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## Enforcement of Rights By Spouses

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not have expressly stipulated to that effect? It is possible that the question was left open because none of the classifications of ownership would adequately describe the nature of the wife's interest in the community. It is submitted that fewer undesirable results will be produced if the wife's interest is characterized as the lawmakers intended it to be — *sui generis*.

Gordon E. Rountree

## ENFORCEMENT OF RIGHTS BY SPOUSES

During the existence of the marital community, two broad classes of actions may arise with accompanying problems peculiar to each: actions against third parties and those between the spouses themselves. The former may be further divided into actions which may be brought by the wife in her individual capacity and actions properly instituted by the husband individually, or as head and master of the community. In the past difficulty has arisen due to uncertainty whether certain actions are separate or community, since choice of an improper plaintiff could result in dismissal for no right of action. In the area of the wife's separate actions there has been a significant broadening of the wife's capacity to sue as well as an increase in the number of claims classified as her separate property. In the area of interspousal suits, most problems are concerned with the scope of the underlying policy prohibiting certain types of suits, especially tort suits, and the breadth of the prohibition itself. This Comment examines these problem areas.

### ACTIONS AGAINST THIRD PARTIES

#### *Wife's Separate Rights and Actions*

Generally, the classification of the right sought to be enforced as one belonging to the community or to the separate estate of one spouse determines the choice of a proper plaintiff. Actions to enforce common rights usually must be instituted by the husband as head and master of the community, whereas each spouse may institute actions relative to his own separate property. The husband's separate rights and actions apparently do not present any problems, since he may personally institute

judicial proceedings to enforce his separate rights; in the event the claims are classified as community, he may prosecute them as head and master of the community.<sup>1</sup>

Before emancipatory legislation, married women in Louisiana were burdened with certain legal incapacities<sup>2</sup> directly traceable to the Code Napoleon.<sup>3</sup> At Roman law, the wife suffered no such general incapacities, her only limitation being lack of capacity to bind herself for her husband's benefit.<sup>4</sup> The most onerous disability in Louisiana was that the wife could not perform juridical acts or appear in court without her husband's authorization<sup>5</sup> unless she were legally separated.<sup>6</sup> If the husband were interdicted, absent, or had refused to give his consent, authorization could be obtained from the court.<sup>7</sup> Relaxation of the restrictions on the wife's capacity began in 1902

1. LA. CODE OF CIVIL PROCEDURE art. 686 (1960).

2. LA. CIVIL CODE arts. 120, 121, 122, 2446 (1870).

3. FRENCH CIVIL CODE art. 214: "*La femme est obligée d'habiter avec le mari, et de le suivre par-tout où il juge à propos de résider: le mari est obligé de la recevoir, et de lui fournir tout ce qui est nécessaire pour les besoins de la vie, selon ses facultés et son état.*" LA. CIVIL CODE art. 120 (1870) is merely a translation of the French code article.

FRENCH CIVIL CODE art. 215 is essentially the same as LA. CIVIL CODE art. 121 (1870), and reads: "*La femme ne peut ester en jugement sans l'autorisation de son mari, quand même elle serait marchande publique, ou non commune, ou séparée de biens.*"

FRENCH CIVIL CODE art. 217 is the counterpart of LA. CIVIL CODE art. 122 (1870): "*La femme, même non commune ou séparée de biens, ne peut donner, aliéner, hypothéquer, acquérir, à titre gratuit ou onéreux, sans le concours du mari dans l'acte, ou son consentement par écrit.*"

FRENCH CIVIL CODE art. 1595 is essentially the same as LA. CIVIL CODE art. 2446 (1870): "*Le contrat de vente ne peut avoir lieu entre époux que dans les trois cas suivants:*

"1. *Celui où l'un des deux époux cède des biens à l'autre, séparé judiciairement d'avec lui, en paiement de ses droits;*

"2. *Celui où la cession que le mari fait à sa femme, même non séparée, a une cause légitime, telle que le remploi de ses immeubles aliénés, ou de deniers à elle appartenant, si ces immeubles ou deniers ne tombent pas en communauté;*

"3. *Celui où la femme cède des biens à son mari en paiement d'une somme qu'elle lui aurait promise en dot, et lorsqu'il y a exclusion de communauté;*

"*Sauf, dans ces trois cas, les droits des héritiers des parties contractantes, s'il y a avantage indirect.*"

4. 1 COLIN ET CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS 632-33 (7th ed. 1931).

5. LA. CIVIL CODE arts. 121, 122 (1870); La. Code of Practice art. 106 (1870). The authorization necessary could be either express or implied. See, e.g., Ireland v. Bryan, 3 Mart. (N.S.) 515 (La. 1825); Rowel v. Buhler, 3 Mart. (N.S.) 348 (La. 1825).

Joinder in suit as authorization: Chiasson v. Duplantier, 10 La. 570 (1837); Lawes v. Chinn, 4 Mart. (N.S.) 388 (La. 1826). When both spouses were cited and the wife alone appeared, the husband's authorization was presumed, Twichell v. Buell, 13 Orl. App. 121 (La. App. Orl. Cir. 1916). For a detailed discussion of the married woman's incapacities, see Comment, 8 TUL. L. REV. 106 (1933).

6. LA. CIVIL CODE art. 123 (1870).

7. *Id.* arts. 132 and 124; Blake v. Nelson, 29 La. Ann. 245 (1877).

when Civil Code article 2402 was amended to provide that damages for the wife's personal injuries were her separate property and "recoverable by herself alone."<sup>8</sup> The amended article was interpreted to allow the wife to bring her separate personal injury suits without the usual authorization.<sup>9</sup> Most restrictions on the wife's contractual and procedural capacities were removed by a series of "emancipatory acts" between 1916 and 1930.<sup>10</sup> Procedurally, the most important is the first of these acts, in 1916, which gave the wife capacity to sue and be sued in respect of her separate and paraphernal property, as if she were *femme sole*.<sup>11</sup> In this and each later emancipatory act, a saving clause provided that the acts were not intended to modify or affect the laws relating to community property.<sup>12</sup> Although this clause prevented intrusion upon the husband's position as head and master of the community,<sup>13</sup> the broadening of the wife's procedural capacity did indirectly affect the community property system, even if only in matters of procedure, and the present law thus does not require that the wife be authorized by her husband to sue for rights which are solely her own.

The wife's separate rights against third parties generally include tort claims for her personal injuries<sup>14</sup> as well as damages to her separate property,<sup>15</sup> real actions in relation to her separate immovable property,<sup>16</sup> and enforcement of certain contractual rights where the proceeds inure to her separate estate.<sup>17</sup> Concurrently, the wife may sue in her own name to enforce some special rights conferred upon her by the legislature even though the proceeds may fall into the community.<sup>18</sup>

Article 2351 of the Civil Code provides that the wife, after

8. LA. CIVIL CODE art. 2402 (1870), as amended.

9. *Shield v. F. Johnson & Son Co.*, 132 La. 773, 61 So. 787 (1913).

10. La. Acts 1916, No. 94; La. Acts 1918, No. 244; La. Acts 1920, No. 219; La. Acts 1926, No. 132; La. Acts 1928, No. 283. These provisions are now incorporated in LA. R.S. 9:101-105 (1950).

11. La. Acts 1916, No. 94, now incorporated in LA. R.S. 9:101-05 (1950).

12. LA. R.S. 9:105 (1950): "Nothing contained in R.S. 9:101, 9:102, and 9:103 is intended to modify or affect the laws relating to the matrimonial community of acquêts and gains or the laws prescribing what is deemed the separate property of the spouses." The substance of this provision is found in La. Acts 1916, No. 94, § 1; La. Acts 1918, No. 244, § 1; La. Acts 1920, No. 219, § 1; La. Acts 1926, No. 132, § 4; La. Acts 1928, No. 283, § 5.

13. *Succession of Howell*, 177 La. 276, 148 So. 48 (1933).

14. LA. CIVIL CODE art. 2402 (1870).

15. *Id.* arts. 2334, 2386, 2404.

16. *Ibid.*

17. *Ibid.*

18. *Van Horn v. Vining*, 133 So.2d 901 (La. App. 2d Cir. 1961); *State ex rel. Kennington v. School Board*, 193 So. 225 (La. App. 2d Cir. 1939).



alternative pleading, allowing both spouses to sue in the alternative, and in the event the right sought to be enforced is declared personal to either, the other may proceed as proper plaintiff.<sup>29</sup>

*Enforcement of Separate Rights Through Other Spouse  
as Agent*

The husband is improper plaintiff if the recovery would be his wife's separate property,<sup>30</sup> and presumably the wife is improper plaintiff if the recovery would be her husband's separate property. If one spouse makes the other his agent to assert a separate action, then the agent is apparently a proper plaintiff. Although no reported case illustrates the use of such procedure, it is believed that it was possible even before adoption of the Code of Civil Procedure.<sup>31</sup> Since adoption of the new Code, the procedure unquestionably is valid under articles 694 and 695.<sup>32</sup>

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29. LA. CODE OF CIVIL PROCEDURE art. 686 (1960): "The husband is the proper plaintiff, during the existence of the marital community, to sue to enforce a right of the community.

"Where doubt exists whether the right sought to be enforced belongs to the marital community or to the separate estate of the wife, the husband and wife may sue in the alternative to enforce the right."

In official comment (b) to article 686, it is said: "One of the greatest reproaches to the administration of civil justice in Louisiana has been the manner in which our courts have permitted defendants to invoke substantive rules of community property to defeat the enforcement of the rights of husband and wife. . . .

"The substantive rules of community property are legal rules of accounting between the community and separate estates which usually are of no concern to the defendant. The only justification for procedural rules on the subject are: (1) a recognition of the husband as head and master of the community to prevent any unauthorized assertion by the wife of a community right; (2) protection of the rights of the forced heirs and creditors of the husband; and (3) protection of a defendant against double recovery. Time and time again the courts have permitted a defendant, completely protected against double recovery, to defeat a wife's suit when the evidence technically showed that the right sought to be enforced by the wife, with the husband's approval, was a community right; or when the evidence failed to rebut the presumption that it was a community right.

"The alternative pleading sanctioned by the second paragraph of this article affords an effective solution of the problems in this area."

Obviously, if the right asserted is classified as the husband's separate right, he may proceed as proper plaintiff.

30. *Martin v. Ethyl Corp.*, 218 F. Supp. 416 (E.D. La. 1963). Here the court, relying on *Grandjean v. New Orleans Gas Light Co.*, Orl. No. 8225, *Tessier's Digest* (La. App. Cir. 1922), held the husband was prohibited from recovering damages to the wife which would not fall into the community when there was no evidence of some agency relationship.

31. Contrary to the rule at common law, in Louisiana the agent for a disclosed principal may sue to enforce the rights of the latter. See, e.g., *Pearson v. Louisiana & Arkansas Ry.*, 226 La. 834, 77 So.2d 411 (1954); *Reisz v. Kansas City So. R.R.*, 148 La. 929, 88 So. 120 (1921); *Casanas v. Audubon Hotel Co.*, 124 La. 786, 50 So. 714 (1909); cf. LA. CIVIL CODE art. 1787 (1870).

32. LA. CODE OF CIVIL PROCEDURE art. 694 (1960), in part: "An agent has the procedural capacity to sue to enforce a right of his principal, when specially

*Community Rights and Actions*

Historically, in community property jurisdictions the husband alone, as head and master of the community, has been entitled to prosecute claims which belong to the community.<sup>33</sup> This principle was adopted in Louisiana through the broad grant of power to the husband as head and master of the community under article 2404.<sup>34</sup> The wife was thus incapable of prosecuting a community claim in her own name, even if she sued under the honest misapprehension that the claim was her separate property and the husband had authorized her to enforce it in her individual capacity.<sup>35</sup> In some cases the courts implied that the wife would not be allowed to prosecute a community claim on behalf of the community as agent.<sup>36</sup> These limitations on the wife's capacity to sue, coupled with the frequent difficulty in distinguishing her separate claims from those of the community, created two problems in enforcement of community claims. First, if the right sought to be enforced is one of questionable classification and the identity of the plaintiff will determine whether the action will be met by successful exception of no right of action, which of the spouses should prosecute the claim? Second, if the husband wishes to allow his wife to sue to enforce a community claim, how can he do so, if at all? Since the married women's emancipation acts were held not to relieve the wife's inability to enforce community claims,<sup>37</sup> these problems remained until the adoption of the Code of Civil Procedure in 1960. The issues involved can be brought into sharper focus by an examination of specific examples from the jurisprudence.

*Problems of Classification and Choice of Plaintiff*

In numerous cases the wife, suing to enforce a right appar-  
authorized to do so."

*Id.* art. 695, in part: "A wife, as the agent of her husband, may sue to enforce a right of his separate estate . . . when specially authorized to do so by her husband."

33. See 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 66 (1943).

34. LA. CIVIL CODE art. 2404 (1870). See, *e.g.*, Mitchell v. Dixie Ice Co., 157 La. 383, 102 So. 497 (1924); Munch v. Central Laundry Co., 2 La. App. 123 (Orl. Cir. 1925).

35. Succession of Howell, 177 La. 276, 148 So. 48 (1933).

36. See, *e.g.*, *ibid.*; Hellberg v. Hyland, 168 La. 493, 122 So. 593 (1929); Mitchell v. Dixie Ice Co., 157 La. 383, 102 So. 497 (1924); Lanza v. DeRidder Coca-Cola Bottling Co., 3 So. 2d 217 (La. App. 1st Cir. 1941).

37. LA. R.S. 9:101-105 (1950). See, *e.g.*, Hellberg v. Hyland, 168 La. 493, 122 So. 593 (1929); Mitchell v. Dixie Ice Co., 157 La. 383, 102 So. 497 (1924); Harris v. Travelers Indem. Co., 70 So. 2d 235 (La. App. 2d Cir. 1954); Delpido v. Colony, 52 So. 2d 720 (La. App. Orl. Cir. 1951); Lanza v. DeRidder Coca-Cola Bottling Co., 3 So. 2d 217 (La. App. 1st Cir. 1941).

ently thought by both the spouses and their legal counsel to belong to the wife's separate estate, was defeated by a successful exception of no right of action, predicated on the finding that the claim was community property and thus enforceable only by the husband. This harsh result occurred, for example, when the wife attempted to recover the following: earnings while she was living with her husband;<sup>38</sup> delictual damages to community property acquired in the wife's name;<sup>39</sup> salary and profits, except in actions under the Teachers' Tenure Law;<sup>40</sup> and medical expenses and loss of earnings resulting from personal injury.<sup>41</sup> Even if the wife were a public merchant,<sup>42</sup> apparently she would not have the capacity to sue for the income of her separate trade unless this income was declared her separate property, a matter of uncertainty in the complexity of the substantive rules of community property.<sup>43</sup> There seem to be only two exceptions to the rule barring the wife from prosecuting a community claim in her own name: (1) if the wife is designated as the payee in

38. Succession of Howell, 177 La. 276, 148 So. 48 (1933); Houghton v. Hall, 177 La. 237, 148 So. 37 (1933).

39. Mitchell v. Dixie Ice Co., 157 La. 383, 102 So. 497 (1924); Jackson v. Firemen's Ins. Co., 86 So. 2d 220 (La. App. 1st Cir. 1956); Cutrer v. Spring, 4 So. 2d 106 (La. App. 1st Cir. 1941).

40. Mitchell v. First Nat'l Life Ins. Co., 231 La. 546, 91 So. 2d 788 (1956); Houghton v. Hall, 177 La. 237, 148 So. 37 (1933); Succession of Howell, 177 La. 276, 148 So. 48 (1933). *But cf.* Youngblood v. Daily & Weekly Signal Tribune, 131 So. 604, 606 (La. App. 2d Cir. 1930), in which two wives, as plaintiffs, were awarded compensation for their services, expenses, and time, though they had not been authorized by their husbands to sue. The court said: "As to whether the amounts collected through these suits, if any, would be community assets under the circumstances disclosed, we express no opinion. But conceding they would be community assets, defendant could suffer no injury by reason of the fact that plaintiffs were not specifically authorized by their husbands to bring the suits . . . [W]e think a judgment rendered against defendant in these suits would be *res adjudicata* and fully protect the defendant."

In *State ex rel. Fields v. School Board*, 227 La. 290, 297, 79 So. 2d 312, 314 (1955), the wife was allowed to sue for reinstatement and back pay on the theory that "the right of a permanent teacher to the protection afforded by the provisions of the Teachers' Tenure Act is a personal one which cannot be asserted by anyone else in his or her behalf, not even on the hypothesis that it belongs to the conjugal partnership where the teacher is a married woman." The court regarded as unsound the decision in *Riche v. School Board*, 200 So. 631 (La. App. 1st Cir. 1941), in which a married woman was not allowed to sue under the Teachers' Tenure Act for her back salary *alone*. The court said the *Riche* decision "fails to take into account that the Teachers' Tenure Act is a special law and that, therefore, the rights vouchsafed thereunder are strictly personal and cannot be governed by the general laws." *Id.* at 298, 79 So. 2d at 315.

41. *Kientz v. Charles Denery, Inc.*, 17 So. 2d 506 (La. App. Orl. Cir. 1944); *Simon v. Harrison*, 200 So. 476 (La. App. 1st Cir. 1941).

42. See LA. CIVIL CODE art. 131 (1870).

43. See, *e.g.*, *Houghton v. Hall*, 177 La. 237, 148 So. 37 (1933); *Succession of Howell*, 177 La. 276, 148 So. 48 (1933). In *King v. Dearman*, 105 So. 2d 293, 297 (La. App. 1st Cir. 1958), the court said: "[T]he wife's earnings from separate trade or business fall within the community if she is living with her husband at the time said business is carried on."



a negotiable instrument in her possession, she may sue to enforce payment even though the funds recovered would fall into the community;<sup>44</sup> (2) if the wife sues under the Teachers' Tenure Law for reinstatement she may prosecute an ancillary claim for earnings.<sup>45</sup> These special concessions perhaps resulted from the courts' realization of the inequity in allowing the substantive rule of community property law to defeat an otherwise legitimate cause of action in circumstances where the defendant was not prejudiced by threat of double recovery or loss of rights or defenses.

The Code of Civil Procedure effectively eliminated the difficulties discussed above, through the simple expedient of alternative pleading. Article 686 provides that "where doubt exists whether the right sought to be enforced belongs to the marital community or to the separate estate of the wife, the husband and wife may sue in the alternative to enforce the right."<sup>46</sup> Thus if the right is classified as a community right the husband will continue as plaintiff, while the wife stands in judgment if the claim is attributed to her separate estate. The only justifications for the former procedural rules were to prevent usurpation of the husband's powers as head and master of the community by the wife, to protect rights of the husband's forced heirs and creditors, and to protect the defendant from the danger of double recovery.<sup>47</sup> Obviously, these ends are achieved by use of alternative pleading, since ultimately the proper plaintiff will stand in judgment.

*Enforcement of Community Claim by Wife under Husband's Authorization*

In *Mitchell v. Dixie Ice Co.*<sup>48</sup> the wife, when confronted with an exception of no right of action based on the theory that she was procedurally incapable of asserting a community claim, contended that she had been authorized by her husband to prosecute the community claim as an agent of the community.<sup>49</sup> The court sustained the exception on the basis that article 2404 allows only the husband to sue for community claims. In *Succes-*

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44. See note 27 *supra*.

45. See note 40 *supra*.

46. See note 29 *supra*.

47. See note 29 *supra*.

48. 157 La. 383, 102 So. 497 (1924).

49. *Id.* at 385, 102 So. at 498.

son of *Howell*<sup>50</sup> a deceptively similar result was reached when the husband authorized the wife's suit in her own name to recover earnings they both believed to be her separate property.<sup>51</sup> Although the court in *Howell* relied heavily on *Mitchell*,<sup>52</sup> it is important to distinguish the two cases. In *Mitchell*, the wife contended she was suing as agent for the community<sup>53</sup> while in *Howell* the wife was prosecuting in her own name.<sup>54</sup> The decision in the *Howell* case, however, implies that the rule of *Mitchell* is the result intended.<sup>55</sup> Act 49 of 1944, amending article 1787 of the Civil Code to allow the wife to "act as mandatarly for her husband or for the community when authorized by her husband,"<sup>56</sup> was seemingly directed at the results of the *Mitchell* and *Howell* cases. In the opinion of at least one writer, the 1944 amendment permitted the wife to institute judicial proceedings for the community upon proper authorization by her husband.<sup>57</sup> The courts, however, have been most reluctant to accept such an interpretation, preferring to allow only the husband to prosecute claims for the community.<sup>58</sup> In the few instances where the wife was allowed to prosecute a claim on behalf of the community, amended article 1787 was not mentioned.<sup>59</sup>

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50. 177 La. 276, 148 So. 48 (1933).

51. *Id.* at 279, 148 So. at 49.

52. *Id.* at 281, 148 So. at 50.

53. *Mitchell v. Dixie Ice Co.*, 157 La. 383, 385, 102 So. 497, 498 (1924).

54. *Succession of Howell*, 177 La. 276, 279, 148 So. 48, 49 (1933).

55. *Id.* at 281, 148 So. at 50: "In the case of *Mitchell v. Dixie Ice Co.* . . . the court said: "In suits for damages for injuries suffered by the community, this court has never held that the mere assent of the husband is sufficient, or that the wife alone can judicially vindicate the rights of the community. There is a uniform and unbroken line of decisions to the contrary, all holding that in suits of this character the wife is not competent to stand in judgment, and that the suit must be brought in the name of the husband."

56. LA. CIVIL CODE art. 1787 (1870), as amended: "A married woman may act as mandatarly, and her acts will bind the mandator and the person with whom she contracts, although she be not authorized by her husband; she may also act as mandatarly for her husband or for the community when authorized by her husband."

57. Oppenheim, *The Significance of Recent Louisiana Legislation Concerning the Marital Community—Louisiana Acts 49 and 286 of 1944*, 19 TUL. L. REV. 200 (1944).

58. See *Rollins v. Beaumont-Port Arthur Bus Lines*, 88 F. Supp. 908 (W.D. La. 1950); *Hollingquest v. Kansas City Ry.*, 88 F. Supp. 905 (W.D. La. 1950); *Williams v. Cormier*, 100 So.2d 307 (La. App. 1st Cir. 1958); *Reid v. Monticello*, 33 So.2d 760 (La. App. 1st Cir. 1948).

59. *Grantz v. Levy*, 170 La. 712, 129 So. 139 (1930) (negotiable instrument exception); *Lavoy v. Tove Bros. Auto & Taxicab Co.*, 159 La. 209, 105 So. 292 (1925) (defendant failed to file exception; court allowed wife to sue for community claim); *Van Horn v. Vining*, 133 So.2d 901 (La. App. 2d Cir. 1961) (negotiable instruments exception); *Anderson v. Simmons*, 75 So.2d 34 (La. App. Orl. Cir. 1954) (husband not party to wife's suit; consented on witness stand that judgment for community loss be rendered in her favor; held that he

Article 695 of the Code of Civil Procedure clearly allows the procedure attempted in *Mitchell*, that is, the wife may sue as agent of the community under special mandate from her husband;<sup>60</sup> but with the fact situation of *Howell*, it is submitted that the article should not apply. The husband's authorization should specifically appoint his wife as agent to sue for the community, not merely authorize her to proceed in her own name.<sup>61</sup>

### INTERSPOUSAL ACTIONS

This section considers the wife's protective actions against the husband, the scope and underlying policy of Louisiana's interspousal tort immunity, and the circumvention of this immunity through the direct action statute.

#### *Wife v. Husband*

##### *Protective Actions*

The wife's protective actions within the community serve to protect her dotal and paraphernal property, as well as her interest in the family home and the community property against her husband's mismanagement. Procedurally, these actions present little difficulty and, since the emancipatory acts,<sup>62</sup> the wife no longer needs court authorization to sue. She may sue for restitution of her paraphernal property at any time when the husband administers it.<sup>63</sup> The wife's action for separation

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constituted wife his agent without mentioning article 1787); *State ex rel. Kennington v. School Board*, 193 So. 225 (La. App. 2d Cir. 1939) (Teachers' Tenure Law exception).

60. LA. CODE OF CIVIL PROCEDURE art. 695 (1960): "A wife, as the agent of her husband, may sue to enforce a right of his separate estate, or a right of the marital community, when specially authorized to do so by her husband." In the official comment it is said: "This article employs express language to accomplish what was sought to be accomplished in the source provision [LA. CIVIL CODE art. 1787]. The source of this article expressly authorized the wife to sue as the agent of her husband. It does not spell out the right of the wife to sue as agent to enforce a community right, and hence does not completely remove all doubt thereof. . . . This article completely spells out the procedural capacity of the wife to sue as agent to enforce a community right, when authorized to do so by the husband."

61. In the first case interpreting the article, *Muse v. United States Cas. Co.*, 306 F.2d 30, 31 (5th Cir. 1962), the court said: "It [article 695] merely authorized a procedural step in that the wife may sue as agent for the husband who otherwise would be the only person entitled to sue on behalf of the community."

62. Now incorporated in LA. R.S. 9:101-105 (1950).

63. LA CIVIL CODE arts. 2388, 2390, 2391 (1870). See, e.g., *Slater v. Culpepper*, 233 La. 1071, 99 So.2d 348 (1958); *Carter v. Third Dist. Homestead Ass'n*, 195 La. 555, 197 So. 230 (1940); *Guss v. Mathews*, 179 La. 1033, 155

of property need not be predicated on danger to her dowry as the Civil Code seems to suggest.<sup>64</sup> When the wife has a legal mortgage on the property of her husband, her capacity to enforce it is unquestioned.<sup>65</sup> Article 2404,<sup>66</sup> as interpreted by the jurisprudence, provides the wife further means to protect her interest in the community by suit to recover half of any community property alienated by the husband in fraud of her rights.<sup>67</sup> Since this action arises upon the dissolution of the community only, unquestionably the wife has capacity to assert the cause of action. The wife may also protect her interest in the family residence by filing a designation and declaration of "family home" in the conveyance records of the parish in which it is located.<sup>68</sup> In the event the home is sold thereafter without her consent, she may take appropriate judicial action against all parties.<sup>69</sup>

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So. 765 (1934); *Bouligny v. Fortier*, 16 La. Ann. 209 (1861).

64. LA. CIVIL CODE arts. 2366, 2425 (1870). See, e.g., *Gastauer v. Gastauer*, 131 La. 1, 58 So. 1012 (1912); *Chaffe v. Watts*, 37 La. Ann. 324 (1885); *Vickers v. Block*, 31 La. Ann. 672 (1879); *Mock v. Kennedy*, 11 La. Ann. 525 (1856); *Childers v. Johnson*, 6 La. Ann. 634 (1851); *Davock v. Darcy*, 6 Rob. 342 (La. 1844).

65. LA. CIVIL CODE arts. 2376, 3319 (1870). See, e.g., *Fastin v. Eastin's Heirs*, 10 La. 194 (1836); *Cable v. Bossier*, 4 La. 558 (1832); *Nadaud v. Mitchell*, 6 Mart.(O.S.) 688 (La. 1819); *Cassou v. Blaque*, 3 Mart.(O.S.) 390 (La. 1814); *Butcher v. Butcher*, 83 So.2d 556 (La. App. 2d Cir. 1955).

66. LA. CIVIL CODE art. 2404 (1870), in part: "But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud."

67. In *Azar v. Azar*, 239 La. 941, 946, 120 So.2d 485, 487 (1960), where the wife could not set aside her husband's *dation en paiement* and transfer of common immovable property since there had been no dissolution of the community, it was said: "[W]hile the jurisprudence is settled that the wife's half interest in the community property is not a mere expectancy during the marriage nor transmitted to her in consequence (sic) of a dissolution of the community, but that title thereto is vested in the wife from the moment it is acquired by the community or by the spouses jointly, nevertheless her interest is subject to the husband's management and control as long as the marital community remains undissolved . . . by dissolution of the marriage itself through death, divorce or annulment; and during the marriage, by the wife's action for separation of property, by a judgment of separation from bed and board obtained by either spouse, or as the result of an action which either spouse may bring if the other member of the community is an absentee."

The rule is clearly pronounced in *Thigpen v. Thigpen*, 231 La. 206, 226, 91 So.2d 12, 19 (1956), where it is said: "[T]he only logical view to be accorded Article 2404 is that it gives to the defrauded wife an action against her husband in the event the community is dissolved by divorce or judicial separation."

In an earlier case, *Oliphint v. Oliphint*, 219 La. 781, 54 So.2d 18 (1951), the divorced wife, alleging fraud in the donation of stock by the husband during the marriage, was permitted to sue her ex-husband.

68. LA. R.S. 9:2801-2804 (1950).

69. In *Smith v. Marino*, 28 So.2d 780 (La. App. 1st Cir. 1947), the court considered the third party purchaser in legal bad faith since he purchased the family home after the wife's declaration was of record, thus enabling the wife to

*Tort Suits*

R.S. 9:291 provides that "as long as the marriage continues and the spouses are not separated judicially a married woman may not sue her husband except for:

- "(1) A separation of property;
- "(2) The restitution and enjoyment of her paraphernal property;
- "(3) A separation from bed and board;  
or
- "(4) A divorce."<sup>70</sup>

This statute prohibits the wife from bringing tort actions against the husband, presumably on the theory that such suits would disrupt domestic tranquility. In applying the statute the courts have looked to the time of the judicial proceedings rather than the time of the alleged offense in deciding whether the wife's right of action is statutorily prohibited.<sup>71</sup> The rule seems proper for two reasons: (1) under Louisiana jurisprudence it has been consistently held that the wife has a cause of action against her husband in delict but she is merely barred from enforcing it because of the matrimonial bond,<sup>72</sup> thus the existence of a marriage at the time of the suit is decisive; and (2) if the underlying policy of the prohibition is to preserve domestic tranquility during the marriage, the status of the parties at the time of the suit should determine the applicability of the statute.

In a recent decision, *Smith v. Southern Farm Bureau Cas.*

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become owner of one-half of the home in indivision with the third party purchaser.

70. LA. R.S. 9:291 (1950). This new statute, added by La. Acts 1960, No. 31, is a transfer of article 105 of the Code of Practice (1870), with minor changes unimportant for our consideration. Article 105 was derived from LAS SIETE PARTIDAS pt. 3, tit. 5, L. 2 (1263).

71. In *Gremillion v. Caffey*, 71 So.2d 670 (La. App. 1st Cir. 1954), the court permitted the newly divorced wife to sue her former husband for assault and battery allegedly committed upon her by him during legal separation but before absolute divorce. In a converse situation, the woman passenger's suit for personal injuries against her host, although instituted a few days before their marriage, could not be maintained after the marriage. *Palmer v. Edwards*, 156 So. 781 (La. App. 1st Cir. 1934).

72. See, e.g., *Burke v. Massachusetts Bonding & Ins. Co.*, 209 La. 495, 24 So.2d 875 (1946); *Ruiz v. Clancy*, 182 La. 935, 162 So. 734 (1935); *Edwards v. Royal Indemnity Co.*, 182 La. 171, 161 So. 191 (1935); *Vitale v. Checker Cab Co.*, 166 La. 527, 117 So. 579 (1928); *Gremillion v. Caffey*, 71 So.2d 670 (La. App. 1st Cir. 1954); *Palmer v. Edwards*, 156 So. 781 (La. App. 1st Cir. 1934).

Co.,<sup>73</sup> defendant's third party demand for contribution against his joint tortfeasor was denied on the theory that the latter, plaintiff's husband, was not a solidary obligor because the wife is prohibited from asserting her cause of action against him. It is submitted that this is not the proper rule because the wife possesses a substantive cause of action against her husband (making him a solidary obligor), but she merely lacks the capacity to enforce this cause of action against him personally.<sup>74</sup> Defendant's third party demand could have been allowed for the same reasons a liability insurer is not permitted to use the personal defenses of the insured.<sup>75</sup> Although a subrogee generally has no greater rights than the subrogor,<sup>76</sup> since the wife has a substantive cause of action against the husband, it seems that the subrogee should receive it free of the relative procedural incapacities of the wife.<sup>77</sup> The wife's relative incapacity to enforce her claim should not affect the defendant because she does have a cause of action, and the husband should not be able to assert his relative immunity as a valid defense to a third party's demands.<sup>78</sup>

#### *Husband v. Wife*

Although R.S. 9:291 does not prohibit the husband from suing the wife under various circumstances, it was once suggested judicially that the prohibition was impliedly mutual.<sup>79</sup> This implication may have been supported by the common law

73. 164 So.2d 647 (La. App. 3d Cir. 1964), *cert. granted*, 167 So.2d 672 (1964).

74. See note 72 *supra*.

75. See note 87 *infra*.

76. See, *e.g.*, *Morgan v. Southern Farm Bureau Cas. Co.*, 223 F. Supp. 996 (W.D. La. 1963); *Great American Indem. Co. v. Laird*, 73 So. 2d 6 (La App. 2d Cir. 1954); *Motors Ins. Corp. v. Employers Liab. Assur. Corp.*, 52 So. 2d 311 (La. App. 1st Cir. 1951); *International Paper Co. v. Arkansas & L.M. Ry.*, 35 So. 2d 769 (La. App. 2d Cir. 1948).

77. *Cf. Harvey v. Travelers Ins. Co.*, 163 So. 2d 915 (La. App. 3d Cir. 1964).

78. In *Ruiz v. Clancy*, 182 La. 935, 949, 162 So. 734, 738 (1935), the court, in discussing *Edwards v. Royal Indem. Co.*, 182 La. 171, 161 So. 191 (1935), said: "The incapacity of the woman to prosecute the suit against Edwards [her husband] was only a relative incapacity on her part . . . [It] did not affect the rights of the insurance company any more than it would have affected the rights of the insurance company if Miss Palmer had merely refused to sue Edwards, and had not married him. . . . The decision in *Edwards v. Royal Indemnity Co.* merely recognized a distinction between a case where there is no cause of action against the insured, and hence no cause of action against the insurer, and a case where there is no right of action against the insured because of a relative incapacity of the injured party to sue the insured . . . in which case, according to *Edwards v. Royal Indemnity Co.*, the injured party may have a right of action against the insurance company alone, under the act of 1930."

79. *Hawthorne v. Clarke*, 39 La. Ann. 678, 679, 2 So. 561, 562 (1887).

rule prohibiting tort suits between spouses on the theory that no cause of action could arise between husband and wife because they were regarded as one entity.<sup>80</sup> Today the rule in Louisiana seems to allow the husband to sue his wife only if denial of the right would result in a miscarriage of justice.<sup>81</sup> The husband has been permitted to maintain the following actions: an application for a writ of habeas corpus directed to his wife;<sup>82</sup> a proceeding against the recorder of mortgages to force the removal of an inscription from the records, where the wife was a nominal party defendant;<sup>83</sup> a suit against the wife in her representative capacity as executrix of the will of a third party deceased;<sup>84</sup> and a suit for the restitution of the husband's separate property, or its value, wrongfully taken by the wife.<sup>85</sup> The jurisprudential rule seems to have imposed no great hardship on the husband, and as long as there is a tendency towards a liberal construction of the rule, it seems proper.

#### *Direct Action Statute*

The direct action statute<sup>86</sup> has allowed the spouse injured through the other's fault to recover for his personal injuries by barring an insurer from claiming the personal defenses of the spouse tortfeasor.<sup>87</sup> A policy problem was presented in *Mc-*

80. See 27 AM. JUR. *Husband and Wife* § 589 (1940).

81. In *Kramer v. Freeman*, 198 La. 244, 262, 3 So. 2d 609, 615-16 (1941), it is said: "While the foregoing authorities cannot be regarded as furnishing a solution to the broad question (i.e., whether a husband should be permitted to sue his wife in all cases), they do, at least, exhibit a tendency on the part of this court to maintain such a suit where a denial of the right would result in a miscarriage of justice. . . . Moreover, the opinion of the court in *State v. Dunn* is an adequate answer to the contention made by counsel for the defendants that the husband is prohibited from suing his wife by Article 105 of the Code of Practice [now R.S. 9:291]. That article, according to its plain provisions as interpreted in the *Dunn* case, applies only to the wife's right to sue her husband and forbids her to maintain an action against him except for the causes specified therein."

82. *State ex rel. Lasserre v. Michel*, 105 La. 741, 30 So. 122 (1901).

83. *State ex rel. Machea v. Dunn*, 148 La. 460, 87 So. 236 (1921); *Bermudez v. Bermudez*, 2 Mart. (O.S.) 180 (La. 1812).

84. *Alexander v. Alexander*, 12 La. Ann. 588 (1857).

85. See *Kramer v. Freeman*, 198 La. 244, 31 So. 2d 609 (1941); *Morrow, Matrimonial Property Law in Louisiana*, 34 TUL. L. REV. 3, 34 (1959): "The circumstances in this case were strong, and perhaps exceptional, since the husband and wife were living separate and apart, and the wife in fact had contracted a bigamous marriage."

86. LA. R.S. 22:655 (Supp. 1963).

87. See, e.g., *Burke v. Massachusetts Bonding & Ins. Co.*, 209 La. 495, 24 So. 2d 875 (1946); *LeBlanc v. New Amsterdam Cas. Co.*, 202 La. 857, 13 So. 2d 245 (1943); *Ruiz v. Clancy*, 182 La. 935, 162 So. 734 (1935); *Edwards v. Royal Indem. Co.*, 182 La. 171, 161 So. 191 (1935); *Landrum v. United States Fid. & Guar. Co.*, 151 So. 2d 701 (La. App. 3d Cir. (1963)); *Eddison v. Employers Mut. Liab. Ins. Co.*, 64 So. 2d 484 (La. App. 1st Cir. 1953); *Chapman v. Travelers*

*Henry v. American Employers' Ins. Co.*,<sup>88</sup> in which the husband sued his negligent wife's insurer for damages. The policy question was whether, since damages for the husband's personal injuries inured to the community,<sup>89</sup> it was proper to award damages as they would incidentally benefit the negligent wife. The court ruled in favor of the husband, reasoning that the recovery would not be against public policy since the community would not be "enriched" but only "reimbursed" for the loss it had sustained as a result of the accident.<sup>90</sup> The decision seems just, but regardless of the court's reference to "reimbursed" rather than "enriched," the community in which the negligent wife has a half interest is indisputably enlarged by her husband's recovery.<sup>91</sup> A similar result was obtained when the husband-employee was allowed to sue his wife-employer's insurer for workmen's compensation claims even though the funds recovered would fall into the community.<sup>92</sup> Unless the injured spouse is also negligent in some manner, no legal doctrine precludes his suing the other's insurer for damages after the decision that the insurer is not entitled to plead the personal defense of the spouse tortfeasor.

### Conclusion

The use of articles 686 and 695 of the Code of Civil Procedure eliminates the procedural problems concerning the proper plaintiff where there is difficulty in classifying the right as either separate or community, and allows the wife to act as agent for her husband to prosecute claims belonging to the community. The articles were enacted for the purpose of eliminat-

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Indem. Co., 45 So.2d 557 (La. App. 1st Cir. 1950).

88. 206 La. 70, 18 So.2d 656 (1944).

89. See LA. CIVIL CODE art. 2334 (1870).

90. *McHenry v. American Employers' Ins. Co.*, 206 La. 70, 18 So.2d 656 (1944).

91. The first case in which the *McHenry* decision was interpreted was *Levy v. New Orleans & N.E. Ry.*, 21 So.2d 155 (La. App. Orl. Cir. 1945). There the court limited the *McHenry* rule to cases in which the wife was not driving a community-owned car on a community mission. (In *McHenry* the wife was driving during the course of her employment.) Later decisions, however, have allowed the liberal use of the *McHenry* rule without mentioning *Levy*. See, e.g., *Dowden v. Southern Farm Bureau Cas. Ins. Co.*, 158 So.2d 399 (La. App. 3d Cir. 1963); *McDowell v. National Sur. Corp.*, 68 So.2d 189 (La. App. 1st Cir. 1953).

92. *McLain v. National Mut. Cas. Co.*, 28 So.2d 680 (La. App. 2d Cir. 1946). The court based its decision to allow the husband's action on a theory of estoppel — the insurance company was estopped from pleading that no recovery could be had since it would fall into the community because the insurance company had constructive knowledge of the husband's coverage in his wife's workmen's compensation policy.



ing inequities whereby a person could avoid liability in the suit by simply urging a provision of law designed to govern behavior between husband and wife only. To minimize the disruption of domestic tranquility, the procedural obstacle to tort suits should remain intact, except inasmuch as they are permitted under the direct action statute.

*Reid K. Hebert*

### CREDITOR'S RIGHTS

Any system that combines a community estate and separate estates for each spouse presupposes a distribution of liabilities among them. Such a system obviously requires judicial caution to prevent dishonest persons from defrauding creditors by astute allocations of assets and liabilities among the community and separate estates of the spouses.<sup>1</sup> Thus it is necessary to distinguish between community debts and the separate debts of either spouse, to determine which property is liable for what debts, and to establish rules of priority between community and separate creditors. Two terse code articles,<sup>2</sup> apparently Spanish in origin,<sup>3</sup> are the only significant legislative provisions on community liability to third persons.<sup>4</sup> Lacking more detailed legislative guidance,<sup>5</sup> the courts have been compelled to dispose of cases on an *ad hoc* basis. The results are not always consistent, and some have been severely condemned as contrary to basic principles of community property.<sup>6</sup> Since 1920 consid-

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1. For a doubtful case, see *Thomas v. Vega*, 185 La. 386, 169 So. 443 (1936).

2. LA. CIVIL CODE art. 2403 (1870): "In the same manner, the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage, must be acquitted out of their personal and individual effects."

*Id.* art. 2409: "It is understood that, in the partition of the effects of the partnership or community of gains, both husband and wife are to be equally liable for their share of the debts contracted during the marriage, and not acquitted at the time of its dissolution."

3. See Morrow, *Matrimonial Property Law in Louisiana*, 34 TUL. L. REV. 3, 8 (1959). FUERO REAL bk. 3, tit. 20, L. 14 (1255) may be the ultimate source of the concluding portion of art. 2403.

4. See also LA. CIVIL CODE art. 131 (1870), apparently copied from FRENCH CIVIL CODE art. 220 (1804).

5. Compare the more comprehensive dispositions of SPANISH CIVIL CODE arts. 1408-1411 (1889) and FRENCH CIVIL CODE arts. 1409-1420 (1804) with LA. CIVIL CODE arts. 2403, 2409 (1870).

6. 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 438-39, 456-57 (1943) [hereinafter cited as DE FUNIAK]. It may be doubted that there are "general