and 17; Feb. Jui. 1.1.3.1.1; 2.61; 3.66; 6.1.1 and 2.

263. PART. 4.11.17; Azevedo, Comm. to N.R. 10.4.1, no. 12; Comm. to N.R. 10.4.2, 3, nos. 23-24; Feb. Jui. 1.1.3.1.42-45; Feb. Jui. 2.3.3.1.49, 96, 98; *id.* 2.3.3.2.131-33.

For accounting procedures generally used in ascertaining the amount of the wife's dowry and *paraphernalia* see Feb. Jui. 1.1.3.1.4-57. See also 9 MANRESA 689-97.

The wife did not have a preference over anterior creditors of the husband with express special or general mortgages. See Feb. Jui. 2.3.3.2.133 (concurus proceeding of wife with husband's creditors). See also Azevedo, Comm. to N.R. 10.4.2 and 3, no. 23; SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, arts. 1424, 1425, 1427-30 (1851). Cf. SP. CIV. CODE arts. 1345, 1349-56, 1358-59, 1361, 1384, 1390; LA. CIV. CODE arts. 2376-78, 3191, 3252, 3254, 3319, 3332-33, 3338-40, 3349, 3369.

For early Louisiana cases recognizing wife's tacit mortgage see Dreux v. Dreux's Syndics, 3 Mart.(N.S.) 239 (La. 1825) (privilege and preference recognized over creditors merely chirographic, but no declaration made as wife's ranking among mass of creditors); LeBeau v. Jewell, 9 La. Ann. 168 (1854) (no retaking of wife's dowry without judgment, and no seizure of dowry in hands of third persons if their title was acquired prior to recording of judgment).

264. Azevedo, Comm. to N.R. 10.4.1, no. 12; Feb. Jui. 1.1.3.1.42, 45-47. See also Degruy v. St. Pe's Creditors, 4 Mart.(N.S.) 404 (La. 1826).

For husband's personal liability to wife in general see PART. 4.11.18-22; Llamas y Molina, Comm. to N.R. 10.4.8, nos. 47-51; Azevedo, Comm. to N.R. 10.4.9, no. 17; Feb. Jui. 1.1.3.1.4, 6-7, 10, 43, 50; 3.78.

ing that assets were sufficient to permit the withdrawal of the husband's capital, that was accomplished next.²⁶⁵ Following this there was a debiting to the proper spouse of all debts for which his separate patrimony was liable, but which had been paid from the common fund during marriage (e.g., ante-nuptial debts, solidary obligations made with the wife which did not concern the marriage, or which were for necessities the husband was responsible for furnishing the wife, obligations for support of a spouse's parents or children from a previous marriage).²⁶⁶ The remaining mass was divided equally between the spouses or between the surviving spouse and the heirs of the other.²⁶⁷ Payment to third-party creditors followed thereafter as set forth below.

Although the ancient writers spoke of the payment of the common debts²⁶⁸ following the withdrawal of the separate patrimonies, they were speaking in terms of accounting procedures²⁶⁹ to be used in the final determination of the respective spouses' shares in the *gananciales*. The ganancial assets and liabilities passed at the time of dissolution²⁷⁰ and did not await any determination of a surplus of assets over liabilities before partition and distribution.

If the succession of the deceased spouse or the respective

265. Azevedo, Comm. to N.R. 10.4.1, no. 12; Llamas y Molina, Comm. to N.R. 10.4.8, no. 48; Azevedo, Comm. to N.R. 10.4.9, no. 17; Feb. Jul. 1.1.3.2-58-65.

Common debts are paid prior to the deduction of the husband's capital in Spain today. See Sp. Civ. CODE arts. 1422-1426.

266. Feb. Jul. 1.1.3.3.68-75.

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

Febrero specifically points out that the wife has no tacit mortgage on her husband's assets for her half of the *gananciales*, as she does in the case of her dowry and her paraphernalia. Feb. Jul. 2.3.3.1.49.

268. Feb. Jul. 1.1.3.1.1; Feb. Jul. 1.1.3.3.66-67, 76-85.

269. As illustration of this see Febrero, *Juicios*, Book I, entitled *Comprehensivo del Juicio de Inventario, y de el de particion entre la viuda, y herederos de su marido hasta reintegrarla de todos sus derechos*, which is composed entirely of accounting procedures to be used in the inventorying and partitioning of assets and liabilities following dissolution by death. Note particularly Feb. Jul. 1.1.3.1.1; Feb. Jul. 1.1.3.3.67, 70-71; Feb. Jul. 1.1.6.2.46. See also forms for inventories, partitions, appraisals, etc., in Feb. Jul. 2.2.10.2. The same idea may be inferred from Matienzo, Comm. to N.R. 10.4.4, Gloss II, no. 3.

V CASTAN TOBENAS, DERECHO CIVIL ESPAÑOL, pt. 1, at 238-46 (1954), confirms the modern practice of liquidation, essentially the same as the ancient, as a matter of accounting procedures.

270. See notes 189-190 *supra*. Cf. SP. CIV. CODE arts. 1392, 1417, which together state that ganancial rights pass at the time of dissolution by death, annulment, and other causes. See also 9 MANRESA, art. 1392 at 527-30; *id.*, art. 1417 at 667-74.

patrimonies were solvent, all debts were paid following the determination of the masses with no question of priority arising. If the succession were insolvent, however, or if the patrimony of the surviving spouse were insolvent, the separate and common creditors of each spouse applied the rule of preference pertaining to that succession or patrimony which was insolvent. There is nothing in the Spanish legislation or literature to indicate that the community of gains formed a separate unit or patrimonial mass so far as creditors were concerned; nor was there anything to indicate that "community creditors" enjoyed a preference over "separate creditors."

Secured creditors, both common and separate, were paid first; then the preferred creditors, both common and separate, proceeded simultaneously²⁷¹ against the two masses²⁷² in the hands of the surviving spouse and the heirs of the other. Common creditors could elect to proceed against the husband alone for the satisfaction of the whole of each debt,²⁷³ or against the wife for the one-half²⁷⁴ of the common debts for which she was liable. After the secured and preferred creditors were paid, the ordinary creditors, both common and separate, proceeded next

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

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

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

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

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

274. L. ESTILO 207. See also note 84 *supra*.

on a *pro rata* basis, obtaining satisfaction from the spouses in the same proportion as indicated above. There was no preference as between the ordinary separate and ordinary common creditors.²⁷⁵ Nor was there a preference between husband and wife²⁷⁶ except that the wife was entitled to have her capital made whole from her husband's assets if the ganancial assets were insufficient and enjoyed a tacit mortgage upon all of his assets for her dowry and *paraphernalia* administered by him; but not for her half of the *gananciales*.²⁷⁷

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

CONCLUSION

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

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

275. See note 271 *supra*.

276. If one spouse were the debtor of the other see 9 MANRESA 708-709.

277. Feb. Jui. 2.3.3.1.49.

278. Feb. Jui. 1.2.1.1.1. confirms the informal handling of successions by the surviving spouse and heirs. See also note 208 *supra*.

its existence, probably for reasons of practicality. The wife's protection against the husband's mismanagement was her right to renounce the community at any time before, during, or after dissolution of the marriage. This was a right which the husband enjoyed at no time. The husband's administration ended abruptly upon death or dissolution, when the assets and liabilities passed in equal proportions to the spouses, or to the surviving spouse and the heirs of the other, without any necessity for determining surplus of assets over liabilities, or partition, or distribution. No administration was required or provided for in ancient Spain.

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