

SPANISH LAW FOR THE PROTECTION OF SURVIVING SPOUSES IN NORTH AMERICA

Toward the end of the eighteenth century the extent of the Spanish dominions in North America was at its height. It was a vast area including all of the territory west of the Mississippi River and the rest of the coast of the Gulf of Mexico to the East. Though this realm was not governed as a unit, the center of activity was New Orleans at the mouth of the Mississippi River, and the greatest concentration of European settlers was in Lower Louisiana. Elsewhere from the Atlantic coast of East Florida to the Pacific coast of Upper California, the European population was very sparse. Within half a century the entire region had been overrun by Anglo-Americans from the East.

The migration of Anglo-Americans into the Hispanic frontier can be divided into two periods. The first period covered the first three decades of the century. Its focal point was the lower basin of the Mississippi River (inhabited by a very mixed, but predominantly French, population) and West Florida (where the English had settled along with the Spanish after the mid-eighteenth century). Spanish rule in the eastern region had been interrupted by twenty years of English control from 1763 to 1783. Anglo-Americans did not begin to move into the region in significant numbers until about 1800. Settlement from the North and East fanned out over the Mississippi River valley northward and along the Gulf coast of Florida during the next three decades. By 1830 the period of initial settlement had passed, and new American governments with separate but similar public institutions were in place. Their rules of private law were, however, somewhat more varied than their rules of public law.

The second period of migration into the Hispanic frontier was part of the general westward movement of Americans to the Pacific Ocean. This process extended from about 1820 to 1870, by

which time new governments had been formed and new legal systems were put in place. After the initial settlement of Texas which began peacefully in the 1820s, the completion of the process there and further West was undertaken by military force against the Mexican republic and the aboriginal inhabitants. But settlement of the desert was slow and a territorial government would not be in place in Arizona until the mid-1860s.

In the very sparsely settled regions East of the Mississippi River and along the upper reaches of the west bank of the river, the first wave of Anglo-American migrants tended to put aside the established Spanish law in favor of their own customs. It was the policy of the national government to achieve an Americanization of the law and there was no initial resistance to this policy. In Lower Louisiana, however, where there was a significant, well established European population, the policy of Americanization met with resistance within the first year of American government. This local resistance to Americanization of the law in Lower Louisiana resulted in the enactment of a civil code along European lines in 1808. In the *Digest of Civil Laws*, as it was called, Spanish rules with respect to succession were codified in English and thus served as a guide to Spanish law for American frontier law makers in the West.

In the replacement of Hispanic government and culture with an Anglo-American frontier society, most of Hispanic law that previously prevailed was replaced with quasi-English legal institutions and rules. But some Spanish law remained. This residue of Hispanic law is still strikingly apparent in relation to the rules of succession, most particularly in the law affecting the rights of surviving spouses.

By comparison to their own rules, some Hispanic institutions better met the needs and aspirations of the Anglo-American frontiersmen. In providing for a surviving wife the early nineteenth century Anglo-American legal system was not generous. Her property rights during marriage were virtually non-existent and those acquired on her husband's death were very limited. At marriage all of a married woman's moveable property became that of her husband. By a premarital contract creating a trust of that property, her control of it during marriage and its disposition at her death might have been provided for, but only

the very prosperous made such settlements. Because the wife's moveable assets became the husband's property on marriage, they were not only subject to the claims of his creditors but were also subject to his uncontrolled disposition during marriage and at his death. As a further consequence of marriage, the wife in much of Anglo-America also lacked the power to make a will of her lands which she might have inherited.

On the death of the husband the Anglo-American wife was usually entitled to the income from one third of the husband's lands for life regardless of the terms of his will. but that expectancy was normally the full extent of her right, although her husband had the power to make his wife absolute testamentary successor and Anglo-American husbands sometimes did so. Then as now, however, most husbands died intestate, in which case the widow's right to enjoyment of income from the husband's land was coupled with a right to one-third or one-half of his moveable property, as well.

Elements of the Spanish law of succession have shown remarkable persistence in North America. This has occurred not only because Anglo-American settlers became familiar with these rules early in the process of settlement and became accustomed to their application but also because Anglo-Americans chose to perpetuate these rules in preference to their own. Because one of the principal objects of Anglo-Americans was the acquisition of lands and making a new life on the land, they became particularly conscious of the laws regulating the acquisition and transmission of land and other property interests at the owner's death. The Anglo-Americans found some of the rules relating to surviving spouses especially appealing to their situation.

The Hispanic institutions affecting the surviving spouse that persisted were those concerning dowry and *arras*, the common property of spouses, and supplementary rights of the survivor such as the *cuarta marital*. The Hispanic doctrine which has had the greatest impact on North American law is the principle of the gains of marriage shared between spouses. The survival of the other rules has tended to be confined to the state of Louisiana. An account of the later history of these Hispanic institutions illustrates the way that subsisting Spanish legal institutions affected Anglo-American law as it spread across the North American continent.

1. DOWRY AND ARRAS

Old Spanish law made careful provisions for regulation of marriage gifts: *dote* presented to the groom for the support of the marriage and *arras* given by the man to his bride¹. In either case, these gifts could be more particularly governed by an agreement of the parties expressed in their marriage contract. As a general rule, on the husband's death the *dote* and *arras* both supported the wife during her widowhood and on her death passed to her heirs².

Written premarital contracts were fairly common in Louisiana, but elsewhere on the frontier they were rarely made. There were dotal provisions in only about a quarter of the Louisiana agreements, however³. Most agreements were devoted to enumer-

¹ See J. FEBRERO, *Librería de Escribanos: Escrituras* I.2.1 2-3 at 297-298 (3rd ed 1783). References to Febrero's work are to the third edition, because it was that edition which was used by the draftsmen of the Louisiana Digest of 1808, hereinafter cited as La. Dig 1808 See note 34 *infra*.

² P. MURILLO VELARDE, *Práctica de Testamentos* 42-44 (Santa Fe, New México, 1850). Although this handbook, used in the drafting of the New Mexican succession act of 1852, was identified as the work of Murillo, later Mexican editions had acquired large accretions from the work of José María Alvarez, cited in note 25. This New Mexican edition appears to be derived from a Mexican edition of 1849.

³ During the period of Spanish rule in Louisiana Professor Baade estimates that there were something less than three hundred and fifty marriage contracts entered into in New Orleans. Baade, *Marriage Contracts in French and Spanish Louisiana A Study in «Notarial» Jurisprudence*, 53 Tul. L. Rev 1, 49 n 243 (1978) See also C MADUELL, *Marriage contracts, Wills and Testaments of the Spanish Colonial Period in New Orleans, 1770-1804*, at v, 1-35 (1969). If fifty additional instruments are estimated for the various posts, the total for the Spanish period comes to about four hundred. If there were dowry provisions in twenty-five per cent. of these, those one hundred dotal written agreements would vastly outnumber the few instances of dowry for which there is evidence on the far western frontier.

In the light of the findings of existing research of marital agreements from the eighteenth century that most Louisiana marriage contracts did not provide for dowry, it is odd to find the statement in La Dig. 1808 III 5 9 at 324-325 (not derived from the Code Napoléon) that «most ordinary conventions» were settlements of dowry and donations of the parties to each other.

In a study of dowries in central New Spain for the latter half of the seventeenth and most of the eighteenth century the investigators found «fewer dowries than we expected». Lavrin - Couturier, *Dowries and Wills: A View of Women's Socioeconomic Role in Colonial Guadalajara and Puebla, 1640-1790*, 59 H A H R. 280, 282 (1979)

ation of separate property, a definition of the character of future acquisitions and miscellaneous provisions for marriage gifts. There is little written evidence of merely dotal arrangements anywhere in the region⁴. Instances of written agreements dealing with *arras* were rare everywhere.

On the western frontier during the Spanish and Mexican periods the giving of any significant property as dowry was confined to a few prosperous families. Such provisions for dowry presupposed financial ability of parents to divest themselves of an interest in lands or fungible moveables, such as money or livestock. By the nature of frontier life, such property in any quantity could not be spared except by the prosperous of which there were not many. A few cattle or sheep might constitute a marriage gift, but such a provision would scarcely warrant a written agreement⁵. Even in those rare instances when lands were given as dowry in New Mexico⁶, the agreement to transfer does not appear to have been put in writing. Thus, although the law itself was dowry-con-

⁴ Occasional instances of written dotal agreements are found in the New Mexican records of the eighteenth century. See, for example, Diego Arias Deguinos Ana María Domingues (Santa Fe, August 16, 1714), SANM I, reel 2, frames 233-234; *Xiran de Tegeda v. Domingues* (Santa Fe, August 1, 1716), SANM I, reel 2, frame 219, action by husband against wife's father for money owed as part of dowry; *Bettia v. Gutierrez* (October 31, 1767), SANM II, reel 10, frames 318-324. There are also some mid-nineteenth century disputes that involved arrangements which were apparently oral. See note 6, *infra*.

Until the promulgation of the Royal Decree of October 8, 1798, junior military officers were required to show adequate dowry in requesting permission to marry. Hence, some further evidence of eighteenth century frontier dotal arrangements should be preserved in the military archives.

Only one true written dotal agreement has been found that was executed in Texas. John B. B. Davenport - Maria C. Edwards, 1B Blake Transcripts (Nacogdoches Archives, University of Texas, Austin) 235 (November 12, 1829). Another dealt solely with *arras*. See note 12 *infra*.

⁵ Perrigo, *Some Laws and Legal Proceedings of the Mexican Period*, 26 N M H R 244, 235 (1951), 27 N M H R 66 at 76 (1952), seems to illustrate this point. This is the brief record of an 1833 trial of a New Mexican dispute involving marriage gifts, including livestock. See also Perrigo, *The Personal Interests of Juan Geronimo Torres*, 26 N M H R 158 (1951), Perrigo, *New Mexico in the Mexican Period, As Revealed in the Torres Documents*, 29 N M.H.R. 28 (1954).

⁶ *Chavez v. McKnight - Gutierrez*, 1 N. Mex. 147 (1857), involved such an agreement of 1826, *Martínez v. Lucero*, 1 N. Mex. 208 (1857), concerned a dowry of land in 1828.

scious, the giving of dowry (and *arras*) on the Hispanic frontier generally went unrecorded.

The clothing, linens, furniture and other paraphernalia which a bride brought to her marriage were not usually termed part of the dowry as a matter of law⁷. Dowry was meant to be productive of income. Although dowry was returnable to a widow on her husband's death, or passed to her heirs if the wife predeceased the husband, the husband was expected merely to return the value of the property rather than the property received *if he took the dowry at an agreed valuation*⁸. Lands, however, were not customarily valued on receipt, because it was anticipated that they would remain intact. A few livestock handed over at or before marriage by the bride's father would probably not be accompanied with any agreement as to value. The written dowry agreement would ordinarily make some provisions for a widow and her heirs on marital dissolution by death, but such concerns were not of much significance on the frontier because dowered marriages were uncommon⁹.

Provisions for *arras* or *donatio propter nuptias* were much rarer than dowry agreements. Though the draftsmen of the Louisiana Digest devoted over forty articles¹⁰ to dowry, they made no specific mention of *arras* and may have meant to consolidate the types of marriage settlements¹¹. In Texas there was a all striking example of *arras* that accompanied the marriage of an ambitious Anglo-American into a well-to-do Mexican family in which the marriage contract consisted wholly of the husband's donation to his bride¹². In those rare instances when *arras* was

⁷ See I J FEBRERO, *op. cit.* note 1 *supra*, *Escrituras* I.2 1 11 at 302-303

⁸ *Ibid*, I 2 1.7-8 at 300-301.

⁹ The wills of frontier husbands in Louisiana, New Mexico and Texas sometimes stated that their wives had no dowry. See, for example, Will of Miguel de Castro (May 16, 1752), Bexar Archives, San Antonio.

¹⁰ La. Dig 1808 III.5 12 at 324-325, 16-.54 at 326-335, .73 at 338-339, .90 at 342-343; III 9.15, 17- 18 at 454-455

¹¹ La. Dig. 1808 III.5.17 (following Code Napoléon art 1541) provided that all that was settled on the wife was part of the dowry unless otherwise agreed.

¹² James Bowie-María Ursula Veramendi, *Carta de pago de Dote propter nuptias*, Bexar Archives, San Antonio (April 22, 1831) The form of this instrument is clearly derived from I E. DE TAPIA, ed., *Febrero Novísimo* 68 (1828) or an earlier edition of Febrero's work where the same form appeared. There is also provision for *arras* in one other written dotal agreement recorded in Texas, though it was

given, it helped to provide for the widow on the husband's death and on her death passed to her heirs.

A strong French dotal tradition¹³ preceded the Spanish occupation of Louisiana and may to some degree explain the retention of the institution in the French population there. At any rate the practice of giving dowry was better established and longer-lived in Louisiana than elsewhere on the Spanish northern frontier, and only in Louisiana was the law applicable to dowry codified. Expressed in terms based largely on the Code Napoléon¹⁴, the rules, compiled in the Louisiana Digest and perpetuated in the Civil Codes of 1825 and 1870, nevertheless largely mirrored the Spanish law in effect with respect to the disposition of dotal property on the death of a spouse. When compared to old Spanish law, there were, nevertheless, some shifts of emphasis in favor of the widow with respect to dotal lands and her right of support on her husband's death¹⁵ and an adjustment of the law in favor of the husband's creditors¹⁶.

actually executed prior to the couple's marriage in Louisiana Adolphus Sterne-Rosina Ruff (January 2, 1828, recorded in Nacogdoches in 1830), Blake Transcripts (Nacogdoches Archives), University of Texas, Austin

¹³ On the basis of the work of A. FORSYTH - G. PLEASANTON, *Marriage Contracts in French Louisiana, 1725-1768* (1979) and his own, Professor Baade estimates that there were «well over three hundred» marriage contracts executed in Louisiana during the period of French rule, Baade, *Marriage Contracts in French and Spanish Louisiana A Study in «Notarial» Jurisprudence*, 53 Tul. L. Rev. 1, 24 (1978). However, Professor Baade found provisions for *dot* less frequent than in 30.8 per cent of the contracts as found in a similar study of metropolitan France J. LELIEVRE, *La Pratique des Contrats de mariage chez les Notaires au Chatelet de Paris de 1769 à 1804* (1959); Baade, *op. cit.* 17 n. 83, 25

¹⁴ About eighty per cent of the articles of the Louisiana Digest that dealt with dowry were verbally derived from the Code Napoléon or its *Projet*. On the other hand there were other provisions, like those dealing with flocks and herds, La. Dig. 1808 III.5.50 at 332-333, which were derived from I. J. FEBRERO, *Librería de Escribanos: Escrituras* I.2.1.9 at 301-302 (1783) and Part. IV.11.21. There is no similar provision in the Code Napoléon.

¹⁵ La. Dig. 1808 III.5.34 at 330-331, *cf.* I. J. FEBRERO, *op. cit.* note 1 *supra*, I.2.1.7-8 at 300-301 La. Dig. 1808 III.5.52 at 332-333 *cf.* I. J. FEBRERO, *op. cit.* note 1 *supra*, I.2.1.37 at 325. There were other changes that did not directly affect post mortem disposition. *See*, for example, La. Dig. 1808 III.5.19 at 326-327 (following Code Napoléon art. 1543), *cf.* Part. IV.11.1 *See also* La. Dig. 1808 III.5.6 at 324-325 (following *Projet* of 1800 III.10.5) that the provisions of marital agreements in general were not subject to alteration during marriage.

¹⁶ La. Dig. 1808 III.5.53 at 332-336, *cf.* I. J. FEBRERO, *op. cit.* note 1 *supra*,

As time passed the practice of giving dowry waned as Lower Louisiana society became more and more Americanized. Dowry disputes (which normally arose concerning agreements made several decades earlier) were common in the appellate courts of Louisiana until about 1860. Thereafter, they became less common and after 1893 they do not occur at all in the appellate reports¹⁷. When the dowry rules were reenacted in 1870, dowry was a dying institution, and it would be surprising to find many dowry provisions in marriage contracts thereafter, although the Louisiana practice of entering into written marriage contracts for other purposes continued at a slackening pace.

In 1824, a wealthy public figure of northern Louisiana made testamentary bequests to two parishes¹⁸ to provide for the young women of those parishes. The history of the administration of those bequests confirms the decline of the institution of dowry. In 1888 the Louisiana legislature allowed diversion of the income from one of the parish funds to general educational purposes¹⁹. Although the fund has continued to be administered in West Baton Rouge Parish, it is merely a sort of public marriage bounty, and it is probably only in that parish that any vestige of dowry remains today²⁰. All of Louisiana's codal authority for dowry was finally repealed in 1979²¹.

I.2.1.9-19 at 302-308; *ibid.*, I.2 2 50-54 at 335-339; 1 *ibid.*, *Juicios* I.3.1.30-35 at 28-33, 3 *ibid.*, *Juicios*|I 3 2.87-89 at 681-683, no 98 at 688 See also La Dig 1808 III.9 17 at 454-455

¹⁷ See Morrow, *Matrimonial Property Law in Louisiana*, 34 Tul L Rev 3, 11 (1959)

¹⁸ Will of Julien Poydras de Lalande (1746-1824) (Pointe Coupée Parish, Louisiana, April 16, 1822) The testator, a bachelor of New Roads who had presided successively over the Legislative Council (1804), the Louisiana constitutional convention (1812) and the upper house of the Louisiana legislature (1812-1813, 1820-1821), made bequests of \$30,000 each to the parishes of Pointe Coupée and West Baton Rouge to provide dowries from the income In the provision for the Pointe Coupée bequest it was directed that «the revenue shall be used for dowries to be given to all the girls of the parish who get the chance of being married and those in pitiable circumstances shall always be given preference»

¹⁹ 1888 Louisiana Gen Laws 60, no 58, § 1

²⁰ For 1986, the income of the fund was distributed to the husbands of 73 brides of the parish. For earlier comments on the administration of this Fund, see H. DAGGETT, *The Community Property System of Louisiana*, 115 n. 5 (1945); Louisiana Library Commission, *Louisiana, A Guide to the State*, 451 (1945)

²¹ 1979 Louisiana Gen. Laws 1886, no 710, § 1 at 1887

Although the Louisiana Code provided the model for the marriage-contract provisions which were enacted by both Texas²² and California²³, the laws of neither state mentioned dowry. The legislative draftsman of the New Mexican succession act of 1852²⁴ made only one passing reference to the institution of dowry in the context of the division of successions, though it was amply dealt with in the Spanish works²⁵ on which he relied. It may be surmised that dowry arrangements had ceased to be made in New Mexico by the end of the nineteenth century, though there is no concrete information to support this assertion. In Texas and California, as far as anyone knows, the giving of dowry in Hispanic families had probably ceased somewhat earlier.

2. GANANCIAL PROPERTY

The first Hispanic territory acquired by the United States was organized as the Mississippi Territory which was gradually enlarged and was later partitioned to form the states of Mississippi and Alabama. Much of the region had been subject to British rule from 1763 to 1783, and the American congressional act of 1798²⁶ which enunciated the rule of «common law» laid the way for sub-

²² 1839-1840 Texas Gen. Laws 3, §§ 5-7 at 5, 2 H. GAMMEL, *Laws of Texas* 177 (1898), modeled on La Civ Code 1825 arts. 2305-2310.

²³ 1850 California Gen. Laws 254, ch. 103, §§ 16-23 (particularly §§ 16, 20-23). Other western states which enacted marriage contract provisions did not look to the law of Louisiana but merely borrowed from the laws of California or Texas.

²⁴ 1851-1852 New Mexico Gen. Laws 352, 361, art. III, § 4 1 at 358, 368. The only other mention of marriage contracts in any New Mexican statute prior to the enactment of 1907 New Mexico Gen. Laws 46, ch. 37, §§ 22-24, is in 1884 New Mexico Gen. Laws 44, ch. 14, § 5, and both of those provisions are in general terms with no allusion to dowry.

²⁵ P. MURILLO VELARDE, *Práctica de Testamentos* 42-44 (Santa Fe, 1850); 2 J. ALVAREZ, *Instituciones de Derecho Real de Castilla y de Indias* II 7.1 Apéndice (1820), which the draftsman had omitted from the abbreviated Taos version which he had published for the use of his pupils in 1842. J. ALVAREZ, *Instituciones de derecho Real de Castilla y de Indias... L'omados los Lugares más Importantes de los Tomos I.II.III y IV, que hacen la obra, para el curso, de los discípulos del P.A. José Martínez* (Taos, New Mexico 1842-1843).

²⁶ 1798 2nd Sess. United States Statutes at Large 549, ch. 28, § 6 at 550.

sequent Anglo-American legislation. Thus the Hispanic tradition of succession was almost wholly eradicated from the Mississippi Territory at the turn of the nineteenth century.

Anglo-Americans who formulated the first laws of the newly organized territory may have been slightly aware of Hispanic principles of matrimonial property law, but those principles were not regarded as a practicable alternative to Anglo-American principles²⁷. Hence in the laws of the territory not a trace of the Spanish law of marital sharing survived.

The second American acquisition of former Hispanic territory was the vast province of Louisiana. The division of the western Mississippi River Valley into two territories in 1804²⁸ had the effect of detaching the northern Missouri region from the legal influence of New Orleans. The annexation of this district to the established Indiana Territory East of the river virtually assured its legal future along Anglo-American lines. Hence the adoption of «common law» by the Missouri legislature in 1816²⁹ was almost preordained by prior events.

Thus Hispanic principles were replaced with Anglo-American institutions of maintenance for widowhood in both the Mississippi and Missouri Territories. Anglo-Americans who controlled the law-making process in both regions seem to have adopted Anglo-American principles as a matter of course. Although in both Mississippi³⁰ and Missouri³¹ there was a subsequent judicial awareness of the legal system that had been displaced, there was no apparent inclination to revert to it. In the state of Mississippi, which was created in 1817, however, a concern for the property rights of married women emerged by the end of the 1830s and

²⁷ These principles were first enacted as 1802-1803 Mississippi Gen. Laws 30, § 11.

²⁸ The area to the north was at first made a part of Indiana Territory as the Louisiana District and then the area west of the Mississippi River north of Orleans Territory was organized as the Louisiana Territory. When Orleans Territory was admitted to the federal union as the state of Louisiana in 1812, Louisiana Territory became Missouri Territory, consisting of what are today the states of Missouri and Arkansas.

²⁹ 1816 Missouri Gen. Laws 32, § 1

³⁰ See W. HAMILTON, *Anglo-American Law on the Frontier: Thomas Rodney and his Territorial Cases* 321 (1953)

³¹ *Cutter v. Waddingham*, 22 M 206 (1855)

the enactment which followed³² seems to have affected the formulation of Texas's adherence to community property doctrine soon afterward³³.

But the seeming indifference of the first wave of Anglo-American migrants to Hispanic marital property law did not recur on the western frontier, and subsequent development of Spanish law in the West was in large measure modeled on concepts embodied in the Louisiana Code. When the Louisiana Digest³⁴ was drafted in the first decade of the nineteenth century for a predominantly French population, the principle of marital sharing under a common-property system was so well established that no other system of matrimonial property seems to have been considered for enactment. Although much of the Louisiana Digest was based on the language of the Code Napoléon, the matrimonial property system defined in the Digest was not that of the community of moveables of the French Code, but the prevailing Spanish regime of common property of acquisitions and gains. The initial objective of the draftsmen of the Digest of 1808 was *not* seen as one of drawing a distinction between the English and Spanish regimes in terms of separate property. Hence the particular elements of marital property law went almost undefined³⁵. In terms of common property, however, the Digest of 1808 defined the regime in a manner that is clearly derived from the Fuero Real³⁶ and the Laws of Toro³⁷. Thus a truly Castilian definition of the ganancial estate was made available to Anglo-American

³² See Moncrief, *The Mississippi Married Women's Property Act of 1839*, 47 J. Miss. Hist. 110 (1985), Brown, *Husband and Wife-Memorandum on the Mississippi Woman's Law of 1839*, 42 Mich. L. Rev. 1110 (1944). See also Younger, *Marital Regimes: A Story of Compromise and Demoralization Together, with Criticism and Suggestions for Reform*, 67 Cornell L. Rev. 45, 60-61 (1981).

³³ See McKnight, *Texas Community Property Law - Its Course of Development and Reform in Essays in the law of property presented to Clyde Emery* 30, 31-32 (1975).

³⁴ The proper name of this code is *A Digest of the Civil Laws now in Force in the Territory of Orleans*, but it is referred to here by its more familiar name, the Louisiana Digest.

³⁵ See La. Dig. 1808 III 5 67 at 336-337 (separate property), La. Dig. 1808 III 5 64, 68 at 336-337 (community property). Both marital estates were more precisely defined in La. Civ. Code 1825 art. 2314.

³⁶ Fuero Real III 3.1, 3. See also Leyes de Estilo 203.

³⁷ Leyes de Toro 77.

lawyers in Texas, California and elsewhere to supplement their limited knowledge of the Hispanic matrimonial regime existing in those regions.

As is illustrated by the judicial decisions of the time, the courts of Louisiana treated the law of matrimonial property as defined in her Digest as perpetuating Spanish law. In two disputes involving ganancial property in 1811 and 1813³⁸, for example, counsel for the parties relied in their arguments on the works of such writers as Juan Matienço, Antonio Gómez, Antonio Ayerve de Ayora, Alfonso de Azevedo, Pedro Sigüenza, Francisco Muñoz de Escobar, Josef Febrero and José Juan Colom as well as provisions of the Partidas, the Laws of Toro and the Nueva Recopilation. A significant variety of Spanish legal sources were evidently available, and there were capable judges and advocates to use them, though many of those judges and lawyers had only recently arrived from the United States.

The Floridas were acquired by the United States from Spain in 1819, but Americans in the region greatly outnumbered Spaniards by the time that sovereignty was transferred and a new government for the territory of Florida was instituted in 1821³⁹. Although English law⁴⁰ was adopted in 1822 and a specific act was passed to provide for surviving widows along the lines of English law⁴¹, it was also provided that the rights «of any person» vested under prior law were protected⁴². In 1824 this provision was clarified and strengthened to protect the older settlers in their rights «established and derived by marriage under the civil law of Spain»⁴³. But though the ganancial rights of former Spanish

³⁸ *Beauregard v Piernas*, 1 Mart 281 (La. 1811), *Pizerot v. Meuillon's Heris*, 3 Mart 97 (La 1813).

³⁹ Report of Mr [Henry Marie] Brackenridge to Governor [Andrew] Jackson, July 26, 1821, 2 W LOWRIE - W FRANKLIN, eds, *American State Papers Miscellaneous* 902 (1834); Governor [Andrew] Jackson to the Secretary of State [John Q. Adams], October 6, 1821, *ibid.*, 909, 910.

⁴⁰ 1821-1822 Florida Gen. Laws 53. The principle of reception was reiterated and the applicable English law was redefined in 1823 Florida Gen Laws 111

⁴¹ 1821-1822 Florida Gen Law 124, clarified in 1825 Florida Gen. Laws 30 and 1828 Florida Gen. Laws 15, § 1, amended 1838 Florida Gen. Laws 35, § 1

⁴² 1821-1822 Florida Gen. Laws 53, § 4 at 54, replaced by a similar provision in 1823 Florida Gen Laws 111, § 3 at 112.

⁴³ 1824 Florida Gen Laws 189

subjects were subsequently recognized both judicially⁴⁴ and by special legislation⁴⁵, there does not seem to have been any inclination to extend the ganancial regime to the entire population.

But on the western frontier the response of the second wave of migrant Anglo-Americans was decidedly different. During the peaceful settlement of Mexican Texas by Anglo-Americans, Anglo-American lawyers among the settlers became familiar with the ganancial principle as the prevailing rule of law. After becoming an independent republic (in 1836) Texas received the law of England as its «rule of decision» in 1840. The principle of the common gains of marriage was nonetheless retained. But although the initial definition of ganancial property⁴⁶ included all moveables brought into a marriage except slaves, it is apparent that the draftsmen of the statute were using Louisiana law as their principal model⁴⁷. In the provisions of the Texas Constitution of 1845 under which she joined the United States, common property of spouses was redefined in a way that more closely adhered to the Spanish tradition as transmitted by the code of Louisiana.

As elsewhere in the western United States where the Spanish ganancial system was adopted, a conscious choice was made between the Hispanic matrimonial property regime and that of Anglo-American law. In making the choice and in defining the common property, the Anglo-American draftsmen of the fundamental definition thought primarily in terms of making adequate provision for the surviving *widow*, whose rights in Anglo-American law of the time were very limited. The constitutional definition adopted in Texas in 1845, which was copied by California and Nevada, was put in these terms:

⁴⁴ *Le Sasser v Alba*, companion case of *Alba v Hubbell*, Records of the Florida Territorial Court of Appeals (1830-1834), Tallahassee

⁴⁵ 1833 Florida Gen. Laws 129 This was an act to allow a widow, as her deceased husband's executrix, to sell his lands. It was recited that the widow «was by the laws of Spain, entitled to one half [of the lands] in her own right»

⁴⁶ 1839-1840 Texas Gen. Laws 3, § 4 at 4, 2 H GAMMEL, laws of Texas 177, 178 (1898)

⁴⁷ §§ 5-7 of the act, which dealt with marriage contracts, was derived from La. Civ Code 1825 arts 2305-2310 See McKnight, *Texas Community Property Law - Its Course of Development and Reform* in *Essays in the Law of Property Presented to Clyde Emery* 30, 31-32 (1975)

All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband..⁴⁸

This formulation is better understood when it is appreciated that its draftsmen sought to distinguish the characteristics of the Spanish regime from that of Anglo-American law, under which the moveable property of a wife became that of her husband at marriage and all of the profits of marriage belonged to him alone. It is notable that this basic definition of the ganancial regime was phrased in terms not of the common property but in terms of the separate or *paraphernal* property of the wife, which was the principal focus of difference as the Anglo-Americans saw it. Those who formulated this definition were more familiar with Anglo-American principles and took those as their basic point of departure. For the Anglo-American lawyer, definition of the common property was secondary to the definition of *separate* property. In Texas the legislature supplied this gloss of the constitutional regime in 1848 in terms of the property interests of both spouses:

[A]ll property acquired by either husband or wife, during the marriage, except that which is acquired [by gift, devise, or descent] shall be deemed the common property of the husband and wife, and during the coverture may be disposed of by the husband only. .⁴⁹

Similar definitions of common property (in terms of the separate property excluded from it) were subsequently adopted in the West⁵⁰. It was everywhere initially provided that the husband's

⁴⁸ Texas Constitution art Seventh, § 19 (1845) This section went on to provide «Laws shall be also passed providing for the registration of the wife's separate property.»

⁴⁹ 1848 Texas Gen. Laws 77, ch 79, § 3 at 78, 3 H GAMMEL, *Laws of Texas* 77 (1898).

⁵⁰ California Constitution, art XI, § 14 (1849), 1849-1850 California Gen. Laws 254, ch 103, §§ 1-2, Nevada Constitution, art. IV, § 31 (1864), 1864-1865 Nevada Gen. Laws 239, ch 76, § 1-2, 1865 Arizona Gen. Laws 60, ch. 31, §§ 1-2, 1866-1867 Idaho Gen. Laws 65, ch 9, §§ 1-2 at 65-66, 1869 Washington Gen Laws 318, §§ 1-2,

control of the common property would prevail during marriage, and this predominance of the husband in *intervivos* property management was consistent with his role in the Anglo-American system⁵¹. It seems to have been ordinary practice, nonetheless, in many areas for the wife to join in transfers of common land (and sometimes in those affecting the husband's separate land) following the Anglo-American practice by which the wife's joinder signified her renunciation of her vested interest to enjoy one-third of the husband's lands after his death. In some instances the joinder of both the spouses in disposing of common land was required before the end of the nineteenth century⁵². It was everywhere understood, however, that the husband might not dispose of more than his share of the common estate if he were the first to

1884 New Mexico Gen. Laws 176, ch 80, § 21 at 180, repealed 1901 New Mexico Gen. Laws 112, ch 62, § 32 at 118, reenacted 1907 New Mexico Gen. Laws 46, ch 37, §§ 8-10 at 47

⁵¹ La Dig 1808 III.5 66 at 336-337, La Civ Code 1825 art. 2373, La Civ. Code 1870 art 2404; 1848 Texas Gen. Laws 77, ch 79, § 3 at 78, 3 H. GAMMEL, *Laws of Texas* 77 (1898), 1849-1850 California Gen. Laws 254, ch 103, § 9; 1864-1865 Nevada Gen. Laws 239, ch 76, § 9 at 240, 1865 Arizona Gen. Laws 60, ch 31, § 9 at 61, 1867 Idaho Gen. Laws 65, ch. 9, § 9 at 67, 1869 Washington Gen. Laws 318, § 9 at 320, 1907 New Mexico Gen. Laws 46, ch 37, § 16 at 48

Except in Louisiana and New Mexico, the husband was initially also given control of the wife's separate property subject to her joinder in the sale or encumbrance of her lands, 1848 Texas Gen. Laws 77, ch 79, § 2, 3 H. GAMMEL, *Laws of Texas* 77 (1898), 1849-1850 California Gen. Laws 254, ch. 103, § 6, repealed and replaced by California Civ. Code 1872 § 162, 1864-1865 Nevada Gen. Laws 239, ch 76, § 6, repealed and replaced by 1873 Nevada Gen. Laws 193, ch 99, § 9 at 194; 1865 Arizona Gen. Laws 60, ch 31, § 6, repealed and replaced by 1871 Arizona Gen. Laws 18, §§ 1-2; 1866-1867 Idaho Gen. Laws 65, ch. 9, § 6 at 66, repealed and replaced by 1903 Idaho Gen. Laws 345 § 2 at 346, 1869 Washington Gen. Laws 318, § 6 at 319, repealed and replaced by 1881 Washington Code § 2400 at 414 See Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975*, 24 U.C.L.A.L. Rev 1 (1976).

⁵² Although it was generally required that both spouses join in any transfer of the family home, only Washington, Arizona and Idaho required joinder of spouses in making transfers and encumbrances of other community land 1879 Washington Gen. Laws 77, § 8 at 78, 1884-1885 Idaho Gen. Laws 137, § 1, 1887 Arizona Revised Statutes § 225 at 92. New Mexico required joinder of spouses in making transfers of community lands with the enactment of 1915 New Mexico Gen. Laws 123, ch. 85, § 1, and California enacted such a requirement in 1917 California Gen. Laws 829, ch 583, § 2

die⁵³. The reality of the wife's interest in the common property was only realized on the husband's death.

In New Mexico, when the law began to be codified after the American invasion of 1846, the Hispanic matrimonial regime of the common gains of marriage was presupposed as an established norm without any felt-need for codification. The ganancial system was merely alluded to in a general way in connection with some of the laws of succession, which were codified earlier⁵⁴. It was not until forty years later that New Mexicans finally codified the basic rules of matrimonial property law for the purposes of succession. In 1901, however, the New Mexicans enacted a statute which went a long way toward abandoning the Spanish system of *intervivos* common-ownership while utilizing Hispanic terminology and preserving Hispanic norms of succession⁵⁵. But in 1907 New Mexico adopted a definition of matrimonial property⁵⁶ based on that of California and the institution, thus revived, has been since maintained.

Both California and Nevada adopted provisions in their constitutions which were verbally identical to Texas's constitutional definition⁵⁷, and Arizona, Idaho, and Washington adopted similar provisions by statute. Although the ganancial concept proved to

⁵³ See I W DE FUNIAK, *Principles of Community Property* 561-564 (1943) The wife who died first also had the testamentary disposition of common property (subject to the same limitations applicable to the husband in Louisiana and Idaho, *ibid*, 563), though in California (between 1850 and 1923), in Nevada (between 1873 and 1957) and in New Mexico (between 1907 and 1975) the wife's testamentary power was seriously curtailed or non-existent California: *ibid*, 562 n 84, 1849-1850 California Gen Laws 254, ch 103 § 11 at 255 (wife's heirs seemingly took by intestacy), replaced by 1923 California Gen. Laws 29, ch. 18, § 1 (Civil Code § 1401), Nevada 1873 Nevada Gen Laws 193, § 10 at 194 (the surviving husband ordinarily took the entire community estate), replaced by 1957 Nevada Gen Laws 359, ch 264, § 1, New Mexico. 1907 New Mexico Gen Laws 46, ch. 37, § 26 at 49 (the surviving husband ordinarily took the entire community estate), replaced by 1975 New Mexico Gen Laws 1109, ch. 257, § 2-804 at 1151

⁵⁴ See, e.g., 1851-1852 New Mexico Gen. Laws 352, 361, art III, §§ 2(3), 4, 5 at 358-359, 368, 1871-1872 New Mexico Gen. Laws 29, ch 17, § 1, 1888-1889 New Mexico Gen Laws 208, ch 90, § 21 (§§ 1410-1411) at 213-214, 1901 New Mexico Gen Laws 112, ch. 62, § 7 at 113

⁵⁵ 1901 New Mexico Gen Laws ch. 62, § 1, 112 *But see ibid* § 7 at 113

⁵⁶ 1907 New Mexico Gen Laws 46, ch 37, §§ 9-10 at 47

⁵⁷ Although the Texas constitutional provision containing the definition of mar-

be attractive to many of the Anglo-American settlers of those states, it was not adopted everywhere that it was evidently discussed. It is apparent, for example, that the matrimonial property provisions of the California Constitution has an impact on the constitutional definition of married women's property rights in Oregon⁵⁸, but the Spanish system was not adopted there.

As the law of shared marital profits has developed in the United States, the ganancial estate is defined in two different ways. In only three of these states (Louisiana, Texas and Idaho) has the Hispanic rule of sharing been maintained in its original terms that the spouses share all the gains of the marriage whether generated by the labor of the spouses or by their *bienes propios*, or separate property. In Louisiana⁵⁹ and in Idaho⁶⁰ statutory

ital property has been amended in 1948 and 1980 to allow intervivos partitions of the common property, the definition as formulated in 1845 has been maintained. But the constitutional provisions of California and Nevada have been significantly altered to allow both legislative and contractual changes in the definition of common property. Since 1966 all of the community property states have substantially changed their rules of management of the community so that it is shared between the spouses.

⁵⁸ Oregon Constitution art. XV, § 5 (1857) provided that the property and pecuniary rights of every married woman at the time of marriage, or afterwards acquired by gift, devise, or inheritance shall not be subject to the debts or contracts of the husband, and laws shall be passed providing for the registration of the wife's separate property. The conjecture of C. CAREY, ed., *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* 481 (1926), that this provision was derived from the Michigan Constitution of 1850, art. XVI, § 5, which it resembles in some respects, overlooks two facts: (1) that the Oregonian provision was the consequence of a floor amendment limiting the section as originally drafted, Carey, *op. cit.*, at 369, and (2) that the provision concerning registration of the wife's separate property is clearly drawn from the California Constitution of 1849, art. XI, § 14. See the text at note 48 for the language of the Texas provision of 1845 which had been borrowed by California.

⁵⁹ By unilateral formal act a married woman was allowed to determine that the profits of her separate property should also be her separate property. 1944 Louisiana Gen. Laws 836, no. 286, § 1, amending La. Civ. Code 1870 art. 2386. This power is now exercisable by either spouse. 1979 Louisiana Gen. Laws 1868, no. 709, La. Civ. Code art. 2339 (1980).

⁶⁰ 1887 Idaho Rev. Stat. § 2497. If the wife provided in the instrument by which property was acquired that the income from it would be her own, it would be her separate property. This rule was amended by 1980 Idaho Gen. Laws 777,

means were, nevertheless, provided to the wife for unilateral designation of profits from separate property as her separate property. In Texas, on the other hand, although income from separate property was defined as community property, certain profits of separate property derived from the sale of contents of the soil (such as minerals⁶¹) were construed as constituting part of the separate property. In the other five states that adopted the ganancial regime, the spouses share the gains produced by their labor, but the gains generated by their own properties belong to the owner of the property which produced the profit⁶², with an apportionment of profit to the common estate (for expenditure of labor) on the dissolution of the marriage⁶³. Although this mode of

ch 300, § 2, Idaho Rev Stat § 32-906 (Supp 1982), which seems to preclude this result. See W BROCKLEBANK, *The Community Property Law of Idaho* 110-111, 170 (1962).

⁶¹ By the use of Anglo-American tracing doctrines these are defined in Texas as *part* of the land and hence of separate property character. See *Commissioner of Internal Revenue v Wilson*, 76 F 2d 766 (U S 5th Cir 1935)

The old Spanish law defined as separate property acquisitions from the sovereign, even if remunerative, as well as the profits of war acquired by a soldier unsupported by the common estate. Fuero Real III 3 1-2, Recop V 9 2-3, Nov Rec X 4 1-2, J LOPEZ DE PALACIOS RUBIOS, *In Librum Quartum Decretalium Gregorii* 20 65, Basanoff, *Bienes Castrenses*, 8 N Mex H Rev 273 (1933) Although some earlier decisions in Louisiana, Texas and California tended to follow the old Spanish rule in this regard, that view has long since been abandoned. *Gayoso de Lemos v García*, 1 Mart N S. 324 (La 1823), *Noé v Card*, 14 Cal. 576 (1860), *Fisk v. Flores*, 43 Tex 340 (1875), *Ames v Hubby*, 49 Tex 705 (1878) The United States Supreme Court, however, has recently tended to such an approach in viewing acquisitions from the national sovereign. *Hisquierdo v. Hisquierdo*, 439 U S 572 (1979), *McCurdy v. McCurdy*, 453 U S 210 (1981)

⁶² Although a general statutory definition similar to that of Texas was provided successively in California, Nevada, Washington, Idaho, Arizona and finally in New Mexico, the income from each spouse's separate property was excluded from the common estate in all of these states except Idaho, in accordance with California's statutory model enacted immediately after her Supreme Court had so interpreted the California constitutional provision along Anglo-American lines. *George v Ransom*, 15 Calif 322 (1860); 1861 California Gen Laws 310, ch 323, § 2 at 310-311

⁶³ The ways by which this apportionment is arrived at in California is explained in *Beam v Bank of America*, 6 Cal 3d 12, 490 P.2d 257 (1971) There is a discussion of the application of these principles elsewhere in the West in W. REPPY-C. SAMUEL, *Community Property in the United States* 137-139 (2d ed 1981).

allocating interests between marital estates on the dissolution of marriage was not derived from Spanish sources, it is still somewhat similar to the Hispanic approach for reckoning credits and debits between marital estates long employed in Texas⁶⁴. Texas courts derived their rules from Asso and Manuel⁶⁵ who in turn relied on Ayerve de Ayora⁶⁶. Though Texas courts have tended in recent years to abandon Ayora's mode of computing the amount of reimbursement in some instances⁶⁷, the Texas system remains fundamentally Spanish in this regard.

In computing the share of the surviving spouse in common property, an American court will first apply its definition of the marital estates and will then make a determination of a separate interest in particular property as it may be proved. In determining the separate or common character of property acquired with the proceeds of sale of separate property, American law has generally treated all such proveable reinvestments as separate property, not merely those traceable to sales or exchanges of separate lands as asserted by the Spanish commentators⁶⁸. However, Louisiana long tended to accept the narrower Hispanic view and in times past imposed some significant difficulties of proof on a claimant of separate property in such cases⁶⁹.

⁶⁴ *Rice v Rice*, 21 Tex. 58, 66-67 (1858), *Furrh v Winston*, 66 Tex. 522, 524, 1 S.W. 527, 529 (1886). The Louisiana system of reimbursement between marital estates is somewhat related to the Spanish method but is directly based on French sources. La. Dig. 1808 III 5 70 at 338-339, based on Code Napoléon art. 1437, La. Civ. Code art. 2377, *Babin v Nolan*, 4 Rob. 278 (La. 1843), 6 Rob. 508 (La. 1844), 10 Rob. 373 (La. 1845), *Waggaman v. Zacharie*, 8 Rob. 181, 187-188 (La. 1844), *Depas v Riez*, 2 La. Ann. 3 (La. 1847).

⁶⁵ I. ASSO-M. MANUEL, *Institutes* 58 (L. Johnston, trans., 1825), I ASSO-M. MANUEL, *Instituciones* 94-95 (7th ed., J. Palacios, ed., 1806), citing Fuero Real III.4.9.

⁶⁶ A. AYERVE DE AYORA, *Tractatus de Partitionibus Bonorum*. Acknowledging some difference of opinion on the point, Ayora expressed the view, *ibid.* I.10 2, that the measure of reimbursement for benefits rendered by one marital estate to another should be the cost expended rather than the value of enhancement to the benefited estate, even though enhancement was virtually inevitable in times of economic inflation.

⁶⁷ *Lindsay v Clayman*, 151 Tex. 593, 600, 254 S.W. 2d 777, 781 (1952); *Anderson v Gilliland*, 684 S.W. 2d 673 (Tex. 1985).

⁶⁸ J. MATIENÇO, *Commentaria on Recop.* V.9 2, gl. 2 nos. 3-4; J. GUTIÉRREZ, *Practicarum Quaestionum* Q. 117.

⁶⁹ See W. REPPY-C. SAMUEL, *Community Property Law in the United States* 77-90.

Without regard to the approach used in *defining* the ganancial system, in all American states that have adopted it, common property is now treated as divisible in halves on the death of one spouse for purposes of either testate or intestate succession. By the great weight of Castilian authority as effectively stated by Juan Matienço, this result was inevitable because each spouse had been co-owner of the profits of the marriage throughout the union⁷⁰. There was, nonetheless, a contrary point of view expressed by Tello Fernández⁷¹. Reverting to Anglo-American concepts and a misunderstanding of Spanish texts, a number of the American states initially reached the view of Fernández but for reasons very different from those he expressed. Thus, for a very long time, Louisiana, California, Idaho, New Mexico and Nevada followed the rule that the wife's right to a half-share of the ganancial property, or her exercise of testamentary disposition of that share, existed only when she survived her husband⁷². However, this persistence of Anglo-American outlook

(2d ed 1981), 1912 Louisiana Gen Laws 310, no 170, § 1, amending La. Civ. Code 1870 art. 2334; La Civ Code arts 2338, 2341 (1980) enacted by 1979 Louisiana Gen Laws 1857, no 709, § 1 at 1865-1867, Morrow, *Matrimonial Property Law in Louisiana* in W. FRIEDMANN, ed, *Matrimonial Property Law* 29, 44-47 (1955), Clark, *Matrimonial Property Law in New Mexico and the Western United States* in *ibid* 89, 104-105 *Savenat v. Le Breton*, 1 La. 520 (1830), was the turning point in the departure from the Spanish rule Huie, *Some Principles of Texas Community Property Law*, in J. CHARMATZ-H DAGGETT, eds., *Comparative Studies in Community Property Law* 115, 116-118 (1955). What Clark says of Texas law at 105 is misleading

⁷⁰ See J. MATIENÇO, *Commentaria* on Recop. V 9.2, gl. 3 especially no. 13. A limitation was generally acknowledged, however, that if cohabitation did not occur immediately after marriage, common ownership was postponed until cohabitation began.

⁷¹ See T. FERNÁNDEZ MEJÍA, *In Leges Tauri* on law 16.

⁷² The *fons et origo* of his confusion was the decision of the Louisiana Supreme Court in *Guice v Lawrence*, 2 La Ann. 226, 228 (1847). It was followed by the California Supreme Court in *Panaud v. Jones*, 1 Cal. 488, 517 (1851), and *Van Marten v Johnson*, 15 Cal. 308, 312 (1860), and by Idaho in *Halls v Johns*, 17 Idaho 224, 228, 105 Pac. 71, 72 (1909). Initially New Mexico gave each spouse testamentary power to dispose of his or her community share 1851-1852 New Mexico Gen Laws 352, 361, art. I, § 2 at 354, 364. In 1907, however, New Mexico adopted an Anglophonic approach by which the wife had no dispositive power over the common property unless she survived her husband. 1907 New Mexico Gen Laws 46, ch 37, § 26 at 49-50, *Reade v De Lea*, 14 N M 442, 463, 95 Pac 131, 138 (1908),

had almost wholly disappeared by 1930⁷³, and in this respect all the American community property states now maintain a doctrinal position consistent with that of their Spanish model in spite of initial adherence to an Anglophonic departure.

In California an immediate force behind the change was not equalization of spousal rights or a striving for *elegantia juris* but a desire to avoid the rigors of the American revenue laws regulating income taxes. As a result of the decision of the United States Supreme Court⁷⁴ that California law gave a married woman a mere expectancy to share in the common gains of marriage, the California law was changed by statute⁷⁵. In the course of preparing the case for trial a great deal of research was done on old Spanish law and a formidable library of Spanish works on the subject was assembled⁷⁶. As a consequence of that research Professor de Funiak published the principal American treatise on the law of ganancial property⁷⁷, two volumes of English translations of the works of Spanish commentators were prepared⁷⁸,

rev'd sub nom Arnett v. Reade, 220 U S 311, 320 (1911) Nevada had taken a similar approach. 1874 Nevada Gen Laws 193, § 10

⁷³ In Idaho, *Kohny v. Dunbar*, 21 Idaho 258, 121 Pac 544 (1912), New Mexico, *Beale v Ares*, 25 N M 459, 185 Pac. 780 (1919); and Louisiana, *Phillips v Phillips*, 160 La 813, 826 107 So. 584, 588 (1926), the change came by way of judicial decisions. The change in California, 1927 California Gen Laws 484, ch 265, § 1, and Nevada, 1957 Nevada Gen. Laws 359, ch 264, § 1, was made by legislation. In New Mexico, however, legislation was needed to complete and clarify the rule, 1973 New Mexico Gen Laws 1253, ch. 276 § 2 at 1254, now codified as 1978 New Mexico Statutes § 45-2-102B

⁷⁴ *United States v. Robbins*, 269 U.S. 315 (1926). In Texas, concern for federal death taxes has twice contributed to constitutional reform by which spouses have been empowered to change the character of their marital property by agreement. Texas Constitution, art. XVI, § 15, amendments of 1948 and 1980.

⁷⁵ 1927 California Gen. Laws 484, ch. 265, § 1

⁷⁶ L. ROBBINS, *The Lloyd M. Robbins Collection on Community Property* (Sacramento 1933)

⁷⁷ W. DE FUNIAK, *Principles of Community Property* (San Francisco, 2 vols 1943, supp 1948), the first volume of which has been slightly edited as W DE FUNIAK-M VAUGHN, *Principles of Community Property* (Tuscon, 1971).

⁷⁸ L ROBBINS-B MURPHY, *Laws of Toro 1505* (Lausanne, 1929), a translation of the commentaries of S. Llamas y Molina on some of the Laws of Toro, L ROBBINS, *Community Property Laws with Commentaries Thereon of Matienzo, Azevedo & Gutiérrez* (Sacramento, 1940).

and a bibliography⁷⁹ and a collection of biographies of Spanish commentators⁸⁰ were published. It was the most academically productive litigation which the subject of community property has generated in the United States.

Except for that portion which was transmitted by a spouse's will, a Castilian spouse's half of the common estate passed to his or her heirs⁸¹. The *Fuero Juzgo*⁸² had provided that the surviving spouse took *from* an intestate spouse only after collaterals of the seventh degree, and the *Partidas* extended the rights of heirs to the tenth degree⁸³. Although the Regulation of 1786⁸⁴ clearly provided that a decedent's estate escheated to the treasury after that which passed to collaterals in the fourth degree, the rule of the *Partidas*⁸⁵ that the *dote*, *donatio propter nuptias*, and the rest of a wife's property passed to her husband in the absence of descendants and collaterals of the tenth degree continued to be expressed⁸⁶. In 1844 Louisiana departed significantly from the Hispanic model by enacting the rule that on the intestacy of a spouse if the decedent's community share passed to the mutual issue of the deceased spouse and the surviving spouse, the surviving spouse should have a usufruct in it⁸⁷, thus postponing the descendants' right of present enjoyment for the lifetime of the surviving spouse. In 1837 Texas had provided that in the absence

⁷⁹ See note 76 *supra*

⁸⁰ L. ROARK, *Translation of Biographies of Noted Spanish Commentators* (San Francisco, c. 1930)

⁸¹ See J. MATIENÇO, *Commentaria* on Recop. V 9 2 (*Fuero Real* III.3 1), gl. 3, nos. 9, 13, 15, A. AZEVEDO, *Commentariorum* on Recop. V 9 6, gl. 4, J. GUTIERREZ, *Practicarum Quaestionum*, Q. 123 no. 1

⁸² *Fuero Juzgo* IV 2 11.

⁸³ Part. IV 13 6

⁸⁴ Nov. Rec. X 22 6

⁸⁵ Part. IV 11 23

⁸⁶ In I I ASSO-MANUEL, *Instituciones* 86 n. 2 (7th ed. 1806, J. Palacios, ed.), Palacios said that neither Nov. Rec. X 22 1 (Recop. V 8 12) nor the Regulation of 1786, Nov. Rec. X 22 6, on escheats specifically varied the rule of reciprocal heirship of surviving spouses and seemed to favor descent to the surviving spouse. As to *arras* see *ibid.* 89-90 n. 1. But Asso-Manuel themselves were seemingly of the contrary view *ibid.* 212-213 and 213 n. 1

⁸⁷ 1844 Louisiana Gen. Laws 99, no. 152, § 2, La. Civ. Code 1870 art. 916. This may have been inspired by art. 52 of the *Coutume de Bordeaux*.

of heirs of the decedent the surviving spouse took the whole of a deceased spouse's estate on intestacy⁸⁸, and that provision was repeated in 1840, but with respect to common property only⁸⁹. In 1872 New Mexico provided that in similar circumstances the surviving spouse would take the decedent's share of the common property⁹⁰. In 1923 California carried this innovation a step further by providing that the surviving spouse would take the intestate deceased spouse's half of the common estate regardless of the existence of surviving ascendants or descendants⁹¹. The California rule was adopted in Nevada, Idaho and New Mexico⁹² and ultimately in Washington⁹³. Thus in those states the whole of the ganancial estate belongs to the surviving spouse on the intestacy of the other. In Texas the intestate deceased spouse's interest in the common estate has continued to pass to the decedent's descendants⁹⁴, and Arizona and Washington followed Texas's approach in this regard until recently⁹⁵. In Arizona today, if there are no mutual descendants of the decedent and

⁸⁸ 1837-1838 Texas Gen Laws 106, § 2, 1 H Gammel, *Laws of Texas* 1448 (1898)

⁸⁹ 1839-1840 Texas Gen. Laws 3, § 4 at 4, 1 H Gammel, *Laws of Texas* 177, 178 (1898)

⁹⁰ 1871-1872 New Mexico Gen Laws ch 17, § 1, 29 (1872) There is no indication that this statute, of which the original was enacted in Spanish, was inspired by the law of any other state

⁹¹ 1923 California Gen Laws 29, ch 18, § 1 (Civil Code § 1401), however, pursuant to 1983 California Gen Laws 3018, ch 842, § 55 at 3080 (Probate Code § 6401), the surviving spouse of a decedent dying after January 1, 1985, takes only one-half of the deceased spouse's share of the common property and the rest passes to the decedent's heirs

⁹² That approach still prevails in each of those states 1975 Nevada Gen Laws 557, ch 393, § 17 (§ 123 250) at 561-562 as amended by 1981 Nevada Gen Laws 779, 1971 Idaho Gen Laws 233, ch. 111 § 1 (§ 15-2-102) at 248, 1975 New Mexico Gen Laws 1109, ch 257, § 2-102 at 1127-1128 Through careless copying of an Idaho law, a similar provision was adopted in Montana, where the community property system was not in effect 1877 Montana Gen. Laws 239, § 551 at 368-69. But that provision was later judicially invalidated *Chadwick v Tatum*, 9 Mont. 354, 23 Pac 729, 733 (1890)

⁹³ 1967 Washington Gen. Laws 817, ch. 168, § 2 at 818-819, as amended by 1974 Washington Gen. Laws 284, ch 117, § 6 at 288.

⁹⁴ Texas Probate Code § 45 (1955)

⁹⁵ See Clark, *Matrimonial Property Law in New Mexico and the Western United States* in W FRIEDMANN, ed *Matrimonial Property Law* 89, 127 (1955).

the surviving spouse, all common and separate property of the deceased spouse passes to the surviving spouse. But if there are descendants not of the surviving spouse, none of the decedent's share of the common estate, as well as only half of the decedent's separate estate, passes to the surviving spouse⁹⁶. Thus today in most of the American states employing the ganancial regime, the surviving spouse's right to the decedent's intestate share of the common property is favored over the decedent's descendants.

Intervivos management of the common property by the husband may result in its being so depleted that at the death of one of the spouses there is relatively little to divide. One of the topics that most perplexed the Spanish commentators was that of the right of the husband as manager of the community to squander it or to make gifts of it to strangers. A great diversity of opinion was expressed. The *lex scripta* merely stated that, as manager of the common property, the husband had the power to dispose of it unless he had done so «por defraudor o domnificar a la mujer»⁹⁷. Matienço⁹⁸ and Palacios Rubios⁹⁹ took a very strict view of the husband's fiduciary responsibility and construed as fraudulent toward the wife any gifts made of the common property, even to children of a prior marriage¹⁰⁰. On the other hand, Antonio Gómez¹⁰¹ and Juan García¹⁰² took the view that unless the wife could prove a fraudulent intent on the husband's part, his gratuitous dispositions of common property were valid and that fraud was never presumed. Other jurists tended toward one or the other of these views or adopted positions that fell between them. For example, Sala¹⁰³ chose to steer a middle course: that the husband could make gifts of moderate amounts but not very

⁹⁶ 1973 Arizona Gen. Laws 347, ch 75, § 4 at 363-364.

⁹⁷ Law of Henry IV at Santa Maria de Nieva (1473); Nov. Rec X.4.5. Antecedents of the general rule on management of the common estate, without the proviso concerning fraud, are found in Fuero Viejo V 1 8 and Leyes de Estilo 205.

⁹⁸ J. MATIENÇO, *Commentaria* on Recop V 9.5., gl. 6 nn. 3-5.

⁹⁹ J. LÓPEZ DE PALACIOS RUBIOS, *De Donationibus Inter Virum et Uxorem* § 66, n 28

¹⁰⁰ See discussion in 22 Q MUCIUS SCAEVOLA, *Código Civil concordado y comentado Extensamente* 311-312, 327-328 (1905).

¹⁰¹ A. GÓMEZ, *Ad Leges Tauri*, law 53, gl 73-75

¹⁰² J. GARCÍA DE SAAVEDRA, *De Conjugali Acquaeatu* no 66.

¹⁰³ See 1 J. SALA, *Ilustración* I.4.24 at 43 (2nd ed. 1820).

large ones without good cause. The subject has also produced diverse views in the United States. In Louisiana¹⁰⁴ and Texas¹⁰⁵ where the Spanish traditions of matrimonial property law have proved strongest, the Gometian view (consistent, as it was, with the primacy of the husband's position) tended to prevail until recently. Then the Louisiana legislature turned the law in the opposite direction¹⁰⁶ and the Texas courts have followed academic thinking almost into the camp of Matienço¹⁰⁷. Thus the old disputes between the Spanish commentators have been once again fought in North America. In the western states a view tending toward that of Matienço has long prevailed with respect to the husband's donations of moveables, and with respect to land the western states have required joinder of the spouses in all conveyances¹⁰⁸.

Two additional points with respect to the ganancial regime require mention: (1) the ability of a couple prior to marriage to contract out of those rules with the consequential effect on rights of succession and (2) the liability of a widow for obligations incurred by the deceased husband and the power of the widow to avoid those debts by renunciation of her share in the common property. Whether a couple about to be married (or spouses) might

¹⁰⁴ Louisiana Civil Code 1870 art. 2404 provided that «the husband may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons» but he cannot give away the whole, or a quarter of the movables» *intervivos* nor can he donate community immovables *intervivos* «unless it be for the establishment of the children of the marriage». See Morrow, *Matrimonial Property Law in Louisiana* in W. FRIEDMANN, ed., *Matrimonial Property Law* 29, 48-49 (1955).

¹⁰⁵ *Dunn v. Vineyard*, 234 S.W. 99, 103 (Tex. Civ. App. 1921), is the high-water-mark of the Gometian view in Texas.

¹⁰⁶ La. Civ. Code art. 2349 (1980), enacted by 1979 Louisiana Gen. Laws 1857, no. 709, § 1.

¹⁰⁷ See J. MCKNIGHT - W. REPPY, *Texas Matrimonial Property Law* 166, 170-171 (1983).

¹⁰⁸ See W. REPPY - C. SAMUEL, *Community Property Law in the United States* 233-241 (2d ed. 1981). Without spousal joinder some of these states treat the conveyance of land as absolutely void whereas in others it is merely voidable or does not pass the interest of the non-participating spouse. *Ibid.*, 223; J. MCKNIGHT - W. REPPY, *op. cit.* 155. In Texas the spouses need not join in making a conveyance of land unless it is subject to their joint management. Texas Family Code § 5.22(c) (1975).

contract out of the ganancial regime or other spousal benefits provided by law was very doubtful under nineteenth century Spanish law¹⁰⁹. Though earlier commentators had recognized that such contracts might be entered into¹¹⁰, the incidence of such agreements must have always been small¹¹¹. The argument that such contracts could be made (at least prior to marriage) rested on the authority of Law 60 of Toro¹¹² that a wife might renounce her community interest. Matienço therefore found an inference that the husband could make a similar renunciation¹¹³. In Castilian practice of the eighteenth and nineteenth centuries, however, such marriage contracts as were ordinarily entered into were devoted to agreements regulating *dote* and *arras*, and the future spouses did not seek to alter the character of *bienes propios* or *bienes gananciales*. Thus succession was not significantly affected by such contracts except insofar as marriage gifts were provided which would be available to the surviving spouse.

On the Anglo-Hispanic frontier of North America in the nineteenth and early twentieth centuries the use of marriage

¹⁰⁹ Sánchez Román interpreted the absence of a rule allowing contracts for separation of property as a prohibition of such undertakings prior to the enactment of the Spanish Civil Code 1889 arts 1315, 1432, 1458 which authorized such contracts 5 F SANCHEZ ROMAN, *Estudios de Derecho Civil*, vol 1, 859-860 (1912) But he went on to say that betrothed couples could have entered into such contracts in those regions where the regime of separation of property was specially recognized by local fueros *Ibid*, 454-455 See also 4 C VALVERDE Y VALVERDE, *Tra-tado de Derecho Civil Español* 273 (1913).

¹¹⁰ See, for example, J MATIENÇO, *Commentaria* on Recop V 9 9 (Nov Rec X 4 9), 2 S LLAMAS Y MOLINA, *Leyes de Toro* 311 n 2 on Recop V.9 9 (Law of Toro 60) gl 3, 1 J SALA, *Ilustración* 43 (2nd ed 1820)

¹¹¹ Font Ruis, *La Ordinación Paccionada del Régimen Matrimonial de Bienes en el Derecho Medieval Hispánico*, 8 A A M N 189, 236-237 (1954), found no instance of a contract providing for separation of property in the Castilian documents that have survived from the medieval period This state of affairs did not appear to have changed very much, if any, by the mid-nineteenth century See 3 F GARCIA GOYENA, *Concordancias* 262 (1852)

¹¹² *Leyes de Toro* 60, incorporated in Recop as V.9 9 and in *Nov Rec* as X 4 9 See A GÓMEZ, *Ad Leges Tauri*, law 60 gl 1, J MATIENÇO, *Commentaria* on Recop V 9 9, gl 1, no 1, gl 2, no 2 and on Recop. V 9 2, gl 1, nos 58-59, A AZEVEDO, *Commentariorum* on Recop V 9 9, gl. 1-3, 6-7, 2 S LLAMAS Y MOLINA, *Leyes de Toro* 311 n 2 on Recop. V 9 9, gl. 3

¹¹³ J MATIENÇO, *Commentaria* on Recop V 9 9, gl. 2, no 2, A. AZEVEDO, *Commen-tariorum* on Recop V 9 9, gl 13-14

contracts to change the character of marital acquisitions was not common except in Louisiana, and the tradition there was French in the sense that alteration of the marital regime was allowed and sometimes agreed¹¹⁴. With the increasing prevalence of divorce, however, such contracts have become more common elsewhere. Although all the American community-property states have maintained marriage contract statutes, they are also essentially French in tone, copied as they were from the provisions of the Louisiana Civil Code of 1825¹¹⁵ which was derived in language and spirit from French models¹¹⁶ which, *inter alia*, forbade alteration of a premarital contract during marriage¹¹⁷.

Another type of premarital agreement was also prevalent in Spanish Louisiana though not elsewhere. It was the agreed inventory of the wife's separate property or that of both parties to the marriage. If the bride's property were received by the groom at an agreed value, this constituted a sort of a dowry contract by which property became that of the groom who would then merely owe the agreed amount rather than the return of the property itself. But such appraised inventories were rare even in Louisiana, where written contracts of dowry were more common than elsewhere on the northern Hispanic frontier. On the other hand, an agreed, *unappraised* inventory as a species of marriage contract persisted in rural Louisiana until the recent past¹¹⁸. Its

¹¹⁴ See Baade, *Marriage Contracts in French and Spanish Louisiana, A Study in «Notarial» Jurisprudence*, 53 Tul L Rev 1 (1978)

¹¹⁵ La Civ Code 1825 arts 2305-2310 Its predecessor was La Dig. 1808 III 5 1, .3-.7 at 322-325

¹¹⁶ Projet du Gouvernement III 10 3-5, 9 (1800) and Code Napoléon arts. 1387-1389, 1398.

¹¹⁷ Projet du Gouvernement III.10.5 (1800), La Dig 1808 III 3 6 at 324-325, La. Civ Code 1825 art 2309, La. Civ. Code 1870 art. 2329 Louisiana Matrimonial Regimes Act La Civ. Code art. 2329 (effective January 1, 1980), however, allows alteration *with judicial approval* unless the spouses shift to the *legal* regime, in which case judicial approval is not required.

¹¹⁸ See H. DAGGETT, *The Community Property System of Louisiana* (1945) From its creation in 1911 to 1930, Evangeline Parish had recorded 264 marriage contracts and most of them consisted of little more than inventories of separate property.

Anglo-Americans who had recently arrived in Texas in the nineteenth century

function was merely to identify property brought into a marriage for the purpose of reclamation on dissolution of the marriage.

During the period of French rule in Louisiana ¹¹⁹ the great majority of marriage contracts had provided that in the absence of children of a marriage, the survivor would take the entire estate of the deceased spouse, but only a few agreements so provided during the period of Spanish rule ¹²⁰. Although such provisions were allowed by the *Fuero Real* ¹²¹ and were therefore sanctioned by Asso and Manuel ¹²², possible encroachment on the rights of surviving ascendants is readily apparent ¹²³.

Texas ¹²⁴, New Mexico ¹²⁵, and Arizona (to some extent) ¹²⁶ maintained principles that were consistent with Hispanic practice of the nineteenth century which treated the marital regime as incapable of alteration by a marriage contract. But all of these states have recently turned away from that tradition ¹²⁷.

occasionally entered into such agreements, presumably motivated by a misconception that on marriage the wife's property became part of the community or that moveables became the property of the husband as under the law that once prevailed in many Anglo-American jurisdictions. The only useful purpose that such agreements served was to preserve evidence of what property constituted the wife's separate estate.

¹¹⁹ See Baade, *op. cit.* note 114, 17-18 at nn. 86-87, 47-48 at n. 238. See also I C FERRIERE, *Commentateurs Anciens et Modernes sur la Coutume de Paris* cxii, art. 280 (2nd ed., N. le Camus, ed., Paris, 1714); R. POTHIER, *Traité de Donations entre Mari et Femme* nos. 257-271 in 7 *Oeuvres de Pothier* 548-550 (2nd ed., M. Bugnet, ed., Paris 1845).

¹²⁰ Baade, *op. cit.* at 53, n. 262. See also *ibid.*, 47-48 nn. 238-239, 86, nn. 455-458.

¹²¹ *Fuero Real* III 6.9

¹²² I. ASSO - M. MANUEL, *Instituciones* 109-110 (6th ed. 1805)

¹²³ I I ASSO - M. MANUEL, *Instituciones* 190 n. 1 (7th ed. by J. Palacios 1806). See Otero, *Mandas Entre Conyuges*, 27-28 A.H.D.E. 399, 404-405 (1957-1958). See also Baade, *op. cit.* 47-48 Under Part. VI 13 6 (see also Part. IV 11.23), on intestacy the survivor of a childless marriage took only if there were no kin of the decedent within the tenth degree.

¹²⁴ See *Burton v. Bell*, 380 S.W. 2d 561 (Tex. 1964), *Gorman v. Gause*, 56 S.W. 2d 855 (Tex. Comm. App. 1933).

¹²⁵ See *McDonald v. Lambert*, 43 N. Mex. 27, 85 P.2d 78 (1938)

¹²⁶ See *In re Mackerich's Estate*, 93 Ariz. 129, 379 P.2d 119 (1963).

¹²⁷ Texas Constitution art. XVI, § 15 (1980), 1973 Arizona Gen. Laws ch. 75, § 11, 347 at 529-530; *Chavez v. Chavez*, 56 N. Mex. 393, 244 P.2d 781 (1952)

Under Castilian law, on the husband's death his creditors could seek satisfaction for half of his debts contracted during marriage from his widow who took half of the ganancial estate¹²⁸. Correlatively the widow might collect one-half of all debts owed to her deceased husband¹²⁹. But just as a decedent's heirs might renounce their inheritance in order to avoid liability for the decedent's debts, his widow was allowed to renounce her share of the common estate and thus avoid her part of community liability¹³⁰. Among American states only Louisiana perpetuated the principle of the widow's renunciation¹³¹, and that right was significantly curtailed when the United States Supreme Court concluded in 1971 that the right could not be exercised to avoid a widow's federal tax liability¹³². Other American community-property jurisdictions have required the payment of all debts of a deceased spouse from the common estate before any division of it is made¹³³. But, if the common estate is insolvent, there is no consequential liability that falls on the surviving spouse merely because that debt was made by the decedent for a community purpose.

Following the pattern set by Texas in 1840¹³⁴, the legislature of the western community property states treated succession to community and separate property independently and very awkwardly so. Whereas the surviving spouse tended to be favored on intestacy over the decedent's heirs as to common property, the order of succession to separate property tended to follow the

¹²⁸ J HEVIA BOLAÑOS, *Curia Philippica* II 10 6

¹²⁹ I. ASSO - M. MANUEL, *Instituciones* 304 (6th ed. 1805).

¹³⁰ *Leyes de Toro* 60, S LLAMAS Y MOLINA, *Leyes de Toro*, law 60, gl. 1; Mozos, *La renuncia de la Sociedad Legal de Gananciales*, 13 A.D.C 62 (1960)

¹³¹ La Dig. 1808 III 5 72 at 338-339, La Civ Code 1825 art 2379, La Civ. Code 1870 art 2410

¹³² *United States v Mitchell*, 403 U S 190 (1971).

¹³³ For example, 1851-1852 New Mexico Gen. Laws 352, 361, art. 3, § 4 at 358, 368, provided that the common property was liable for all common debts, and that the net amount remaining after payment of debts would be divided between the surviving spouse and the heirs. The section also provided that if any of the wife's separate property should have been mixed with the common property, she was entitled to its value as a preferred claim except as against bona fide creditors without knowledge of the claim

¹³⁴ 1839-1840 Texas Gen. Laws 132, 2 H GAMMEL, *Laws of Texas* 306 (1978)

Anglo-American pattern in favor of the decedent's kin. But in this regard there was a considerable diversity of approach derived from Anglophonic sources. Anglo-Americans were very familiar with the concept of solely owned property of spouses and therefore treated it in their usual way. Co-owned property of spouses as a result of their mutual exertions was unfamiliar to Anglo-Americans and they treated it as a unique type of property, seemingly oblivious of the fact that it closely resembled the Anglo-American tenancy-in-common and was also very similar to their tenancy in partnership. Thus a diversity of disposition remains and can cause great complexity in the division of intestate estates.

The ganancial system was not only adopted in the American West where no Hispanic population had settled, but the system has also had a significant impact on all American citizens as a result of its influence on the federal tax system. Because spouses in the common-property estates were allowed to split their combined incomes in halves for reckoning federal income taxes and thus to achieve a lower combined tax than would have fallen on the one spouse who earned most of the income, six American jurisdictions¹³⁵ adopted the ganancial system by statute in the 1940s so that their citizens might pay lower federal income taxes¹³⁶. But the federal tax law was changed in 1948 not only to allow spouses a choice whether they would pay their income taxes jointly (at a favorable joint rate) or singly, but also to extend to all Americans the benefits that community-property law had provided with respect to gift and death taxes¹³⁷. Two of the six jurisdictions which had embraced the ganancial system had already reverted to their former laws and the other four promptly did so¹³⁸. The lasting consequence of this interaction between the

¹³⁵ The states of Michigan, Nebraska, Oklahoma, Oregon and Pennsylvania and the territory of Hawaii.

¹³⁶ See Surrey, *Federal Taxation of the Family - The Revenue Act of 1948*, 61 *Harvard L. Rev.* 1097, 1104 (1948) See also W. DE FUNIAK - M. VAUGHN, *Principles of Community Property* 535-536 (2d ed. 1971).

¹³⁷ Surrey, *op. cit.* at 1104-1111 (income tax), 1117-1121 (death and gift taxes).

¹³⁸ See Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 *Cornell L. Rev.* 45, 69-70 (1981)

ganancial system and American federal tax law is the joint system of taxing spouses which still prevails¹³⁹.

A wider familiarity with the ganancial system over the last half century not only produced significant changes in the states where it has been established¹⁴⁰, but such familiarity has also prompted discussion of its adoption in other states. After long deliberation the state of Wisconsin adopted a ganancial system in 1983¹⁴¹, but some time must elapse before her doctrinal development of the system may be measured in comparative terms.

3. SUPPLEMENTARY RIGHTS

Besides a half of the common gains of marriage, the general law of Castile gave significant further protection to the surviving widow. The *Fuero Juzgo*¹⁴² had provided for the right of each surviving spouse to a child's portion in the estate of the other. But the *Partidas*¹⁴³ merely provided an adaptation of Justinian's fifty-third novel¹⁴⁴ by which a poor widow without dowry might be awarded up to a fourth part of her deceased husband's property in an amount not to exceed «one hundred pounds in gold». Sala's comments¹⁴⁵ on this provision suggest that the judges of the late eighteenth century had been inclined to justify small awards in reliance on this monetary limitation. Sala therefore re-

¹³⁹ United States Internal Revenue Code § 6013 (1986)

¹⁴⁰ Modernization has been achieved largely by reform of *intervivos* management of common property which now tends to be shared by the spouses. See Bartke, *Community Property Law Reform in the United States and in Canada: A Comparison and Critique*, 50 *Tulane L. Rev.* 213 (1976), W. REPPY - C. SAMUEL, *Community Property in the United States* 205-215, 228 (2d ed. 1982)

¹⁴¹ 1983-1984 Wisconsin Gen. Laws 1153, act 186, § 47 (§ 766.31) at 1164-1165, as amended by 1985 Wisconsin Gen. Laws 571, act 37, §§ 76-83 at 579-580 (effective January 1, 1986); Taylor & Raabe, *Wisconsin's Uniform Marital Property Act. Community Property Moves East*, 12 *Comm. Prop. J.* 83 (1985)

¹⁴² *Fuero Juzgo* IV 2.13,15.

¹⁴³ Part VI 13.7. There is no comparable provision in the *Fuero Real*

¹⁴⁴ Nov. Just. LIII 6. See also Nov. Just. CXVII 5.

¹⁴⁵ J. SALA, *Ilustración del Derecho Real de España* II.8.5 at 224 (2nd ed. 1820)

ferred to the work of Covarrubias¹⁴⁶ and Gómez¹⁴⁷ to show that the restriction should be broadly interpreted in the light of the current monetary equivalent¹⁴⁸ of the Justinianic limitation. The maximum amount that a widow could claim was computed on the entire value of the husband's estate, whether he died testate¹⁴⁹ or intestate. Thus in making an award to the widow there would always be a prospect of encroaching upon the legitim of the heirs, but more particularly the claims of legatees, who might be expected to resist the claim.

Following the model of Justinian's novel, the draftsmen of the Partidas defined the poor widow as one without dowry. Late eighteenth and early nineteenth century Spanish writers¹⁵⁰ seemed to stress comparative financial insecurity, or need, rather than lack of dowry. If a widow were poor, a lack of adequate dowry, as well as an absence of an adequate ganancial share, might have been presupposed. It would therefore seem that the widow's share must have been sought mainly from her deceased husband's separate estate, though none of the writers mentioned this point.

The right of the widow to claim up to a fourth part of the husband's estate has given that institution its common name, *la cuar-*

¹⁴⁶ Covarrubias fixed the limitation at the equivalent of 7200 castellanos of his time D COVARRUBIAS, *Veterum Numismatum Collatio* VI 5

¹⁴⁷ J. AYLLÓN LAYNEZ, *Illustrationes sive additiones ad varias resolutiones Antonii Gomezii*, II 4 7 See also J. GUTIERREZ, *De Juramento Confirmatorio* I 7 5-7

¹⁴⁸ Following F. MUÑOZ DE ESCOBAR, *De Ratiociniis Administratorum et Computationibus* II 1 14-17, Febrero in turn rendered the reference to Roman money at the rate of 485 maravedis for each castellano rather than 450 as reckoned by others. Thus the limitation would have been 3,492,000 maravedis rather than 3,240,000 2 J. FEBRERO, *Librería de Escribanos. Juicios* II 3 4 171 at 279-280 (3d ed. 1786) However, J. Gutiérrez, *op cit*, I 7 6 had valued a castellano at 544 maravedis In the mid-nineteenth century the limitation was calculated by Gustavus Schmidt as 121,976 reales 16 maravedis vellón (i.e., in terms of the silver and copper alloy then in use) G. SCHMIDT, *The Civil Law of Spain and Mexico* 270 (New Orleans, 1851)

¹⁴⁹ That is, the fourth was to be calculated before the fifth and the third were deducted from the estate See F. MUÑOZ DE ESCOBAR, *op cit*, II.1 14

¹⁵⁰ J. FEBRERO, *Librería de Escribanos: Escrituras* I.1.21.233-234 at 196-198 (3d ed. 1783), 1 J. SALA, *Ilustración del Derecho Real de España* II 8.5 (2nd ed. 1820); 3 J. ALVAREZ, *Instituciones de Derecho Real de Castilla y de Indias* III.1-13 3 Note (1820)

ta marital. It has also been called the widow's legitim¹⁵¹. Although a literal reading of the text of the Partidas seems to limit the claim to *widows*, both López¹⁵² and Febrero¹⁵³ interpreted the provision in the light of its Roman prototype¹⁵⁴ which allowed awards to surviving *widowers*. Febrero¹⁵⁵ nonetheless mentioned an actual dispute in which the Chancery of Valladolid had reached the contrary conclusion.

As suggested by the text of the Partidas, the draftsmen of the Louisiana Digest of 1808¹⁵⁶ and the Civil Codes that followed¹⁵⁷ relegated the *cuarta* to that part of the code which dealt principally with dowry, and there it remained until 1979 when a short chapter devoted entirely to the marital portion was enacted¹⁵⁸. It is evident from Moreau's catalogue of references related to specific provisions of the Digest of 1808¹⁵⁹ and the notes to his trans-

¹⁵¹ See 7 S. MINGUIJÓN, *Elementos de Historia del Derecho Español* 101-102 (1920), where he mentions the Fueros of Cuenca, Alcazar and Zorita

¹⁵² G. LÓPEZ on Part VI 13 7, gl. 4.

¹⁵³ J. FEBRERO, *op cit* note 1, I 2 1 235 at 198.

¹⁵⁴ See Feenstra, *The «Poor Widower» in Justinian's Legislation* in P. STEIN - A. LEWIS, eds *Studies in Justinian's Institutes in Memory of J.A.C. Thomas* 39 (1983)

¹⁵⁵ *Ibid*

¹⁵⁶ La Dig 1808 III 5 55 at 334-335. The provision refers to those situations when the widow has no dowry or its amount «is but trifling with respect to the condition of the husband» G. LÓPEZ on Part VI.13 7, gl. 3 said that if the dowry was small, it was deducted from the quarter

¹⁵⁷ The provision of the Digest was reenacted in substantially similar terms as La Civ Code 1825 art. 2359 and La Civ Code 1870 art. 2382. By 1926 Louisiana Gen. Laws 175-176, no. 113, § 1, a second paragraph was added to authorize periodic allowances while the succession was in the process of settlement. After slight amendment by 1974 La Gen. Laws 381, no. 115, § 1, it was repealed by 1978 La Gen. Laws 1589, no. 627, § 6 at 1601, effective 60 days after final adjournment of the regular session of 1979, *ibid*, § 9 at 1601, but was reinstated as La Civ Code 2432-2437 by 1979 Louisiana Gen. Laws 1886, no. 710, § 1 at 1887, effective January 1, 1980

¹⁵⁸ 1979 Louisiana Gen. Laws 1886, no. 710, § 1 at 1887, La. Civ. Code arts. 2432-2437 (1980).

¹⁵⁹ In the de la Vergne MS of the Louisiana Digest, interleaf opposite 335, these references are given for art. 55. 1 J. FEBRERO, *Librería de Escribanos. Escrituras* I.1.21.233-235 at 196-198 (3rd ed. 1783); 2 J. FEBRERO, *Librería de Escribanos Juicios* II.2.1.4-5 (3rd ed. 1786), Part VI 12.7 (providing for the *cuarta marital*), Part IV 11.32 (dealing with delivery of the widow's dowry to her or her heirs after her husband's death and the expenses claimable by the husband's heirs).

lation of the Partidas¹⁶⁰ that he and his fellow compiler of the Digest regarded the Spanish *marital portion*, as they termed it, as having particular applicability to widows without dowry or those whose dowry was inadequate for their proper maintenance, as well as those instances when hardship resulted from delay in the surrender of the widow's dowry by the husband's heir¹⁶¹. But following Febrero's suggestion that the *cuarta* should be available to either surviving spouse, the Louisiana Digest's authors provided that the marital portion of one-fourth of the succession of a deceased spouse should pass to *either* surviving spouse¹⁶², but without any upper monetary limit as provided in the Partidas. Interpreting the Partidas as Febrero¹⁶³ did (by reading Justinian's Novel 117 into it) the draftsmen of the Louisiana Digest went on to provide that the surviving spouse's quarter was «in full property» in the absence of children and a usufruct of a quarter when there were three children or less. When there were more than three children, the survivor took a child's share in usufruct. The surviving spouse was obliged to include in the marital portion any testamentary provision made by the decedent. This sliding-scale formula derived from Novel 117 made the award of the marital portion harmonious in operation to the fixing of legitim¹⁶⁴. Inbedded, as these rules were, in the dowry provisions of the Louisiana Digest and succeeding provisions of the Civil Code of

¹⁶⁰ L. MOREAU LISLET & H. CARLTON, *The Laws of Las State Partidas, which are still in Force in Louisiana* 541 (Part IV.11.32), 1102 (Part VI.13.7) (2 vols. New Orleans 1820). A note to the translation of both Part IV.11.32 and Part VI.13.7 refers to La. Dig. 1808 III.5.55 at 334-335.

¹⁶¹ In commenting on the widow's right to support from her deceased husband's property until her dowry is restored, Matienço makes no allusion to any provision of the Partidas. J. MATIENÇO, *Commentaria on Recop. V.9.2* (Nov. Rec. X.4.1) gl. 1, no. 10.

¹⁶² La. Dig. 1808 III.5.55 at 334-335.

¹⁶³ 1 J. FEBRERO, *op. cit.* note 1, 12.1.234 at 197 and 2 *ibid.* *Juicios* II.3.4.173 at 281. Febrero seems to borrow his analysis from López who rested his argument on Nov. Just. CXVII.5. G. López, on Part. VI.13.7, gl. 8. In *Abercrombie v. Caffray*, 3 Mart. N.S. 1 (1824), the difference between Part IV.13.7 and Nov. Just. CXVII.5 is clearly noted, but it appears that the Louisiana Supreme Court read Febrero's account somewhat differently from the way that Moreau had interpreted it.

¹⁶⁴ Febrero also said that the widow's interest was cut to a usufruct if she remarried. 2 *ibid.* *Juicios* II.3.4.174 at 281.

1825¹⁶⁵, they were left undisturbed when the 1844 enactment¹⁶⁶ for community benefits of the surviving spouse were built into the Civil Code of 1870¹⁶⁷. As ultimately amended in 1979¹⁶⁸, Louisiana law maintains the characteristics of the marital portion of 1808.

Although it is evident that the translator of the English version of the New Mexican succession act of 1852 may have had some familiarity with the terminology of the Louisiana Civil Code of 1825¹⁶⁹, there is no evidence that the draftsman of the 1852 act consulted the Louisiana law. Theretofore the Spanish law of succession had been perpetuated by the Kearny Code of 1846, which incorporated the writings of Murillo Velarde by reference¹⁷⁰, and Murillo and Alvarez¹⁷¹ were clearly the principal sources of the provisions on succession in the act of 1852. The New Mexican marital quarter of 1852 was an integral part of the succession act and was handled there with imagination and adaptation. It was provided for *both spouses*, out of the *separate property* of the deceased spouse, but its amount was limited to \$5,000 if there were descendants¹⁷². There was no specific mention of poverty except in reference to the surviving husband, but it was stated that the widow's fourth should be paid from the husband's separate property, thus presupposing the absence of a

¹⁶⁵ La Civ Code 1825 art 2359

¹⁶⁶ 1844 Louisiana Gen Laws 99, no 152, § 2. After this change in the law, if there was a significant community estate, the surviving spouse's situation would have been less likely to be necessitous and the disparity of comparative riches of the spouses would have been less marked

¹⁶⁷ La Civ Code 1870 art 916

¹⁶⁸ 1979 Louisiana Gen Laws 1886, no 710, § 1 at 1887, La. Civ Code arts. 2432-2437

¹⁶⁹ Some familiarity is apparent because he rendered «bienes gananciales» in the Spanish text as «acquest property» in the English text 1851-1852 New Mexico Gen Laws 352, 361, art. III, §§ 2, 4-5 at 358-359, 368.

¹⁷⁰ 1846 New Mexico Gen. Laws (Kearny Code) § 1 at 17

¹⁷¹ See note 25 *supra* and accompanying text

¹⁷² 1851-1852 New Mexico Gen. Laws 352, 361, art III. § 7 at 359, 369 The text of the section is obscure in both the Spanish original and the English translation Although it was provided that the widow's quarter should be set apart after deducting the fifth, it is not clear whether the quarter was computed on the basis of the decedent's entire estate or on the net amount after deducting the fifth.

net community estate¹⁷³. When most of the Hispanic structure of the New Mexican law of succession was repealed in 1889, it was nonetheless provided that on intestacy one-fourth of the decedent's whole estate would pass to the surviving spouse and three-fourths to the children¹⁷⁴. Thus the fraction passing to the survivor seems clearly derived from the tradition of the *cuarta marital*. The same fraction is today in effect with respect to the passing of separate property on intestacy as a result of New Mexico's adoption of the Uniform Probate Code in 1975¹⁷⁵.

¹⁷³ If need was a condition for the award of the *cuarta*, it would have occurred less frequently after 1872 when it was provided that all common property passed to the surviving spouse on default of surviving legitimate children. 1871-1872 New Mexico Gen Laws 29, ch 17, § 1 This provision was presumably meant to apply only on intestacy The original enactment was in Spanish and consisted of only two sections. § 2 merely repealed contrary laws There is no indication that this statute was inspired by the law of any other state

¹⁷⁴ 1888-1889 New Mexico Gen Laws 208, ch 90, § 21 (§ 1411) at 214. On default of issue the entire estate of the deceased spouse passed to the surviving spouse *Ibid.* § 21 (§ 1413) at 214, § 23 at 215. By 1851-1852 New Mexico Gen Laws 352, 361, art II, § 7, 4th at 357, 367, it was provided that the estate of a decedent escheated to the treasury in the absence of descendants (including illegitimate children) and ascendants, though a spouse without descendants or ascendants might dispose of all property by will in favor of a surviving spouse or a stranger who was neither infamous nor incompetent *Ibid.* art I, § 10 In the Spanish tradition the statute also spoke of instituting an heir, but this merely referred to the manner of designating legacies

Most of the Hispanic provisions dealing with succession had probably been inferentially repealed by enactment of 1886-1887 New Mexico Gen Laws 60, ch 32, § 46 at 68. But when that act was repealed in 1889, the provisions of the act of 1852 as reenacted in the Compiled Laws of 1884, were treated as still in effect See 1888-1889 New Mexico Gen Laws 208, ch 90, § 49 at 222.

¹⁷⁵ 1975 New Mexico Gen. Laws ch. 257, § 2-102A(2) compiled as § 45-2-102A(2). See Flickinger, *Intestate Succession and Wills Law The New Probate Code*, 6 New Mex L. Rev. 25-26 (1975) As under pre-1975 law, on intestacy under post-1975 law the surviving spouse takes one-fourth of the deceased spouse's separate property and all of the community if there are issue, and, if there are no issue, all of the separate property as well as the common property The provision is traced through the following chain of statutes: 1897 New Mexico Compiled Laws § 2031, 1901 New Mexico Gen Laws 112, ch 62, § 9 at 114, 1907 New Mexico Gen Laws 46, ch 37, §§ 27-28 at 50; 1915 New Mexico Compiled Statutes §§ 1841-1842; 1929 New Mexico Compiled Statutes §§ 38-105, 38-106, 1941 New Mexico Compiled Statutes § 31-111, 1953 New Mexico Compiled Statutes §§ 29-1-9, 29-1-10

Under 1907 New Mexico Gen. Laws 46, ch 37, § 26 at 49-50, if the wife pre-

Arizona was a part of New Mexico until 1863, when she was separated as a distinct territory with laws of her own. Thereafter there is no trace of the *cuarta* in Arizona law. Nor did it elsewhere survive except in New Mexico and Louisiana. Today it is still intact in Louisiana and its spirit survives in the New Mexican law of intestate succession to separate property.

In Texas there was a lingering familiarity with the Spanish *cuarta* even after its disappearance as a consequence of the reception of Anglo-American law in 1840¹⁷⁶. In 1843 a claim to the *cuarta* came before the Texas Supreme Court with respect to a dispute which had arisen before 1840¹⁷⁷. The court, speaking through Chief Justice Hemphill, resolved the issue on behalf of the widow. At the Texas Constitutional Convention of 1845 Hemphill made an attempt to reinstate the doctrine of the *cuarta* but failed¹⁷⁸. But Hemphill later remarked¹⁷⁹ that the *cuarta* had been already replaced in Texas law by awarding property exempt from creditors' claims to the surviving spouse¹⁸⁰. The notion of exempt

deceased the husband, the entire community estate belonged to the husband without any power of disposition by the wife. Parity of the spouses with respect to the community was restored by 1973 New Mexico Gen. Laws 1253, ch. 276, § 2 at 1254. In 1959 it was provided that on the husband's death intestate, the widow took the whole of the community estate. 1959 New Mexico Gen. Laws 387, ch. 147, § 1. See also 1961 New Mexico Gen. Laws 26, ch. 12, § 1. The 1973 act provided that the surviving husband took the entire community on the death of the wife. 1973 New Mexico Gen. Laws 1253, ch. 276, § 2 at 1254. After the 1973 enactment, 1953 New Mexico Compiled Statutes § 29-1-10 applied to separate property only.

¹⁷⁶ 1839-1840 Texas Gen. Laws 3, § 1, 2 H. GAMMEL, *Laws of Texas* 177 (1898).

¹⁷⁷ *Garrett v. Nash*, Dallam 497 (1843), per Hemphill, C. J. See also *Babb v. Carroll*, 21 Tex. 765, 771 (1858).

¹⁷⁸ W. WEEKS, ed., *Debates of the Texas [Constitutional] Convention, 1845*, 505 (1845) (§ 18 as proposed by the Judiciary Committee of which Hemphill was chairman).

¹⁷⁹ *Green v. Crow*, 17 Tex. 180, 184 (1856).

¹⁸⁰ An Act to amend the Probate Law, 1842-1843 Texas Gen. Laws 14, §§ 1-2, 2 H. GAMMEL, *Laws of Texas* 834 (1898). As Hemphill, C. J., went on to explain, this provision was «enlarged, equalized and rendered certain» in 1846 *Green v. Crow*, 17 Tex. 180, 184 (1856). An Act to organize Probate Courts, 1846 Texas Gen. Laws § 26, 308, 317-318, 2 H. GAMMEL, *Laws of Texas* 1614, 1623-1624 (1898), modified and replaced by 1848 Texas Gen. Laws ch. 157, §§ 44-45, 235 at 248-250, 3 H. GAMMEL, *Laws of Texas* 235 at 248-250 (1898). The provisions of the acts of 1843, 1846 and 1848 show no verbal kinship to the provisions of La. Dig. 1808.III 5 55 at 334-335 and La. Civ. Code 1825 art. 2359.

property in Texas had Hispanic antecedents¹⁸¹, but the extension of the doctrine to benefit the surviving spouse does not seem to have stemmed from any Hispanic model. Along with the Anglo-American allowance for the surviving widow and children during the settlement of a decedent's succession, the exempt property has become a significant provision for the surviving spouse in many American jurisdictions¹⁸² including Louisiana¹⁸³ and New Mexico¹⁸⁴.

In addition to the rights of a surviving widow to the *cuarta*, some local customs of Castile gave the surviving spouse (particularly the widow) a variety of additional related rights to clothing and linens¹⁸⁵ the marital bed and other essential household furnishings¹⁸⁶, beasts of burden and other animals¹⁸⁷, and a place

¹⁸¹ See McKnight, *Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle*, 86 S W H Q 369 at 370-374, 380-381 (1983).

¹⁸² All the community property states have adopted these rules 1848 Texas Gen Laws 235, ch 157, § 44 at 248-249, Texas Probate Code §§ 286-288 (1986), 1851 California Gen Laws 448, ch 124, §§ 120-123 at 462-463, California Probate Code §§ 6510, 6521 (1985), 1861 Nevada Gen Laws 186, ch 55, §§ 122-124 at 204-205, Nevada Rev Stats §§ 146 010-146 030 (1985), 1901 Arizona Rev Stats §§ 1725-1727 at 501-502, Arizona Rev Stats §§ 14-2401, 2402, 2403 (1986), 1854 Washington Gen. Laws 266, §§ 71-75 at 279, Washington Rev Code §§ 11 52.020- 040 (1986), 1863-1864 Idaho Gen Laws 326, ch 3, §§ 122-124 at 348, Idaho Code §§ 15-2-401, -402, -403 (1979) For Louisiana and New Mexico law, see notes 183 and 184

¹⁸³ See La Civ Code 1870 art 3252 as amended by 1917 Louisiana Gen Laws 25, no 17 (allowance of up to \$1,000), La Civ Code 1870 art 2382 as amended by 1926 Louisiana Gen Laws 175, no 113 (annual allowance based on 5 per cent of marital portion), replaced by art 2437 by 1979 Louisiana Gen Laws 1887, no 710, § 1 at 1892, La Civ Code art 916 I added by 1976 Louisiana Gen. Laws 691 at 694, no. 227, § 1, replaced by art 890, 1981 Louisiana Gen Laws no 919, § 1 (usufruct of family home).

¹⁸⁴ 1888-1889 New Mexico Gen Laws 208, ch. 90, §§ 21-23 at 215 (for the surviving spouse and children under 15 for 6 months), 1978 New Mexico Stats. §§ 42-10-9, -10, 45-2-401, -402 (1975) (expanded to include either surviving spouse and minor children for one year).

¹⁸⁵ Fuero Viejo V 1 5.

¹⁸⁶ Fuero Viejo V 1 5; Fuero de Usagre 77, Fuero de Salamanca 221 See Graue, *The Right of Surviving Spouses Under Private International Law*, 15 A J C.I 164 (1967)

¹⁸⁷ *Ibid.* See also 7 S MINGUIJÓN, *Elementos de Historia del Derecho Español* 101-102 (1920)

to live¹⁸⁸. Some of these rights were expressly provided in the *Fuero Viejo*¹⁸⁹, the *Fuero Real*¹⁹⁰ and other *fueros*¹⁹¹. But if any supplementary rights were accorded to the Hispanic-American surviving spouse by local custom, no mention seems to have been made of them in early frontier records. The first enacted recognition of such rights in Louisiana law is the markedly Hispanic provision in the Civil Code of 1825¹⁹² that the surviving widow who renounced her share of the community estate was entitled to linens and clothing. Whether other Spanish usages with respect to provisions for a surviving spouse prevailed in Louisiana at the beginning of the nineteenth century can only be conjectured¹⁹³, but

¹⁸⁸ See I J BENEYTO PÉREZ, *Instituciones de Derecho Histórico Español* 133-134 (1930), *Fuero de Usagre* 77. This aspect of Philippine law, adopted from the Spanish Civil Code of 1889 arts 834-839, has been thought to relate back to ancient antecedents. Alvarez, *Hereditary Rights of the Surviving Spouse Under the Civil Code*, 11 PHILIPPINE L. J. 1 (1931). The author referred to the *Fuero Juzgo*, but the surviving spouse's right to a child's portion, there provided, is a substantially different sort of right from that discussed here.

¹⁸⁹ *Fuero Viejo* V 1 5

¹⁹⁰ *Fuero Real* III 6.6

¹⁹¹ 7 S MINGUIJÓN, *Elementos de historia del Derecho Español* 101-102 (1920). He mentioned the *Fueros* of Usagre, Salamanca, Cuenca, Alcázar, Zorita and Ledesma. See also 6 J MANRESA Y NAVARRO, *Comentarios al Código Civil Español* 548 *et seq* (7th ed T Ogayár y Ayllón, ed 1951), E GACTO FERNÁNDEZ, *La Condición jurídica del cónyuge viudo en el Derecho Visigodo y en los Fueros de León y Castilla* 162-178 (1975).

¹⁹² La Civ Code 1825 art. 2385, La Civ. Code 1870 art 2416. There is no comparable provision in the Code Napoléon or the Louisiana Digest of 1808. All the articles on the widow's renunciation of the community are verbally derived from the Code Napoléon except La Civ Code 1825 art 2385, La Civ Code 1870 art 2416 (linens and clothes) and La Civ Code 1825 art 2386, La Civ Code 1870 art 2417 (judgment taken against the widow as a partner). For the former, a correlative provision is found in La Code of Practice 1825, arts 644, 1140, and its source is identified in the 1823 Project of the Code of Practice as J HEVIA BOLAÑOS, *Curia Philippica* II 16 5, 19. See also 1817 Louisiana Gen. Laws 126-127, § 4.

¹⁹³ La Dig III 5 52 at 332-333, La Civ Code art 2353, provided that a widow with a dowry might elect to take the income on her dowry for a year or to claim support during that period, and in either case she was entitled during the year to a place to live and mourning clothes, all the cost of which would not be deducted from the income due her. In appeals to the Louisiana Supreme Court it was concluded that this provision, based on Code Napoléon art 1570, excluded the right of a widow without dowry to make a similar claim. *Hagan v Sompeyrac*, 3 La

it was not until 1852 that any other statutory right to moveables was acquired by the surviving spouse¹⁹⁴, and it was not until 1865 that the surviving spouse received a right of occupancy to the family home¹⁹⁵. Both of these Louisiana provisions appear, however, to be derived from the laws of Texas. Thus legal influences tend to wash back and forth across American state boundaries.

CONCLUSIONS

With the mounting incidence of divorce and consequent division of common property between spouses on divorce, the institution of ganancial property has come to be looked upon as an intervivos marital right and such it has become. In the early nineteenth century, however, when marriage was seen as a lifetime commitment, the ganancial estate as such served principally as a means of providing for the surviving spouse. It was in the latter respect that it appealed most strongly to the settlers of the American West. From the mid-1820s in the United States the ideology of married women's property rights was an emerging political creed, and many Anglo-Americans were therefore receptive to new ideas which promoted that objective. American couples who moved westward during the nineteenth century in search of cheap land and making a new start in life endured great hardship in the process, and both spouses worked together to make the new land productive. By abandoning the rules of English law in favor of expanded property rights for the surviving wife, frontiersmen sought to give recognition to efforts of their wives. Their encounter with the Spanish ganancial system gave them a model for achieving that aspiration.

154, 159 (1831), *Pool v Pool*, 3 La 465, 466 (1832), *Michot v Flotte's Administratrix*, 12 La 129, 131 (1838) It is perhaps worthy of note that in each of these cases the trial judge had ruled in favor of the dowryless widow

¹⁹⁴ 1852 Louisiana Gen Laws 171, no. 255, § 1

¹⁹⁵ 1865 Louisiana Gen Laws 52-53, no 33, § 1, La Civ Code 1870 art 2422, La. Constitution 1879 art 220. E. BOURBOUSSON, *Du mariage de regimes matrimoniaux de succession* 266 (1934) classifies the subject matter of La Civ Code 1870 art 2416 (linen and clothes), art 2422 (occupancy of the family home) and art 3252 (sum provided as a widow's allowance) as *biens reserves*.

As the nineteenth century progressed, Anglo-Americans, who encountered the Spanish law as they settled in the American West and set up new governments there, realized that their own rules providing for a surviving spouse were less suitable to their needs than Spanish institutions practiced by the local inhabitants. The law of Louisiana had already codified these prevailing Spanish laws of ganancial property in 1808, and using those Louisiana provisions as a model Texans and Californians adopted the Spanish doctrine of ganancial property to suit their own needs. In spite of obvious pressures to abandon these Spanish rules, they were also maintained by the predominantly Hispanic population of New Mexico. Elsewhere, in wholly unsettled regions and in areas where there was no significant Hispanic population, the Anglo-American frontiersmen nevertheless followed the example of Texas and California in adopting the ganancial regime of shared gains of marriage.

In Louisiana and consequentially elsewhere the name most often applied to the ganancial system has been that of *community property*. Because of the peculiarity of this term and the failure of Anglo-American lawyers to examine the principle conceptually, it was not realized that ganancial principles are similar in many respects to the doctrines of partnership and tenancies in common in Anglo-American law. Thus the ganancial doctrine matured in conceptual isolation. The doctrine therefore tended to maintain its Hispanic features to a greater degree than if it had passed into the mainstream of local law. Its treatment in isolation was also the consequence of the fact that the doctrine was almost wholly defined by statute. Hence ganancial, or community, property tended to be regarded as a peculiar element of the law of succession.

This element of peculiarity is nowhere so obvious as in the distinct treatment that all American common-property estates have accorded to separate and community property. With respect to the common estate the surviving spouse is strongly favored in almost every state and in most instances to a very marked degree in intestate succession. On the other hand, both lineal and collateral heirs are favored with respect to intestate succession to separate property. Each type of property has been looked upon as distinctly different in this regard.

While the ganancial principle has proved to be particularly

strong in American law, related Hispanic principles have virtually disappeared. The institution of dowry did not comport to the marriage customs of Anglo-American society and thus disappeared. The statutory law of dowry in Louisiana nevertheless remained with little, if any, application during the last century of its existence into the late twentieth century. Elsewhere the principle had not taken root. The institution of the *cuarta marital* has nevertheless maintained its existence in Louisiana, if not elsewhere. In other states, and in Louisiana as well, its object has been largely replaced with Anglo-American provisions for exempt property and family allowances for the surviving spouse and minor children. Thus there is an element of discretionary division of property for the surviving spouse but its formulation has tended to be in terms of a fixed amount rather than as a proportion of the net value of the decedent's property. If the Louisiana *cuarta* had not been codified with the law of dowry, it is quite possible that it might have received greater attention as a concept both in Louisiana and elsewhere. But Anglo-American doctrines, though similar in nature, tended to satisfy societal needs and therefore prevailed.

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