

# University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Quarterly, November to June, by the University of Pennsylvania Law School, at  
34th and Chestnut Streets, Philadelphia, Pa.

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VOLUME 70.

MAY, 1922.

NUMBER 4.

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## MATRIMONIAL PROPERTY RIGHTS UNDER MODERN SPANISH AND AMERICAN LAW.

Aside from the interest arising from comparing Common Law and Civil Law property rights emanating from marriage, the subject has a special importance in this country because it is governed specifically in several of our Western States by the Spanish law. It would be difficult to select a topic revealing more emphatic contradictions in the two great systems of law.

The Spanish law as codified in the *Forum Judicum* or *Fuero Juzgo* (Visigothic Code, A. D. 650) and later restated with modifications in *Las Siete Partidas* ("The Seven Parts," promulgated by Alphonso XI, called the Wise, in A. D. 1348), was brought to South America with the Conquistadores and remained the fundamental law of all Latin America under sanction of the *Recopilacion de Indias*, promulgated in 1680, and its supplements, until Spanish rule was overthrown by the wars of independence. There have been some changes in the various countries by constitutional provision and legislative adoption of codes, but in none has there been any material departure from the principles of the *Partidas* which today is a familiar authority in every Latin-American court. As Peru was the center of the most important vice-royalty under the Spanish dominion, the laws of that country retain the purest traits of the laws of civil status and particularly those relating to marriage and its incidental property rights. It was the Spanish

law of that vice-royalty which was adopted to the northward and ultimately became the common law of certain portions of the United States that had formerly been under Spanish rule. It is fitting, therefore, that the Peruvian law of matrimonial property rights be utilized in pointing out those peculiar features which, while foreign and even antagonistic to the Common Law, are nevertheless fundamental in several of our States. Peruvian commentators, however, are not the only authorities which may be cited with propriety, for Spanish Peninsular writers, as well as the works of French jurist-consults, have equal force by reason of identity of principles involved. As to our own States, support is to be found in Federal and State decisions and text-book writers of recognized authority on this particular subject.

The Civil Law declares that at the moment of marriage there springs into existence a "conjugal society" or "community" in which the spouses as members become the involuntary instruments of a legal entity subject by law to a rigid and detailed régime of rights and liabilities concerning property.

"The common law, if attempted to be used to throw light upon doubtful features of the community status, would only shroud it in deeper obscurity, since it furnishes no analogies with the civil law system."<sup>1</sup>

The property relation between husband and wife under the institution of a conjugal society known as the "community system" is radically at variance with the principles of the Common Law, and utterly devoid of analogies with that system of jurisprudence, the reason being that the Common Law legal oneness of husband and wife is alien to the Civil Law, which does not admit that the rights of the wife are incorporated and consolidated with those of her husband.

**THE CONJUGAL SOCIETY.**—The Peruvian Civil Code provides:

"Art. 955. There results from marriage, as between the husband and wife, a legal society in which there may be separate individual property of each associate, and property common to the spouses. The

<sup>1</sup> Ballinger, *Community Prop.*, Sec. 255.

husband is administrator of these properties in accordance with Articles 180 and 181." ("Art. 180. The husband is administrator of the property of the conjugal society." "Art. 181. The administration of the husband does not embrace the paraphernalian property which the wife has reserved in accordance with the terms expressed under the title herein relevant thereto.")

"Art. 956. Neither spouse can renounce this society nor its effects."

"The effect of the marriage is the formation of a legal society between husband and wife, in which there can be individual property of each spouse and property common to both, but without power in one or the other to renounce the society or its effects."<sup>2</sup>

"Legal Society. The community of property that is formed between husband and wife as a consequence of the celebration of the marriage. It is a society or company because the property of both spouses may become augmented, the same as in other company contracts; and it is called 'legal' because not founded by express contract of the interested parties, but upon the provisions of the law. Some persons call it also 'conjugal society' in order to indicate that it is formed between spouses, but the laws more commonly call it 'legal society' and, therefore, it is the denomination that we adopt. Between husband and wife there results from the marriage a legal society in which there may be individual property of each associate and property common to the spouses. The husband is administrator of the property of the conjugal society."<sup>3</sup>

SEPARATE PROPERTY OF THE HUSBAND.—The Civil Code further provides:

"Art. 957. Property belonging to the husband is that which he brings to the marriage, as appearing always as of the capital that he should form before it is celebrated."

"Art. 958. *No está formado el capital de bienes mientras no conste de escritura pública.*"

("No capital of property is formed when it is not set out in a public instrument.")

"Art. 960. Property that augments the capital of the husband is: 1st. That which he acquires by inheritance, donation or other gratuitous title, after formation of capital. 2d. That purchased or received in exchange with the property of his capital or the property acquired according to the former section."

<sup>2</sup> I Tratado de Derecho Civil, por T. Pacheco, p. 185.

<sup>3</sup> Diccionario de la Legislación Peruana, por F. G. Calderón, title "Sociedad legal."

SEPARATE PROPERTY OF THE WIFE.—“Art. 961. Property belonging to the wife is 1st. The dowry or marriage settlement (*dote*). 2d. The husband's marriage gift (*arras*). 3d. Her individual effects (*bienes parafernales*). 4th. That which she acquires by inheritance, donation or other gratuitous title, after constitution of the dowry. [By Art. 991 the dowry is fixed by public instrument before marriage as required in case of the husband's ‘capital,’ and if not then by Art. 1036 one-half of the ‘*bienes parafernales*’ goes to the husband.] 5th. That purchased or received in exchange with the property referred to in the four preceding sections.”

MATRIMONIAL COMMUNITY PROPERTY.—“Art. 964. Property common to the spouses, notwithstanding one brings to the marriage more than the other, is: 1st. The products of the separate property of each one of them. 2d. That which is purchased by or received in exchange for those products. 3d. That which either one or the other of the spouses acquires by his labor, industry, profession or other onerous title.”

THE DECLARATION OF CAPITAL AND CONSTITUTION OF DOWRY.—The Code contemplates, as mentioned in the foregoing quoted articles, that if the husband desire to identify his separate property so that it shall be returned at the end of the marriage, and also that if the wife desire to keep her dowry intact for withdrawing it at the end, then each shall indicate such intention clearly by a solemn instrument executed before a competent public official. This is obviously necessary, because the property of both is pooled for raising income which will belong to them in common and it is imperative that there be some method of declaring the amount and nature of the property intended to be withdrawn at the dissolution of the society.

“Art. 809. If the law requires for solemnity of any act the execution of a public instrument, such becomes the sole means of proving the reality and legitimacy of the act.”<sup>4</sup>

“Public instruments, that is, those executed by a public officer in the performance of acts that belong to his office, are divided into authenticated instruments (*instrumentos auténticos*) which are those issued by a designated public functionary, and public writings (*escrituras públicas*) which are executed before a notary with the formal-

<sup>4</sup>Code Civ. Proc. of 1851.

ties prescribed by law (725 Proc.) . . . Authenticated documents produce public faith, contain full proof and are executable without previous verification (724 and 732 Proc.).”<sup>6</sup>

Under the title of “In what cases must a public writing be executed,” Calderón says:

“The capital of property that a husband forms must be stated in a public writing when it exceeds 500 pesos. In default of this formality, the capital is not presumed to be formed, and as a consequence all that which the husband holds at the end of the society, is ganancial, except that property the acquisition of which can be proved by public writing or by judicial decision (958 and 1047C). The dowry must be constituted before the marriage and stated in a public writing.”<sup>7</sup>

“Capital. The wealth or united property that any one possesses . . . the wealth or property that the husband contributes to the marriage. . . . When the word capital is employed to designate the property (*los bienes*) of the husband, it may express movable or immovable things (*cosas*) or both jointly. . . . As in the conjugal society there may be property belonging to each spouse and property common to them both, it is necessary that the ownership of the property be declared legally to avoid the difficulties that otherwise would result. . . . Therefore it is declared that the property the husband brings to the marriage, appearing always as part of the capital that he should form before it is celebrated, belongs to him (957 C). No capital of property is formed when it is not set out in a public instrument.”<sup>8</sup>

**GANANCIALES OR MATRIMONIAL SOCIETY GAINS.**—This head embraces the paramount result of the community system, *viz.*, the ultimate division of the common property with its increase and profits. While dominated by the general features of Spanish law in which it originated, the system in Peru is defined and regulated by the Civil Code.<sup>9</sup>

“Gananciales.— Thus is called the property (*bienes*) that gains or augments during the marriage. This word is used as both substantive and adjective. As the latter it is used with the word ‘*bienes*’ and means the same as in the former, so that it is the same to say simply ‘*gananciales*’ or ‘*bienes gananciales*.’ By the fact of

<sup>6</sup> Calderón, title “Auténtico.”

<sup>7</sup> Title, “Escritura Pública.”

<sup>8</sup> Calderón, title, “Capital.”

<sup>9</sup> Title V, “De los gananciales”—Arts. 1046-1056.

marriage there is formed between the husband and wife a legal society in which there may be individual property of each spouse and property common to both. This common property is not called ganancial while the society lasts, but when it terminates. . . . Thus the property that the spouses acquire and that belong to them both in proprietorship, is called 'common property' (*bienes comunes*) during the legal society, because then not considered as true gain (*ganancia*) for the reason that it may be consumed later; and is called 'ganancial' when the society ends, because it then enters into the ownership of each spouse and represents the gain (*ganancia*) made in the society."<sup>9</sup>

"Art. 1046. Gananciales are all the property that is found at the end of the legal society after deduction or payment of the individual property of each spouse and the debts contracted during the marriage."<sup>10</sup>

"Art. 1047. If the husband made no capital of property before the marriage, all that which he may have at the time when the society terminates is ganancial. Alone are excepted: 1st. The real estate of the husband of which the acquisition before the marriage is proved by a public instrument or by judicial decision. 2d. That which he may have acquired during the marriage according to Article 960, if the ownership is established in the same manner."<sup>11</sup>

"Art. 1049. The gananciales are divisible by halves between the husband and the wife or their respective heirs."

"Art. 1055. That which the common property produces during the time it remains undivided, is common to the husband or his heirs and to the wife or her heirs."

"Art. 973. The society is responsible . . . for the debts that have been contracted while it continued."

It can be said that the feature of the Spanish law of matrimonial community property relating to the division of acquests and gains was with certainty not derived from the Roman law, and in origin was anterior to the matrimonial property rights

<sup>9</sup> Calderón, title, "Gananciales."

<sup>10</sup> Civil Code. "Art. 1046. Son gananciales todos los bienes que se encuentran al fenecer la sociedad legal, después de deducidos ó pagados los bienes propios de cada cónyuge, y las deudas contraídas durante el matrimonio."

<sup>11</sup> Civil Code. "Art. 1047. Si el marido no hizo capital de bienes antes del matrimonio, es ganancial todo lo que él tenga al tiempo de fenecer la sociedad. Solo se exceptan: "1. Los inmuebles del marido, cuya adquisición anterior al matrimonio se compruebe por escritura pública ó por sentencia judicial. 2. Los que haya adquirido durante el matrimonio, según el artículo 960, si acredita la propiedad en la misma forma."

developed under French law, having been evolved from the Visigothic or Germanic institutions which were first expressed in the *Fuero Juzgo* (*Forum Judicum*), recognized as the ground work of Spanish positive law and jurisprudence.<sup>12</sup>

The general doctrines, however, of *communio bonorum* or marital partnership and the separate rights and independent capacities of husband and wife followed wherever the Roman law system became dominant, and while legislative modifications have appeared in divers countries, there has been consistent adherence to the traditional bases. Thus in Holland are found the two forms of universal and particular community (*communio bonorum omnium* and *communio quaestuum*), the former comprising all property of both spouses owned at the time of marriage and all subsequent acquisitions, the latter including only acquests during coverture. In France the *coutume* of Paris under which *le régime de la communauté* prevailed and *le régime dotal* of Southern France (*le pays de droit écrit*) derived from the Roman law were merged in the Code Napoleon by provision for a contractual dotal system, with alternative, in default of contract, of an imposed community system comprising all movable property of the spouses at marriage plus subsequent acquests as a joint capital yielding equal shares of gains, with the husband as sole and absolute administrator, and the wife having only *une simple espérance* until the dissolution of the conjugal society.<sup>13</sup>

Spain, on the other hand, has always maintained a distinctive feature of community property, known as the "Ganancial System." There is the *dote* and the paraphernal, or extra-dotal, property of the wife and the *arras*, or husband's marital gift or contribution. "All other property is described by the terms *bienes propios* or *bienes comunes*. By the term *bienes propios* is meant the property of either consort acquired by succession, testament or lucrative title. The term *bienes comunes* is applied

<sup>12</sup> Walton, *Civ. Law in Spain*, pp. 32, 42 (ed. 1900); Preface to trans. of Visigothic Code by Scott (1910); McKay, *Law of Com. Prop.*, sec. II (ed. 1910).

<sup>13</sup> Ballinger, *Com. Prop.*, sec. 4; *Dixon v. Dixon's Exrs.*, 4 La. Rep. 190 (1832); I Wharton, *Conf. of Laws*, sec. 183 (ed. 1905).

to *bienes gananciales* or *multiplicados*, that is, to all such property as the consorts have acquired during the marriage by their labor or industry, or by purchase. . . . The law of Spain does not recognize the general *communio bonorum*, which exists in Holland, but admits only the *communio quaestuum* or community of acquests and gains. The latter is constituted between the husband and wife as the legal and necessary effect of their marriage. The property of which it consists is termed *ganancial*, *bienes gananciales*.<sup>14</sup>

This was the law of Spain as extended to the Spanish American colonies by the *Recopilación de Indias*, promulgated in 1680 and amended from time to time until the colonies became independent, but always maintaining the system of *gananciales*, even in the Civil Code of 1888, extended to the remaining colonies in 1889 and distinctly upholding the system in accordance with the former codes.<sup>15</sup>

Through the same political changes the Spanish conjugal society, community property and *ganancial* system became imbedded not only in the law of the South American countries, but also in such portions of our own country as are now embraced in Florida, the states carved out of the territory of Louisiana, Texas, California and New Mexico, although it has been superseded by legislative action in some and been borrowed by some others. Now the "American community system" prevails in Louisiana, Texas, California, Nevada, Arizona, Washington, Idaho and New Mexico, where the distinctive Spanish traits of the conjugal society and *gananciales* are clearly preserved, thus permitting reference to judicial decisions on the subject rendered by courts of common law.<sup>16</sup>

The American writer Ballinger, in his "Community Property," after saying that the general doctrine is unaffected by legis-

<sup>14</sup> Citing I Burge on Colonial and Foreign Laws, pp. 413-417, published in London in 1838; White's *Recopilación*, p. 48, *et seq.*, published at Philadelphia in 1839. Ballinger, *Com. Prop.*, sec. 5.

<sup>15</sup> Schmidt, *Civil Law of Spain & Mexico*, pp. 91-99 (ed. 1851); Walton, *Civ. Law in Spain and Spanish America*, pp. 119-376, Art. 1401 (ed. 1900).

<sup>16</sup> Ballinger, *Com. Prop.*, sec. 6; McKay, *Law of Com. Prop.*, sec. III.

lative modification, and reviewing the Spanish authorities, declares "that the property constituting the *ganancias* belongs in common to the two consorts; that it is confined to future acquisitions, and that it embraces all property of whatever nature which the spouses acquire by their own labor, industry and skill during coverture."

And further: "*Prima facie* all property is presumed to be common which is not proved to be the separate property of either spouse."<sup>17</sup>

LOUISIANA.—"Art. 2399. Every marriage contracted in this State superinduces of right partnership or community of acquests or gains, if there be no stipulation to the contrary."

"Art. 2401. A marriage contracted out of this State between persons who afterwards come here to live, is also subjected to community of acquests with respect to such property as is acquired after their arrival."

"Art. 2404. The husband is the head and master of the partnership or community of gains; he administers its effects. . . ."

"Art. 2405. At the time of the dissolution of the marriage all effects which both husband and wife reciprocally possess are presumed common effects or gains, unless it be satisfactorily proved which of such effects they brought in marriage or which have been given them separately, or which they respectively inherited."

"Art. 2406. The effects which compose the partnership or community of gains are divided into two equal portions between the husband and the wife, or between their heirs, at the dissolution of the marriage."<sup>18</sup>

CALIFORNIA.—By Secs. 162 and 163 of the Civil Code all the property owned by the wife and the husband respectively before marriage is considered separate property.

Sec. 164. All other property acquired after marriage by either husband or wife, or both, is community property.

<sup>17</sup> Sec. 5, p. 27.

One of his supporting authorities is "Diccionario Razonado de Legislación y Jurisprudencia," by Don Joaquín Escriche, Madrid, 1847, which is still recognized as a leading doctrinal authority as well in Spain as in all South American countries, being given by Caldéron in the "Prólogo" of his "Diccionario de la Legislación Peruana" as the reason for publishing his work in the same encyclopedic form.

<sup>18</sup> Voorhie's Rev. Civil Code of La.

Sec. 172. The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate.

Sec. 177 provides that the Code shall not apply if there be a marriage settlement governing property.

Sec. 1402 provides that one-half of the community property shall go to the wife or her heirs on the death of the husband.

Sec. 1403 gives the entire community property, on the wife's death to the surviving husband, except what has been set aside for her maintenance by judicial decree.

Texas, Nevada, Washington, Idaho and Arizona have the same general community system as California, varying only in some particulars which are similar to the Louisiana law, *e. g.*, in Texas all property at dissolution of the community is presumed "common effects or gains," and in Washington on the death of either spouse there is an equal division between the survivor and the heirs of the deceased, both being subject to the community debts.<sup>19</sup>

**EFFECT OF DEATH OF EITHER SPOUSE.**—By Art. 978 of the Peruvian Civil Code, the conjugal society is terminated by the death of either spouse ("*Por muerte de uno de los cónyuges*"), and by Art. 1047, as already quoted, in the absence of a declaration of capital by the husband, "all that which he may have at the time when the society terminates is ganancial," except his real estate proved by public instrument and what he has acquired by donation, &c., shown by like instrument as specified in Art. 960. If the wife die first, the husband at that moment becomes a sort of liquidating partner of the society, in full possession and control of the community property of which he has been the sole manager while the society still existed, but the rights of the parties are in abeyance until the assets are recovered, followed by accounting and liquidation, in which the required deductions shall be made to ascertain if there be gananciales for division. The Spanish doctrine is that upon the death of either spouse the com-

<sup>19</sup> Ballinger, Com. Prop.—Appendix.

munity continues until liquidation and division has actually taken place, the survivor and the heirs of the deceased holding their respective rights meanwhile.<sup>20</sup>

"Partition of Property. The division that is made of common property between co-heirs or co-proprietors, . . . between one spouse and the heirs of the other. . . . One of the effects of marriage is the formation of the legal society between the husband and the wife. While this society continues no action in partition can be begun; but once the society has ended by death of one of the spouses . . . partition may be applied for and obtained."<sup>21</sup>

"This common property is not called *gananciales* while the society exists, but when it is terminated."<sup>22</sup>

There is a legislative vesting of the right in those having the successional or inheritable qualities which the law prescribes for the heirs of the spouse whose death has put an end to the conjugal society. They take that share which the wife would have received, if she had been the survivor, of what is shown as *gananciales* upon final settlement of the property interests of the society, but they do not take it as a part of her estate, for it never existed as her property, could have no existence at all until the moment after her death, and might never exist because the husband, as complete master of the community property, might have so badly managed as to leave nothing after payment of the conjugal debts.

Inasmuch as the law makes the husband sole administrator and master of the conjugal property, whether brought to the marriage by him or by the wife or thereafter acquired as profits on investments, or as fruits of his own industry or hers, and further declares that all community property and rights shall be deemed gains at the dissolution of the marriage (in the absence of a formal prior declaration of capital or dowry or title appearing by public instrument) a surviving husband's "estate" embraces every sort of property and right to which he had an

<sup>20</sup> 1 Burge on Col. & For. Laws, 421; Suc. of Dumestre, 40 La. An. 571 (1888).

<sup>21</sup> Calderón, title, "División de Bienes."

<sup>22</sup> Calderón, title, "Gananciales."

assertable claim at the moment of his death. Final distribution can occur only after marshalling of the debts, allocation thereof to determine whether they are owing by the husband out of his separate property, by the wife out of hers or by the conjugal society, restoration of the wife's *dote*, ascertainment of the net *ganaciales* and allowance of the wife's "*quarta*."

In the Codes of all our Civil Law States the words used are substantially the same as in the Peruvian Civil Code in respect of specifically designating who shall take, but without identifying the share as part of the decedent's estate. Indeed the language used when referring to the separate property would seem to preclude the thought of an inheritance by the survivor in respect of community property.

"The community of acquests and gains commences at the moment of marriage with *nothing*, and includes at its dissolution, presumptively, *everything* found in the succession of the deceased spouse, and in the possession of the survivor, unless it be satisfactorily proved which of such effects either of the spouses brought into the marriage."<sup>23</sup>

"On the death of either spouse the survivor takes, not as heir nor by arbitrary devise from the other, but by virtue of the community right."<sup>24</sup>

Where death dissolves the community a wife's heirs succeed to the interest to which she would otherwise be entitled, but they do *not* succeed to such interest as a *portion of her estate*, but because the statute vests it in them.<sup>25</sup>

In a California case it was said: "The title to such property vests in the husband, and for all practical purposes he is regarded by the law as the sole owner. It is true, the wife is a member of the community and entitled to an equal share of the

<sup>23</sup> Citing La. Civ. Code, 2374, 2405; *Boulogny v. Justin*, 16 La. An. 209; *Suc. of Pratt*, 12 La. An. 457; *Denegre v. Denegre*, 30 La. An. 275; and *Suc. of Dumestre*, 40 La. An. 571, and as Spanish authority *Nueva Recop.*, 5, 91. *Ballinger, Com. Prop.*, sec. 221.

<sup>24</sup> *Kirchner v. Murray*, 54 Fed. 617 (1893).

<sup>25</sup> *Garrozi v. Dastas*, 204 U. S. 79 (1906); *Reade v. De Lea*, 95 Pac. 131 (1908).

acquests and gains, but so long as the community exists her interest is a *mere expectancy*, and possesses none of the attributes of an estate, either at law or in equity."<sup>26</sup>

"The laws of Louisiana have never recognized a *title* in the wife during marriage to one-half of the acquests and gains. . . . As long as the husband lives and the marriage is not dissolved, the wife must not say that she has *gananciales*, nor is she to prevent the husband from using them, under the pretext that the law gives her one-half. But, *soluto matrimonio*, she becomes irrevocably the owner of one undivided half, in the *manner provided by law* for ordinary joint ownership. The husband is, during marriage, *real y verdadero dueño de todos, y tiene en el efecto de su dominio irrevocable*. The provisions of our code on the same subject are the embodiment of those of the Spanish law, without any change."<sup>27</sup>

In Texas on death of either spouse one-half of the community property by statute vests in the decedent's heirs, the other half remaining in the survivor, but the statutory vesting has been emphasized by construing the language so strictly that the words "child or children" were held not to mean "descendants," so as to include grandchildren.<sup>28</sup> Any attempt of the spouses by antenuptial contract or during the coverture to change the statutory order of the descent as to themselves or their children is deemed subversive of the statutes regulating marital rights.<sup>29</sup>

In Texas, where divorce dissolves the legal society with the same effect as death, it was held that a Colony certificate issued after divorce remained community property because the right to acquire it accrued before the dissolution.<sup>30</sup> The profits made in commercial transactions carried on by husband or wife are community property, though the capital of the business is the wife's separate estate.<sup>31</sup> Until the debts of the community are paid neither the wife nor her heirs can claim anything.<sup>32</sup> The com-

<sup>26</sup> Packard v. Arellanes, 17 Cal. 525, 539 (1861).

<sup>27</sup> Rost, J., Guice v. Lawrence, 2 La. An. 226 (1847).

<sup>28</sup> Burgess v. Hargroove, 64 Tex. 117 (1885); Pcgues v. Hayden, 76 Tex. 94 (1890).

<sup>29</sup> Groesbeck v. Groesbeck, 78 Tex. 664 (1890).

<sup>30</sup> Goode v. Jasper, 71 Tex. 48 (1888).

<sup>31</sup> Mitchell v. Mitchell, 80 Tex. 101 (1891).

<sup>32</sup> Hart v. Foley, 1 Robinson (La.) 378 (1842).

munity has a fictitious existence till the debts are paid.<sup>33</sup> An administrator of a wife's estate has no control over community property while the husband lives.<sup>34</sup> The surviving husband has exclusive right to take possession, control and dispose of the community property in order to settle up the community.<sup>35</sup> While the community existed the husband could dispose of the whole property and also after its dissolution, but only in his lifetime and not by will.<sup>36</sup> Where death dissolves the community a wife's heirs succeed to the interest to which she would otherwise be entitled, but they do not succeed to such interest as a portion of her estate but because the statute vests it in them.<sup>37</sup> Under both Spanish and French systems a putative marriage contracted in good faith by both parties is sufficient to sustain a legal community of property.<sup>38</sup> The administration of the husband's succession involves administration of community if unliquidated.<sup>39</sup>

In this whole field of matrimonial community property rights and obligations, no element leads to litigation so much as that of *domicil*. The ante-nuptial residence and the place of the celebration of the marriage both frequently require adjudication before liquidation of a presumptive conjugal society. A determination of the domicil of a husband immediately before the marriage is often essential to ascertainment of the matrimonial domicil, and upon the latter depends the solution of all the community property questions. Both private international law and local law may be and in many cases have to be the bases of decision. Some of the leading authorities may be briefly here noted.

<sup>33</sup> *Succ. of Dumestre*, 42 La. An. 411 (1888).

<sup>34</sup> *Walker v. Howard*, 34 Tex. 478 (1870); *Cullers v. May*, 81 Tex. 110 (1891).

<sup>35</sup> *Packard v. Arellanes*, 17 Cal. 525 (1861).

<sup>36</sup> *Buchanan's Est.*, 8 Cal. 507 (1857); *Cooke v. Norman*, 50 Cal. 634 (1875).

<sup>37</sup> *Garrozi v. Dastas*, 204 U. S. 79 (1906); *Reade v. De Lea*, 95 Pac. 131 (1908.)

<sup>38</sup> *Ballinger*, Com. Prop., sec. 14; *McCaffrey v. Benson*, 40 La. An. 10 (1888); *Hatch v. Ferguson*, 57 Fed. 966 (1893); *Morgan v. Morgan*, 21 S. W. 154 (1893); *Kromer v. Friday*, 10 Wash. 621 (1895).

<sup>39</sup> *Oriol v. Herndon*, 38 La. An. 759; *Succ. of Lamm*, 40 La. An. 212.

"Domicil is a residence acquired as a final abode. To constitute it there must be (1) residence, actual or inchoate, (2) the non-existence of any intention to make a domicil elsewhere."<sup>40</sup>

"Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time."<sup>41</sup>

*"Le domicile d'une personne est le lieu où est présumé se trouver le siège de ses intérêts."*<sup>42</sup>

"Domicil is the place where a person resides as his permanent home with the fixed intention of constantly remaining there, to which, whenever he is absent, he has the intention of returning."<sup>43</sup>

*L'étranger domicilié est celui qui a établi son habitation dans une localité, avec l'intention d'y rester d'une manière permanente. Il y a fixé ce qu'on appelle, en droit, son domicile."*<sup>44</sup>

The Peruvian Civil Code provides:

"Art. 45. Domicil is constituted by dwelling in a place with intent to become permanent there."

"Art. 46. Proof of this intention is by any of the following means: 1. By express declaration of the domiciled before the civil authority. 2. By the passage of two years of voluntary residence. 3. By whatever other fact that supports his having fixed his principal establishments."

"Art. 50. The married woman has as domicil that of her husband."

"Art. 53. The provisions of this title likewise include foreigners."

"There are two conditions required to establish domicil: real dwelling in a place, *habitatio*, and the meaning or intention of permanency in it, *animus manendi*. Habitation is known as an external, real and patent fact, which is the existence of an individual in a

<sup>40</sup> Wharton, Conf. of Laws, sec. 21 (ed. 1905).

<sup>41</sup> Westbury, J. Udry v. Udry, L. R., 1 H. L. Sc. 458 (1869).

<sup>42</sup> Valery, Dr. int. privé, Art. 112 (ed. 1914).

<sup>43</sup> Moore, III Dig. Int. Law, 813; Guier v. O'Daniel, 1 Binney 349, note (1806); Borchard, Diplomatic Prot. of Cit. Abroad, sec. 243 (ed. 1915); Abington v. North Bridgewater, 23 Pick. 170 (Mass. 1839); *In re An Alien*, Fed. Cas. No. 202a (1842); White v. Brown, 1 Wall. 217 (1848).

<sup>44</sup> Pradier-Fodéré, "De la condition legale des étrangers au Perou" (V. Jour. dr. inter. privé, pp. 345, 580). This author's great work "Traité de droit international public Européen et Americain," 8 vols., 1885-1906, Paris, has general recognition as a leading authority.

place; not so the intention of permanency, which is an inner fact and depends exclusively upon the will of the individual, and hence is not and cannot be subjected to positive and peremptory proofs, but is deduced from mere presumptions."<sup>45</sup>

"A person, born in Pennsylvania, removed to Cuba, settled there and engaged in the trade of that island; the presumption in favor of the continuance of the domicil of origin no longer existed, and the burden of disproving the domicil of choice lies on him who denies it."<sup>46</sup>

"The domicil is where a person has fixed his habitation without a present intention to remove from it. To constitute domicil there must be both residence and an intention to make the place of residence the home of the party. *Prima facie* the residence is the domicil."<sup>47</sup>

The ultimately essential and far more important point to be determined is always the *matrimonial* domicil.

"Where there is no marriage contract or settlement the mutual rights of the husband and wife to each other's movables, whether possessed at the time of the marriage or acquired afterwards, are governed by the law of the matrimonial domicil, without reference to: (1) The law of the country where the marriage is celebrated or where the wife is domiciled before marriage, or (2) any subsequent change of domicil or nationality on the part of the parties to the marriage. The effect of this rule is that the mutual rights of husband and wife to each other's movables are governed entirely by the law of the actual (or, possibly, of the intended) domicil of the *husband* at the time of the marriage. It may now be considered—to a great extent at any rate—as well established."<sup>48</sup>

"In the absence of express contract, the law of the matrimonial domicile regulates the rights of the husband and wife in the movable property belonging to either of them at the time of the marriage, or acquired by either of them during the marriage. By the matrimonial domicile is to be understood that of the *husband* at the date of the marriage."<sup>49</sup>

The generally accepted doctrine follows the early theory of Savigny, that a husband cannot change the original matrimonial domicil to the prejudice of a wife as it is deemed she "has accepted

<sup>45</sup> Citing Art. 45 of Civil Code. I Pacheco, p. 121.

<sup>46</sup> Collateral inheritance held not due. Hood's Est., 21 Pa. 106 (1853).

<sup>47</sup> Man made a will in Penna. although he resided in R. I. Probate here revoked. Carey's App., 75 Pa. 201 (1874). Followed in Price v. Price, 156 Pa. 617 (1893); Lowry's Est., 6 Pa. Super. 143 (1897); Dalrymple's Est., 215 Pa. 367 (1906).

<sup>48</sup> Dicey, Conf. of Laws, Rule 175, pp. 638, 639.

<sup>49</sup> Westlake, Priv. Int. Law, sec. 36, p. 71 (ed. 1905).

the conjugal rights as fixed by the law of the domicil, and naturally has reckoned on its perpetual continuance."<sup>50</sup>

Where spouses domiciled in France, married there without antenuptial contract, and so became subject to the system of marital community of goods as fixed by the French Code, removed to and became domiciled in England and the husband by will disposed of all his personal property as if he were the sole owner, the House of Lords unanimously upheld the claim of the widow to her share as of a community of goods under the French law, it being declared that the terms of the Code created a contract from which the husband could not free himself by change of domicil.<sup>51</sup>

In the same manner it was subsequently held that immovables in England acquired from investment of community acquisitions were governed by the same rule, and the wife was awarded her interest in accordance with the French matrimonial property law.<sup>52</sup>

"Where there is no intention to remove to another domicil, the husband's domicil at the time of the marriage gives the prevailing law . . . . But in case of a conflict between the domicil at the time of marriage, and that which the parties intend to permanently adopt, and in which they take up their residence, the latter should prevail."<sup>53</sup>

Mr. Parsons says the rule is that "the rights of the parties, as springing from the relation of marriage, must be determined by the place where they then supposed themselves, and intended to be, domiciled."<sup>54</sup>

"The previous domicil of the parties seems to be entirely immaterial, except for the purpose of illustrating their intention as to the matrimonial domicil."<sup>55</sup>

In this connection, it sometimes becomes important to also bear in mind our Federal legislation. As to our Statute of 1855, it is said:

"The effect of this statute is that every alien woman who marries a citizen becomes perforce herself a citizen, without the formality of naturalization and regardless of her wish in that respect."<sup>56</sup>

<sup>50</sup>"System des heutigen Römischen Rechts," sec. 379 (Guthrie trans., p. 294, 2d ed.).

<sup>51</sup>DeNicols v. Curlier, App. Cas., 21 (1900).

<sup>52</sup>DeNicols v. Curlier, 2 Ch. 410 (1900).

<sup>53</sup>Wharton, Conf. of Laws, sec. 190 (ed. 1905); Story, Conf. of Laws, sec. 194 (ed. 1883).

<sup>54</sup>2 Parsons on Contracts, p. 559.

<sup>55</sup>Wharton, Conf. of Laws, sec. 190, note 5.

<sup>56</sup>Borchard, Dip. Protec. Cit. Abroad, sec. 264; Kelly v. Owens, 7 Wall. 496 (1868); Ins. Co. v. Gorbach, 70 Pa. 150 (1871).

"Marriage of an American woman with a foreigner is tantamount to voluntary expatriation, and Congress may, without exceeding its powers, make it so, as it has in fact done by the Act of March 2, 1907."<sup>87</sup>

Former Justice Hughes of the United States Supreme Court, in considering a "community" case under the old law of New Mexico, refers to the old saying of the civilian that "*community is a partnership which begins only at its end.*"<sup>88</sup>

*W. W. Smithers.*

*Philadelphia.*

<sup>87</sup> Mackenzie v. Hare, 239 U. S. 299 (1915).

<sup>88</sup> Arnett v. Reade, 220 U. S. 311, 319 (1911).