

7-1-1957

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## Recommended Citation

Manuel Borja Martinez, *The Mexican Doctrine of Imposed Joint Ownership*, 11 U. Miami L. Rev. 461 (1957)  
Available at: <http://repository.law.miami.edu/umlr/vol11/iss4/5>

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## THE MEXICAN DOCTRINE OF IMPOSED JOINT OWNERSHIP

MANUEL BORJA MARTINEZ

The general rule of the Roman law that "No one may be forced to remain in a community"<sup>1</sup> is well known. As well known as the general rule are the exceptions thereto. One of the exceptions applicable here, is that "A thing may remain undivided by destination."<sup>2</sup> This exception is also found in the *Digest* which quotes a text of Paulus, "Where the proceeding is against the will of any of the owners, a master should not be appointed to partition a common thing as, for example, the vestibule of two houses, because he may be forced in fixing the auction price of the vestibule to take the entire value of the house if it does not have another entrance."<sup>3</sup>

The modern French, Italian, and Portuguese writers agree that a compulsory joint property exists along side of ordinary co-ownership. Cunha Goncalves says that "no legal system favors joint ownership since it has been proven beyond any doubt that individual ownership is the best form for achieving the maximum utilization of a particular thing, and in addition because long experience has demonstrated the accuracy of the Roman saying '*Communio mater discordiarum*' (The community is the mother of discord.)"<sup>4</sup>

It is agreed that in certain situations "the failure to divide interests or the imposed continuation of a community of interests, rather than making more difficult the proper exploitation of the thing held in common, is indispensable for this very utilization. Disagreements which may arise among the joint owners ought not to be feared, particularly because one is dealing with things whose proper destination to joint use is clear to all at first sight; and finally that the economic desirability which generally favors the free circulation of all goods is in no way improperly limited since the very nature of the thing in question makes its joint utilization indispensable."<sup>5</sup>

It would appear that all of the various doctrines regarding compulsory community property (forced co-ownership) require that the thing which is to be the object of the community must be accessory to an ordinary ownership.<sup>6</sup> The traditional doctrine, however, has been extended to include

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1. *Nemo compellitur invito in communione detineri.*

2. See 3 WINDSCHEID, *DIRITTO DELLE PANDETTE* 34 (1925), also 3 MAYANZ, *COURS DE DROIT ROMAIN* 500 (1891).

3. *DIGEST* 10, 3, 19.

4. 11 DA CUNHA GONCALVES, *TRATADO DE DIREITO CIVIL* . . . 63 (1957).

5. 2 COLIN-CAPITANT, *CURSO ELEMENTAL DE DERECHO CIVIL* 625 (1933).

6. CAPITANT, *L'INDIVISION, IN REPERITIONS ECRITES DE DROIT CIVIL APPROFONDI* 8 (1927-8).

things which are not within the purview of mere accessories or auxiliary to ownership in the classic sense.<sup>7</sup>

Does compulsory joint ownership exist in Mexican law? An answer must first be sought in the civil code. Article 939 states that "the law does not impose the duty on owners of property by whatever title they may have taken, to keep that ownership undivided except where, either because of the nature of the things in question or by rule of law, ownership is indivisible." To put it another way, the joint owners may only be compelled to maintain the joint ownership when either by the nature of the thing or by legal disposition it is incapable of being partitioned. The more limited form of joint ownership, in accordance with the classic theory, is expressly adopted by the Mexican legal system.

The following article of the Code, Article 940, appears to destroy the effect of the one just mentioned. It states that "if the ownership of a thing is not divisible or the thing does not admit of an easy division and the joint owners have not been able to agree on its transfer to one of them, the court shall decree its sale and the distribution of the price among those holding an interest in the property." A literal interpretation of this article would not appear to be justified; a too superficial analysis could carry with it serious consequences. We agree with Barassi<sup>8</sup> that the term "ownership incapable of division" has many meanings. The first and purest meaning is that there are things which are absolutely indivisible; that is, in which the community of ownership cannot be dissolved in any fashion, not even by forced sale at auction with a division of the price or by adjudging the thing to the ownership of one of those holding a joint interest. Such a situation is found, for example, in the Horizontal Property Law,<sup>9</sup> the law governing the property system regarding buildings divided by floors, apartments, or other living units."

Secondly, "ownership incapable of division" could mean that a thing is indivisible if it is not capable of being divided in the physical sense, but it can be divided in law either through forced sale and division of proceeds or by turning it over to one of the several joint owners in its entirety in exchange for that joint owner's surrendering an interest of an equal value in another piece of jointly owned property. Here it is obvious that one is dealing with a mere physical indivisibility and not with a community interest incapable of division, e.g., the case of a painting or an automobile belonging jointly to several individuals.

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7. LABRET, *LA NOTION DE L'INDIVISION DANS LE DROIT FRANCAIS ACTUEL* (1922) cited from 4 BONECASSE, *SUPPLEMENT AU TRAITE THEORIQUE ET PRATIQUE DE DROIT CIVIL* 357. The most liberal opinions in this regard are expressed in Italy by BARASSI, *PROPRIETA E COMPROPRIETA* 762 (1951), and BRANCA.

8. See note 7 *supra*.

9. *Ley sobre el regimen de propiedad y condominio de los edificios divididos por pisos, departamentos, viviendas o locales* (1954), *Diario Oficial* t.107, no. 38 of December 15, 1954. The act appears to be the equivalent of what is now called the Law of Horizontal Property in many of the Latin American countries.

There is a third meaning in which the indivisibility is reduced to the lowest degree. This occurs when the circumstances make it merely economically inconvenient or inopportune to divide the thing. An example of this situation is a collection of movables or personal property which could be divided among those holding the joint interests, but where the totality has a far greater economic value than the sum of the component parts.

It is felt very strongly that Article 940 is only applicable in the latter two instances mentioned. To apply it in the first would be to assume that the code intended to create a grave inequity. Planiol put it very well: "laws are enacted to produce for men the greatest possible usefulness. A legal system which gives unjust or unsatisfactory results is a poor one, violating its own central purpose. No legal system can be understood by pure logic alone; logic must be tempered by considerations of equity and utility. It is obvious that there is a limit which must be maintained, beyond which the judge, who is a mere interpreter of the law, cannot substitute his personal belief for the authority of the law, but there is also another evil to be avoided which is the mere mechanical interpretation of the law that turns it against itself and brings it to an anti-social end."<sup>10</sup> The interpretation which is favored here is supported by even the stricter schools of thought on the proper construction of the law since it is generally agreed that the law cannot be applied to situations which, even though literally within the text of the law, are excluded by the spirit of the particular legal disposition. Even the so-called restrictive interpretive school accepts the maxim "where reason ceases, there also ceases the law."<sup>11</sup>

From all the foregoing, it is clear that Mexican law recognizes compulsory community property in general. Planiol, explaining the basis of this particular form of property holding, stated that "there are relatively few hypotheses on which to establish the theoretical basis but innumerable cases in which its practical basis can be found. These practical cases can be divided into three groups. The first two are made up of outside walls, floors, and other partitions on the one hand, and, on the other hand, the land and various parts of apartment houses owned by several people. The third group deals with those things which, either by virtue of their nature or some agreement, have achieved the status of indispensable accessories to two or more separate pieces of property all having an interest in the common use. In this third group may be cited such things as covered archways, private streets, passageways or alley ways, patios, wells, and washrooms, septic tanks serving various houses, walls, streets, or pathways connected with the use of various

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10. 1 PLANIOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* 224, cited by 1 BORJA SORIANO, *TEORÍA GENERAL DE LAS OBLIGACIONES* 39 (1953).

11. 1 BAUDRY-LACANTINERIE AND HOUQUES FOURCADE, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL* 263; also 1 AUBRY AND RAU, *COURS DE DROIT CIVIL FRANÇAIS* 130, both cited by BORJA SORIANO, *op. cit.* note 10.

deposits and dikes, canals, or aqueducts serving several industrial establishments. It lies in the discretion of the judges to determine whether a thing is really necessary for joint or common usage and whether its partition would have such a disastrous effect on the usefulness of the property so served as to make a division practically impossible."<sup>12</sup>

The first of the cases mentioned by Planiol, concerning joint and party walls, was also the first to be especially regulated in our civil codes. As early as 1870 and 1884 our code, based on the 1851 draft Spanish Civil Code, formulated rules governing party walls. These codes placed the rules dealing with this particular subject matter in Book II regarding goods, property and their various modifications, Title 6 of servitudes, Chapter 5 of the legal servitude for common or party walls. Our Code of 1928 properly places all of the rules dealing with party walls in the chapter on joint ownership. This arrangement, based on the Spanish Code of 1889, seems to be much better than the prior ones mentioned. The substantive language, however, remains almost the same as in the earlier codes with only insignificant changes in terminology.

The second hypothesis of Planiol, that regarding land and houses divided into apartments, was regulated in the earlier Codes of 1870 and 1884 under the title dealing with servitudes, and, together with the dispositions referring to party walls, passed into the chapter on joint ownership of the Code of 1928.<sup>13</sup> The only group mentioned by Planiol which does not have a particular set of rules in Mexican law is the third, that dealing with individual properties connected by certain aspects of joint utility, such as a patio, swimming pool, source of fresh water or a street. The first problem here is to find out whether it is true joint ownership or a question of reciprocal servitudes. Goubreau states that the words "compulsory joint interests" were originally deemed to be incompatible with the proposition contained in Article 815.<sup>14</sup> Instead of holding the perpetual community to be a form of joint ownership, it was deemed to be one of mutual or reciprocal servitudes.<sup>15</sup>

However, from 1858 on the decisions of the French courts began to admit, at first by implication and later expressly, that these cases were not really matters of servitudes but were cases of co-ownership. Thus the decision of the 15th of February, 1858, said, "It is impossible to visualize, in the case of land destined to remain permanently undivided, either a dominant or

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12. 3 PLANIOL AND RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 281 (1926) In the same sense COLIN AND CAPITANT, *op. cit.* note 5, at 624, and DA CUNHA GONCALVES, *op. cit.* note 4 at 279.

13. Some of the problems involved have been given consideration in the law cited in note 9 *supra*.

14. "Nobody is compelled to remain in a community; partition may be demanded in all cases, regardless of an agreement to the contrary."

15. COLIN AND CAPITANT, *op. cit.* note 5, at 626; also 6 BAUDRY-LACANTINIÈRE AND CHAUVEAU, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL* 199 (1905).

servient tenement. It is rather a question of the continuing exercise of the rights resulting from co-ownership." Since that time, Goubeau continues, no doubt has existed about the real distinction between servitudes and compulsory co-ownership. Unfortunately, in reaching this conclusion, our courts failed to determine the precise legal character of the limitation contained in Article 815. They announced that it was an established principle that certain situations required perpetual joint ownership because "of the nature and force of circumstances." Today it is sufficient for the courts to make such a declaration of necessity or greater utility or even to impose the property regime automatically without any particular reason.

The same condition may be found in the writings, for example, of Baudry-Lacantiniere and Chauveau, that "things are affected by a so-called servitude of indivisibility," but this expression is not precise. Compulsory indivisibility, to tell the truth, is not an incumbrance of things held jointly or in common. Rather these things are the object of a form of joint ownership, the only restriction on the concept of ownership being that partition is impossible for the reason it would destroy completely the usefulness of the particular property . . . The joint owners hold property and not merely a servitude." In his turn, Plainol stated, "We are not dealing here with a matter of dominant or servient tenement. The joint owners have equal rights which are exercised on an absolute par in all the parts of the things jointly owned."<sup>16</sup>

What practical importance does this doctrinal concept have? Several practical cases will demonstrate the importance of the answer to this question:

A) Let us suppose a building adjoining on a common alleyway. The owner of the building wishes to open up several direct entrances onto this street from the building. According to the first system, this would only be possible if the way which borders on the alleyway is no less than one meter distance from the middle line of the wall (Article 815 Civil Code) because that line represents the boundary of the adjoining property. According to the second system, it is sufficient if the distance of one meter exists between the wall in which the entrances are going to be broken and the other side of the alleyway since that is where the neighboring property starts.

B) Now let us suppose the same common passageway is not utilized by one of the neighboring properties for more than three years. If we were dealing with a mutual servitude of passage, this would have been wiped out since this class of servitudes is extinguished by nonuser for three years.<sup>17</sup> On the contrary, if there is joint property, this situation in the eyes of the

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16. CIVIL CODE Art. 1128.

17. In accord AUBRY AND RAU, COLIN AND CAPITANT, JOSSRAND, CUNHA GONCALVES, DIAS FERREIRA, BARASSI, SCIALOJA AND BRANCA.

court will not have changed at all as the property right is perpetual whether it is used or not.<sup>18</sup>

Once it has been determined that we are dealing with a true joint ownership situation a second problem presents itself. Since there is no express legislation on the point, what rules shall decide? Should a choice be made among the two following possible solutions? The first would be to control these cases by the express rules set out for the two other cases; the second would be to admit this is a different form of joint ownership regulated only by the general rules of the civil code.

It appears impossible to apply the rules for party walls to this other kind of imposed joint ownership. Those rules would be inadequate as they were conceived with an entirely different legal institution in mind. Certain of the general norms (e.g., those contained in Articles 959, 960, 971) would be used by analogy since these norms are applicable to all the forms of joint ownership.

Another provocative question is whether the Horizontal Property Law could govern this kind of joint ownership. This question may be examined from two different points of view. First within the terms of the existing law and second from the viewpoint of possible future legislation. It is highly improbable that this form of community property was within the scope of legislation concerning horizontal property. Article 951 of the Civil Code as amended was intended to control only those cases where "the floors, apartments, living quarters, within a building belong to different owners." If this limitation is not clear enough by itself, the statement of purpose which the President of the Republic submitted with the horizontal property bill clarifies the issue.<sup>19</sup> It is obvious from this preamble that the purpose of the law was only designed to make possible separate ownership of apartments within one building. The law had no intention of dealing with the situation where separate houses depend upon some common services.<sup>20</sup> The most elementary case of horizontal property is pointed out by Poirier as "a

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18. "Whereas . . . the Capital of the Republic has undergone an extraordinary development in the last forty years resulting in a considerable increase in its demographic density, which at the same time has caused such an extension in territory as to require enormous investments in public services for the new subdivisions; and whereas for various reasons the value of the land and the cost of these public works for new subdivisions has risen to such a point that it has made it impossible for persons of limited means to acquire land on which to build homes, leaving them thus in a situation where they must rent living quarters; for all these reasons and in view of the experience of other countries in solving this problem by cooperative housing based on horizontal property by floors and apartments; and whereas it appears that this property system can be applied with satisfactory results in the City of Mexico, and for the purpose of solving all the problems attendant upon such form of property that have not been properly solved in our present Civil Code, now therefore . . ."

19. See particularly rules contained in Art. 14, 25, 26, 47 and 48 of the law cited in note 9 *supra*.

20. POIRIER, *LE PROPRIETAIRE D'APARTEMENT* 57 (1936); also NEGRI, *REGIMEN ARGENTINO DE LA PROPIEDAD HORIZONTAL* 42 (1955).

building with two apartments located under one roof; each one has its own doorway providing completely separated living quarters, one on the ground floor and the other the first floor. . . . This is not a situation where two twin semi-detached houses are separated by a party wall but rather have a suitable form of construction which eliminate, as far as possible, parts that are commonly used. In the true horizontal property there are not even common hallways but only economies in the use of land and construction materials."<sup>21</sup>

Let us now look at the problem from the second point of view, that of legal policies. Were these situations to be declared under the control of the Law of Horizontal Property, all of the cases of individual ownership of services common to the totality, such as patios, wells of water, streets, pools, etc., would be dealt with in an incorrect way. This important legal institution would suffer as a result of an improper confusion of two distinct varieties of compulsory indivisibility. It is clear that many of the rules necessary when placed in the Horizontal Property Law, lose their sense if applied to the classic type of joint ownership. An example would be the prohibition of excavation, increasing the height of the building, or painting floors different colors.<sup>22</sup> Imagine a building with each floor painted or decorated differently from the rest. Such a problem does not occur if each apartment is a separate one-family dwelling. There is no reason to make such uniform requirements, just as there are no requirements that all the houses on one block be of homogeneous design. Without doubt, various articles of the Law of Horizontal Property could be applied by analogy to these situations, but the same is true of certain rules for party-walls. In fact, certain general rules in the field of compulsory joint-ownership are applicable in all of its various forms.

The reasons cited, in our opinion, definitely establish the distinction. There is, notwithstanding, a trend of opinion which insists on application of the Horizontal Property Law to similar cases. No valid technical ground is ever cited. The points of similarity are taken into consideration, but the unquestionable differences which exist are not accounted for.

In Mexico City the principal motivation for this reasoning is the desire to evade certain dispositions of the law of subdivisions, which, for example, prohibit lots of less than 120 square meters with a frontage of less than seven meters. Furthermore, when dealing with homes costing not more than sixty thousands pesos (roughly \$4,800) the Horizontal Property Law grants certain tax exemptions.<sup>23</sup> A similar law of the state of

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21. Art. 25, 26 of the law cited in note 9 *supra*.

22. These are provided for in the Law of exemption from taxes for popular housing in the District and Federal Territories (decree of December 8, 1956).

23. Ley sobre el régimen de propiedad y condominio de los edificios divididos en pisos, departamentos, viviendas o locales del Estado de Morelos, Art. 1, and 2 (December 24, 1956, PERIODICO OFICIAL OF DECEMBER 25, 1956).

Morelos of Dec. 24, 1956, with little reason, declares that "For the purpose of this law, building is understood to be any type of construction or series of constructions on the same lot, built for dwelling, commercial, industrial, professional, or any other purpose normal to human activity."<sup>24</sup> Perhaps the reason for this definition was the extension to any type of construction of the privileges enjoyed by the Law of Horizontal Property.<sup>25</sup> It appears laudable to us that these constructions be conceded the same exemptions, but in doing this there is no reason to torture juridical technique as was done in Morelos. The legislature could have as easily extended the privileges given horizontal property to housing projects where the occupants share some facilities in common (classic joint ownership).

The solution suggested here is the one accepted in France. There the law of February 7, 1953, extended the dispositions of the law of July 28, 1938, to "corporations formed or to be formed, whatever be their corporate structure, with the object of constructing, acquiring or administering joint properties for the principal purpose of living quarters composed of collective properties, individual homes, and, eventually, of common facilities destined to be attributed to the corporate members in property or in use."<sup>26</sup>

We have affirmed that joint ownership of patios, streets, ditches, wells, and sewers should not be assimilated to the joint ownership of a party wall, nor to that in buildings separated into individually owned apartments. This joint ownership, very clearly, has its own rules. In the first place there is no possibility to seek a partition. Neighbors being what they are, action for partition would probably be an abuse of rights, having no other motive than to interfere with the other joint owners. Even were this not true, partition has no place in this kind of property. To the legal arguments already mentioned, we may add the following: Article 951 of the Civil Code and Article 15 of its supplementary regulations declare that the joint ownership of elements common to an entire building is not capable of partition. The very same reason that lies behind this prohibition of partition of houses applies to the joint ownership of patios, streets, wells and the other common services. This is merely an application of the general rule of Article 939 of the Civil Code that partition cannot be sought when the ownership is indivisible. The analogy is quite clear.

In the second place, in accordance with Article 941 of the Civil Code, a contractual agreement can be made by the joint owners to facilitate the administration of common facilities. In the absence of such settle-

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24. Art. 2 (transitional) of the law cited in note 23 *supra*.

25. Art. 80 of the law of February 7, 1953 (JOURNAL OFFICIEL, February 8, 1953), tit. III. See DENIS, SOCIÉTÉS DE CONSTRUCTION ET COPROPRIÉTÉ DES IMMEUBLES DIVISÉS PAR APPARTEMENTS 240 (1954), and BOITARD, *Legislation Française en Matière de Droit Civil*, 51 REVUE TRIMESTRIELLE DE DROIT CIVIL 401 (1953).

26. COLIN AND CAPITANT, *op. cit.* note 5, at 624.

ment, Articles 942 to 944 control. With respect to Article 950, we agree with the general opinion that the joint owner cannot "dispose of his rights in the thing jointly held to any person outside of the community" for the same reasons that a partition cannot be sought. Furthermore, "granted the perpetual character of the indivisibility, each owner will enjoy powers more extensive than that of the ordinary joint owner. He can freely enjoy the thing for the purposes established by agreement or by its nature. Likewise, he can transform or modify the thing within the same terms. The owner of a common patio can raise the ground level of the garden, or construct small drainage canals. . . . The co-proprietor of an alleyway can add a fence provided it does not impede passage. . . . It can be generally stated that each owner can conduct himself as though he were the exclusive owner of the facility in question, subject to two basic limitations: (1) he can not modify its character; thus the co-proprietor of a patio cannot install a warehouse or stable, nor carry on his business there if the patio were designed as a passageway . . . ; and (2) he must use the thing for the purposes for which it was placed in imposed and indivisible joint ownership."<sup>27</sup>

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27. COLIN AND CAPITANT, *op. cit.* note 5, at 286.