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Creditor's Rights

Karl W. Cavanaugh

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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.¹ 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,² apparently Spanish in origin,³ are the only significant legislative provisions on community liability to third persons.⁴ Lacking more detailed legislative guidance,⁵ 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.⁶ Since 1920 consid-

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

erable uncertainty has been introduced by the married women's emancipation statutes⁷ and the judicial decision to treat the wife as owner of half the community during marriage.⁸ This Comment examines the rights of creditors, community and separate, in an effort to delineate their position in present Louisiana law.⁹

Classification of Debts

As the sketchy treatment of community liabilities in the Civil Code does not include identification of separate and community debts contracted during marriage, the courts have been obliged to invent modes of classifying such debts. Two methods of classifying debts have developed: by the first, debts are classified according to their nature; by the second, according to which spouse incurred them. Article 2403 speaks of "debts contracted during the marriage," without exception, as community debts. Nevertheless the courts early recognized that some debts incurred during the marriage are not community debts but separate debts of one spouse.¹⁰ Indeed, once it became settled law

principles of community property" based on some ideal community property system as De Funiak seems to suggest. Rather, there appears to be numerous community property systems, each adapted to the legal system of which it is a part, and each having its own principles which are not necessarily applicable to other community systems.

7. Now compiled in LA. R.S. 9:101-105 (1950).

8. *Phillips v. Phillips*, 160 La. 813, 107 So. 584 (1926) is the root decision. *Fazio v. Krieger*, 226 La. 511, 76 So. 2d 713 (1954), considered in text accompanying note 173 *infra*, is a branch of the doctrine which is pertinent to creditors.

9. This Comment treats the legal community only. To a certain extent, the parties in a conventional community may alter the rights of creditors. For example, if the marriage contract stipulates the ratio of the community to which the wife is entitled on its dissolution, unless there is a stipulation to the contrary, she is liable for no greater ratio of the debts. *Succession of Coco*, 32 La. Ann. 325 (1880).

10. *Dickerman v. Reagan*, 2 La. Ann. 440, 441 (1847): "It is true, that debts contracted during the marriage enter into the community of gains, and must be acquitted out of the common fund. C.C. art. 2372 [1825 Code]. But this provision applies to the partners alone, and regulates their rights between themselves, upon a settlement of the community at its dissolution. It has no application to creditors, and does not deprive them of their recourse against the wife, during marriage, for debts contracted for her separate advantage, and for which she is individually liable." No authority was cited for its rationalization of liability. The court's rationalization has not been followed, but it is settled that the wife's debt may be her separate debt. See *Columbia Fin. Corp. v. Robitcheck*, 243 La. 1084, 150 So. 2d 23 (1963); *Schaeffer v. Trascher*, 165 La. 315, 115 So. 575 (1928); *Rahier v. Rester*, 11 So. 2d 87 (La. App. 1st Cir. 1942); *Godchaux & Mayer, Ltd. v. Richardson*, 123 So. 178 (La. App. Or. Cir. 1929). A series of cases holding the wife personally liable for a broker's fee when she defaulted on a contract to sell immovable property, due to her inability to convey community immovables, have the same import. See *Nelson v. Holden*, 219 La. 37, 52 So. 2d 240 (1951); *Mathews Bros. v. Bernius*, 169 La. 1069, 126 So. 556 (1930); *Uchello v. Arnold*, 135 So. 81 (La. App. Or. Cir. 1931).

that there could be acquisitions under onerous title for the separate estate of either spouse during marriage,¹¹ separate debts were a necessary corollary to prevent unjust enrichment of one spouse at the expense of the other. Logically, if the property acquired is community property, the purchase price should be a community debt; if the property acquired is separate property, the purchase price should be a separate debt.¹² Classification based on the nature of the debt, if consistently applied, would conveniently dispose of all debts resulting from acquisition of property. Such classification is less convenient in the allocation of debts for services rendered¹³ or obligations imposed by law,¹⁴ although the principle must be considered. In these cases a different mode of classifying debts has been frequently employed, based on which spouse incurred the debt. From the premise that the husband is head and master of the community,¹⁵ the conclusion is reached that as his assent is necessary to obligate the community, a debt contracted by the wife without his assent must be a debt of her separate estate only.¹⁶ Unhappily, this approach has also been employed in cases concerning the acquisition of property.¹⁷ In recent years there has been a reaction against relieving the community of liability for debts incurred by the wife,¹⁸ and the classification of debts by determining which spouse incurred the debt has be-

11. This is well settled. See Comment, 25 LA. L. REV. 95 (1964).

12. The principle is useful and explains many decisions. However, it is not universally applied, and the converse certainly is not true: property purchased with the separate funds of the husband may fall into the community for want of proper recitals in the act of sale, or property purchased with the separate funds of the wife may fall into the community for want of proof that she administered such funds. See Comment, 25 LA. L. REV. 95 (1964).

13. Attorney fees for services rendered the wife in a suit for divorce, for example, have been troublesome. See note 114 *infra*.

14. For example, damages owed for a tort of the wife may be a community obligation. See text accompanying note 237 *infra*.

15. See LA. CIVIL CODE art. 2404 (1870).

16. Tucker v. Carlin, 14 La. Ann. 734 (1859): "Being head and master of the community, and rigorously bound as above, the law has given him absolute control over the debts and contracts of the community, and no man can pretend to a debt against the community . . . in virtue of a contract, without his consent." In the case, an attorney who represented the wife in an unsuccessful divorce action failed to collect his fee from the community. This is not current law, but the case is a good illustration of the court's mode of classifying debts.

17. See Schaeffer v. Trascher, 165 La. 315, 115 So. 575 (1928); Keller-Zander, Inc. v. Copeland, 196 So. 527 (La. App. Or. Cir. 1940); Lacaze v. Kelsoe, 185 So. 676 (La. App. 2d Cir. 1939); Sizeler v. Pino, 119 So. 904 (La. App. Or. Cir. 1929).

18. Conley v. Johnson, 98 So. 2d 847, 851 (La. App. 2d Cir. 1957): "We are not unmindful that in everyday life the wife does the greater part of the buying for the community and instances are legion where such contracts as this are entered into by the wife in which the husband may or may not have full knowledge."

come hopelessly entangled with the problem of the wife's power to obligate the community.¹⁹ It remains true, however, that some debts are community debts and some are not. Both systems of classification are still used, probably of necessity, but it is believed that classification according to the nature of the debt should be the general rule and classification according to which spouse incurred the debt the exception.

Community Debts

"[I]t is a primary principle of the community property system that community property is subject to the payment of only those debts contracted during the marriage which concern the actual marriage and the conjugal partnership and were contracted on its account."²⁰ The stated principle is useful, provided that no narrow view is taken as to what debts concern the conjugal partnership. If debts are to be classified as separate or community according to their nature, the extent of community interests must first be known in order to identify the sources of community liabilities.²¹

In the absence of donations, the legal community begins with a single asset — a right which amounts to a usufruct of the separate property of both spouses.²² With the capital so obtained, and that resulting from the labor and industry of the spouses,²³ property may be acquired which is owned by the community. The expenses occasioned by such property — the cost of its acquisition, defense, repair, and expenses incurred in making the property productive — are, logically, community debts.²⁴ Since the community has, in effect, the usufruct of the separate property of the spouses, then, as any other usufructuary,²⁵ the community should bear some of the expenses which concern the separate property.²⁶ Finally, the expense of sup-

19. The problem is considered in text accompanying note 203 *infra*.

20. 1 DE FUNIAK 438. See note 6 *supra*.

21. There is some indication that Washington adopts a similar view by requiring that the community "benefit" from the transaction if it is to be held liable for the debt. The question has arisen in cases where the husband acts as surety. See *Horton v. Donohoe Kelly Banking Co.*, 15 Wash. 399, 46 Pac. 409 (1896); 1 DE FUNIAK § 163; Mecham, *Creditor's Rights in Community Property*, 11 WASH. L. REV. 80, 87 (1936).

22. See LA. CIVIL CODE arts. 2386, 2402 (1870); Comment, 25 LA. L. REV. 95 (1964).

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

24. 9 MANRESA, COMMENTARIOS AL CÓDIGO CIVIL ESPAÑOL 603 (5th ed. 1950) [hereinafter cited as MANRESA].

25. See LA. CIVIL CODE arts. 570, 571, 578 (1870).

26. 9 MANRESA 603: "*Además la sociedad de gananciales es realmente la*

porting the family should be borne by the community, for one function of a community property system is to provide an economic base for the family.²⁷ Thus most debts contracted during the marriage concern the community, a fact which provides a rational basis for the presumption that debts so contracted are community debts.²⁸

Debts which represent the purchase price of property acquired during marriage are usually classified as community or separate according to the community or separate status of the property acquired.²⁹ It seems self-evident that the purchase price of community property is a community debt. That the wife enjoyed the use of the property³⁰ or that she selected the property acquired³¹ does not alter the result: if the property acquired is community property, the purchase price is a community debt, not her separate debt.³² Nor should the result be different if the wife is the spouse who acquires the property for the community; if there is a valid acquisition of community property, classification of the resulting debt should not depend upon determination of the wife's power to obligate the community. In some cases, acquisitions of immovable property by

usufrucuaría de las bienes privativos de cada cónyuge, y así como tiene todos los derechos inherentes al usufructo, ha de tener forzosamente todas las cargas del mismo." Cf. Hall & Lisle v. Wyche, 31 La. Ann. 734 (1879).

27. See 9 MANRESA 5-6, 14, 603. Cf. Berdejo, *En Torno a la Naturaleza Jurídica de la Comunidad de Gananciales del Código Civil*, 187 REVISTA GENERAL DE LEGISLACION Y JURISPRUDENCIA 7, 21-22 (1950).

28. See Succession of Sangpiel, 114 La. 767, 38 So. 554 (1905); Hall & Lisle v. Wyche, 31 La. Ann. 734 (1879); Van Wickle v. Violet, 30 La. Ann. 1106 (1878); Graham v. Thayer, 29 La. Ann. 75 (1877); Surls v. Hienn, 20 La. Ann. 229 (1868); Kennedy v. Bossiere, 16 La. Ann. 445 (1862); Draughon v. Ryan, 16 La. Ann. 309 (1861); Graham v. Egan, 13 La. Ann. 546 (1858); Lobit & Charpentier v. Harman, 13 La. Ann. 593 (1858); Fairbanks, Morse & Co. v. Bordelon, 198 So. 391 (La. App. 1st Cir. 1940); Bank of Montgomery v. Calhoun, 146 So. 51 (La. App. 2d Cir. 1933). See also 1 DE FUNIAK 453; DAGGETT, THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA 50 (1945) [hereinafter cited as DAGGETT]. Cf. Fox v. Weissbach, 76 Ariz. 91, 259 P.2d 258 (1953); Cauthen v. Cauthen, 53 N.M. 458, 210 P.2d 942 (1949); Foster v. Hackworth, 164 S.W.2d 796 (Tex. Civ. App. 1942); Olympia Bldg. & Loan Ass'n v. McCroskey, 172 Wash. 148, 19 P.2d 671 (1933).

29. See Succession of Franek, 224 La. 747, 70 So.2d 670 (1954); Whittington v. Pegues, 165 La. 151, 115 So. 441 (1928); Moniotte v. Lieux, 41 La. Ann. 528, 6 So. 817 (1889); Graham v. Thayer, 29 La. Ann. 75 (1877); Lemoine v. Powers, 25 La. Ann. 514 (1873); Lobit & Charpentier v. Harman, 13 La. Ann. 593 (1858); Seignouret & Co. v. Gardanne, 9 La. Ann. 4 (1854); Davidson v. Stuart, 10 Rob. 146 (La. 1836); Brock Furniture Co. v. Carroll, 86 So.2d 715 (La. App. 1st Cir. 1956); Lotz v. Citizens Bank & Trust Co., 17 So.2d 463 (La. App. 1st Cir. 1944); Standard Mfg. Co. v. Dupuis, 6 La. App. 476 (La. App. 1st Cir. 1927).

30. Lobit & Charpentier v. Harman, 13 La. Ann. 593 (1858); Ward v. Trimble, 20 So.2d 765 (La. App. 2d Cir. 1945).

31. Seignouret & Co. v. Gardanne, 9 La. Ann. 4 (1854).

32. See cases cited in notes 30 and 31 *supra*.

the wife have been held to be community property, with the result that the purchase price is a community debt, without inquiry into the wife's power to obligate the community.³³ Where movable property is so acquired, the tendency has been to ignore the community status of the acquired property and to investigate the power of the wife to obligate the community.³⁴ The sounder approach, it seems, in all cases where the debt is created by the acquisition of property, is to determine the status of the property, and to classify the debt as separate or community accordingly.³⁵

Liability for the purchase price is only the first of community debts flowing from the acquisition of community property. Taxes,³⁶ repairs,³⁷ ordinary operating expenses³⁸—in fine, the community is subject to the liabilities of any other proprietor.³⁹ By their nature, all such debts are community debts,

33. See *Succession of Franek*, 224 La. 747, 70 So.2d 670 (1954); *Fortier v. Barry*, 111 La. 776, 35 So. 900 (1904); *Bouligny v. Fortier*, 16 La. Ann. 209 (1861); *Lotz v. Citizens Bank & Trust Co.*, 17 So.2d 463 (La. App. 1st Cir. 1944). The cases are legion in which property acquired by the wife is held to be community property. See Comment, 25 LA. L. REV. 95 (1964). *But see Parham v. Gaspard*, 26 So.2d 300 (La. App. 2d Cir. 1946) for a decision that the wife cannot acquire immovable property for the community without the husband's written authority to act as agent.

34. See *Schaeffer v. Trascher*, 165 La. 315, 115 So. 575 (1928); *Montgomery v. Gremillion*, 69 So.2d 618 (La. App. 2d Cir. 1953); *Mathews Furniture Co. v. LaBella*, 44 So.2d 160 (La. App. Orl. Cir. 1950); *Lacaze v. Kelsoe*, 185 So. 676 (La. App. 2d Cir. 1939); *Sizeler v. Pino*, 119 So. 904 (La. App. Orl. Cir. 1929). Some cases classify the resulting debt by the community status of the property acquired. See *Brock Furniture Co. v. Carroll*, 86 So.2d 715 (La. App. 1st Cir. 1956); *Philip Werlein Co. v. Madsen*, 120 So. 237 (La. App. 1st Cir. 1929); *Standard Mfg. Co. v. Dupuis*, 6 La. App. 476 (La. App. 1st Cir. 1927).

35. The power of the wife may be a pertinent inquiry in classifying the property acquired, but justice seems better served by making classification of the property acquired the basis of classifying resulting debt. The status of the property is an easily administered test: the law applicable in classification of property is generally well settled; the law applicable in determining the power of the wife to obligate the community is complex and uncertain.

36. See *Tate v. Tate*, 12 So.2d 506 (La. App. 1st Cir. 1943). *Cf. Schoeffner v. Schoeffner*, 167 La. 208, 118 So. 890 (1928) (paving lien).

37. *Dickinson Motors Co. v. Sullivan*, 6 La. App. 329 (La. App. 2d Cir. 1927).

38. See *Ruffino v. Hunt*, 234 La. 91, 99 So.2d 34 (1958); *Motion Picture Advertising Serv. v. Modica*, 139 So. 80 (La. App. Orl. Cir. 1932); *Smithson v. Jones*, 130 So. 628 (La. App. 2d Cir. 1930); *Perfection Garment Co. v. Lanasa*, 7 La. App. 31 (La. App. Orl. Cir. 1927).

39. 9 MANRESA 604: "*La sociedad adquiere un inmueble, por ejemplo; los gastos de escritura, impuesto de derechos reales e inscripcion corren a su cargo. A ella incumben los gastos de cultivo y recoleccion, reparaciones ordinarias o extraordinarias que exijan, el pago de las contribuciones o de las cargas que la afecten, las costas o desembolsos que pueda originar su defensa judicial o extrajudicial, etc. Lo que se dice de un inmueble se aplica igualmente a un crédito, a un ganado, a una empresa mercantil o industrial, etc. La sociedad es propietaria, y como tal, así como goza de todos los derechos de un propietaria, y sufre todas las obligaciones que incumben al mismo.*"

and it is immaterial which spouse incurred them.⁴⁰ The community, not the separate estate of either spouse, has received the benefit for which remuneration is due⁴¹ and justice requires that the community pay the debt.

Community liability for debts incurred on account of the separate estate of either spouse is not well defined, but such liability is less extensive than community liability incurred on account of community property. Clearly the community should not be liable for the purchase price of property which is separate property of one of the spouses.⁴² Since the community receives the income of the separate estate of either spouse,⁴³ by analogy the community should bear the same types of expenses incurred by the separate estates that the usufructuary must bear. Louisiana courts have properly charged the community with ordinary operating expenses of separate property.⁴⁴ The early cases to the contrary⁴⁵ should be disapproved on principle and considered overruled by *Succession of Ratcliff*.⁴⁶ Likewise,

40. See the striking case, *Conley v. Johnson*, 98 So. 2d 847 (La. App. 2d Cir. 1957), in which the community was held liable to a carrier who, pursuant to a contract with the wife, moved a house belonging to the community. In such cases, the concept of the husband as head and master of the community yields to fact that a benefit has been conferred upon the community.

41. Taxes are an exception. The community is liable for taxes on community property because it is the proprietor.

42. This follows from the principle that separate property is acquired by an investment of funds which are separate in origin. See Comment, 25 LA. L. REV. 95 (1964). It has usually been assumed that the purchase price of the wife's paraphernal property is her separate debt. See, e.g., *Bailey v. Alice C. Plantation & Refinery*, 152 So. 2d 336 (La. App. 1st Cir. 1963); *Shevvin v. Grimmer*, 119 So. 894 (La. App. 2d Cir. 1929); *Demack Motors Co. v. Hallick*, 119 So. 572 (La. App. Orl. Cir. 1929). During the marriage, the purchase price of separate property of the husband can be satisfied from either community or his separate property. See text accompanying note 179 *infra*. At the dissolution of the community, however, the debt is treated as a separate debt of the husband. See, e.g., *Pennison v. Pennison*, 157 So. 2d 628 (La. App. 4th Cir. 1963).

43. Exceptionally, the income from the wife's paraphernal property may be her separate property. See LA. CIVIL CODE art. 2336 (1870). Likewise, the earnings of the wife may be her separate property if husband and wife live separate and apart. *Id.* art. 2334.

44. See *Succession of Ratcliff*, 209 La. 224, 24 So. 2d 456 (1945); *Courrege v. Colgin*, 51 La. Ann. 1069, 25 So. 942 (1899); *Pior v. Giddens*, 50 La. Ann. 216, 23 So. 337 (1897); *Wells v. Norton*, 28 La. Ann. 300 (1876); *Wilcox v. Henderson*, 9 La. Ann. 347 (1854); *Harris v. Harris*, 160 So. 2d 358 (La. App. 4th Cir. 1964).

45. *Succession of Penny*, 14 La. Ann. 194 (1859); *Patterson v. Frazer*, 8 La. Ann. 512 (1852); *Dailey v. Pierson*, 5 La. Ann. 125 (1850); *Dickerman v. Reagan*, 2 La. Ann. 440 (1847).

46. 209 La. 224, 238, 24 So. 2d 456, 460 (1945): "Since the profits of the separate property, under the administration of the husband, fall into the community, it is but just, equitable and proper that the ordinary expenditures required in the production of such profits and in the preservation of the property should be borne by the community." See also LA. CIVIL CODE art. 570 (1870): "The usufructuary is liable to all the necessary expenses for the preservation and working

minor repairs,⁴⁷ but perhaps not major repairs,⁴⁸ taxes,⁴⁹ and interest on the mortgage indebtedness of a separate estate⁵⁰ are community debts.⁵¹ Such decisions are probably necessary. The income from the separate estate falls into the community, with the consequence that the separate estate could pay such debts only by a depletion of capital. The decision to obligate the community instead is more logical as a matter of justice and economics.

The everyday expenses of supporting the family are community debts.⁵² This can be deduced from the Code itself. The husband is personally liable for these expenses,⁵³ but it is contemplated that they shall be defrayed in part by the dowry,⁵⁴

of the estates subject to the usufruct." Cf. 9 MANRESA 604-05. FRENCH CIVIL CODE art. 1409 (1804) places some obligations of the usufructuary on the community.

47. See *Courrege v. Colgin*, 51 La. Ann. 1069, 25 So. 942 (1899).

48. The analogy to the obligations of the usufructuary suggests that the community should not be liable for extraordinary repairs. See LA. CIVIL CODE arts. 571-572 (1870). SPANISH CIVIL CODE art. 1408 (1889) expressly so provides. However, art. 2408 of the Louisiana Civil Code may contemplate that such expenses are to be borne by the community. Cf. *Giamanco v. Giamanco*, 131 So. 2d 159 (La. App. 3d Cir. 1961).

49. See *Succession of Boyer*, 36 La. Ann. 506 (1884). Cf. LA. CIVIL CODE art. 578 (1870) for the obligation of the usufructuary.

50. See *Sharp v. Zeller*, 110 La. 61, 34 So. 129 (1902). *Accord*, FRENCH CIVIL CODE art. 1409 (1804); SPANISH CIVIL CODE art. 1408 (1889). *But see Mathews v. Hansberry*, 71 So. 2d 232 (La. App. Or. Cir. 1954). Cf. 3 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 1122 (1959) [hereinafter cited as Planiol]: "Because law gives the community usufruct of the spouses' separate property, it charges the community with the payment of interests or arrears due to their separate creditors (Art. 1409-3). Interest is usually paid from current income which goes to the community. Hence it is natural that community should pay the spouses' annual interest charges."

51. Most cases previously cited deal with expenses incurred on immovable property. Two cases dealing with automobiles may be deviations from the principle established in the cases just considered. *Dickinson Motors Co. v. Sullivan*, 6 La. App. 329 (La. App. 2d Cir. 1929) treated repairs to an automobile, the wife's separate property, as creating a separate debt for which the community was not liable. *Godchaux & Mayer v. Richardson*, 123 So. 178 (La. App. Or. Cir. 1929) held that premiums for insurance on an automobile, the wife's separate property, were separate debts. *But cf. Succession of Boyer*, 36 La. Ann. 506 (1884). In both cases it may be questioned from what source the wife's separate estate was to derive funds for payment of the debt. If the automobile served community purposes, on principle, the community should have been obliged to answer for the debts.

52. Cf. SPANISH CIVIL CODE art. 1408 (1889): "*Serán de cargo de la sociedad de gananciales: . . . 5º El sostenimiento de la familia y la educación de hijos comunes y de los legítimos de uno solo de los cónyuges.*" FRENCH CIVIL CODE art. 1405 (1804): "*La communauté se compose passivement . . . 5º Des aliments des époux, de l'éducation et entretien des enfants, et toute autre charge du mariage.*"

53. See LA. CIVIL CODE art. 120 (1870).

54. *Id.* art. 2337: "By dowry is meant the effects which the wife brings to the husband to support the expenses of the marriage."

Id. art. 2349: "The income or proceeds of the dowry belong to the husband,

or by the income of the wife's property if *all* her property is paraphernal and under her administration,⁵⁵ or if the spouses are separate in property.⁵⁶ In other words, if the wife contributes neither dowry nor available property to the community of gains, she is personally liable for a portion of the living expenses. Manifestly the intent is that such expenses shall be borne by the community if there is one.

Thus the items of ordinary living expense such as food,⁵⁷ housing,⁵⁸ clothing,⁵⁹ medical expenses,⁶⁰ and without doubt the expenses incurred for the comfort and recreation of the family,⁶¹ are expenses the community must bear.⁶² The expense of providing education for the children of the marriage likewise is a community obligation.⁶³ Although these debts are by their

and are intended to help him support the charges of the marriage, such as the maintenance of the husband and wife, that of their children, and other expenses which the husband deems proper."

55. *Id.* art. 2389 (1870): "If all the property of the wife is paraphernal, and she have reserved to herself the administration of it, she ought to bear a portion of the marriage charges, equal, if need be, to one half her income." This provision apparently derives from FRENCH CIVIL CODE art. 1575 (1804) making the wife liable up to one-third of her income. La. Civil Code art. 57, p. 334 (1808) is identical with the French Code article; the change of proportion was made without comment in the 1825 Code. In the circumstances mentioned in the article, the wife's separate estate would contribute nothing to the community of gains; therefore, she is made personally liable for a portion of the ordinary living expenses. To the same effect is LA. CIVIL CODE art. 2395 (1870): "Each of the married persons separate in property, contribute to the expenses of the marriage in the manner agreed on by contract; if there be no agreement on this subject, the wife contributes to the amount of one half of her income." This provision was introduced in the Code of 1825 and probably borrowed from FRENCH CIVIL CODE art. 1537 (1804). The provisions are seldom enforced in Louisiana. See *Rowley v. Rowley*, 19 La. 557 (1841); *Madison v. Jackson*, 131 So. 736 (La. App. Or. Cir. 1928). *Cf.* *Bank of Lafayette & Trust Co. v. Fabre*, 169 La. 1185, 126 So. 916 (1930); *De Lesdernier v. De Lesdernier*, 45 La. Ann. 1364, 14 So. 191 (1893).

56. See note 55 *supra*.

57. See *Chaix v. Villejoin*, 7 La. 276 (1834); *Smith v. Viser*, 117 So. 2d 673 (La. App. 2d Cir. 1960); *Breaux v. Decuir*, 49 So. 2d 495 (La. App. 1st Cir. 1950).

58. See *Rouchon v. Rocamora*, 84 So. 2d 873 (La. App. Or. Cir. 1956). *Cf.* *Spring v. Barr*, 120 So. 256 (La. App. 1st Cir. 1929).

59. See *Trudeau v. Row*, 23 La. Ann. 197 (1871); *D. H. Holmes Co. v. Huth*, 49 So. 2d 875 (La. App. Or. Cir. 1951). *But cf.* *Garst & Levy v. Loeb*, 8 La. App. 221 (La. App. Or. Cir. 1928), holding the wife personally liable for child's clothes bought on credit; liability based on married women's emancipation acts. Very doubtful.

60. See *Succession of Casey*, 130 La. 743, 58 So. 556 (1912); *Choppin v. Harmon*, 24 La. Ann. 301 (1876); *Tate v. Tate*, 12 So. 506 (La. App. 1st Cir. 1943); *Jones v. Davis*, 155 So. 269 (La. App. 1st Cir. 1934); *Beal v. Ward*, 127 So. 423 (La. App. Or. Cir. 1930); *Overton v. Nordyke*, 120 So. 544 (La. App. Or. Cir. 1929).

61. *Cf.* *Brantley v. Clarkson*, 217 La. 425, 432-33, 46 So. 2d 614, 617 (1950): "The wife is entitled to her own recreation, enjoyment and pleasures as well as the husband and the community owes her these things in the same manner it owes her the food or the clothes she requires."

62. See 9 MANRESA 607-08.

63. See *St. Louis Univ. v. Prudhomme*, 21 La. Ann. 525 (1869). The Span-

nature community debts, it is in such cases that the court has frequently inquired into the power of the wife to obligate the community and has evolved ingenious theories by which she may do so.⁶⁴ This inquiry seems unnecessary. Debts incurred in supporting the family are community debts and ultimately the community must pay them. Even if it is decided in a particular case that the wife must pay, as she lacked power to obligate the community, on payment the wife obtains a right of reimbursement at the settlement of the community.⁶⁵ Justice seems better served by making the community originally pay debts which are community debts by their nature, for many just claims for reimbursement are lost because of the difficulty in establishing such claims.⁶⁶

Separate Debts

Having explored the general types of debts which are community debts, it may now be inquired what debts remain as separate debts. Clearly debts contracted previous to the marriage or after its dissolution are separate debts, for there is no existing community at the time of their creation.⁶⁷ Funeral

ish Civil Code expressly provides that maintenance and education of the legitimate children of either spouse is a community obligation. See note 52 *supra*. If the matter were put to test in Louisiana, our courts would probably agree. *Cf. Fazzo v. Krieger*, 226 La. 511, 76 So.2d 713 (1954).

64. See text accompanying note 209 *infra*. One of the principal theories, based on the husband's personal liability for necessaries, is not uniformly successful in obligating the community. See, *e.g.*, *Schaeffer v. Trascher*, 165 La. 315, 115 So. 575 (1923).

65. *Denégre v. Denégre*, 30 La. Ann. 275, 277 (1878): "[I]f the community has been enriched by the separate funds of either spouse it is indebted *pro tanto* at the dissolution to the separate estate of such spouse whose funds have so enriched it, and this is as much a debt of the community as if it were due to a third person." See *Glasscock v. Green*, 4 La. Ann. 146 (1849); *McIntosh v. Smith*, 2 La. Ann. 756 (1847). See also *Huie, Separate Claims to Reimbursement from Community Property in Louisiana*, 27 TUL. L. REV. 143 (1953); *Comment*, 25 LA. L. REV. 108 (1964).

66. See *Huie, Separate Claims to Reimbursement from Community Property in Louisiana*, 27 TUL. L. REV. 143 (1953); *Comment*, 25 LA. L. REV. 151 (1964).

67. LA. CIVIL CODE art. 2403 (1870). See *Harman & Stringfellow v. Le-grande*, 151 La. 253, 91 So. 726 (1922); *Newman v. Cooper*, 46 La. Ann. 1485, 16 So. 481 (1894); *Ruthenberg v. Hellberg*, 43 La. Ann. 440, 9 So. 99 (1890); *Thezan v. Thezan*, 28 La. Ann. 442 (1876); *Markham v. Allen*, 22 La. Ann. 513 (1870); *Waring v. Zunts*, 16 La. Ann. 49 (1861); *Childers v. Johnson*, 6 La. Ann. 456 (1851); *Glenn v. Elam*, 3 La. Ann. 611 (1848); *Thompson v. Waterhouse*, 157 So.2d 300 (La. App. 4th Cir. 1963); *Keyser v. James*, 153 So.2d 97 (La. App. 1st Cir. 1963); *Succession of Evans*, 8 Orl. App. 196 (La. App. Orl. Cir. 1911). Which of these debts may be enforced against the community in spite of their separate character is considered in text accompanying

expenses, for example, of either spouse are a separate debt for this reason.⁶⁸ The debts incurred during marriage which are separate debts compose a limited group. If separate property is acquired by onerous title, the purchase price is a separate debt.⁶⁹ Extraordinary repairs on separate property perhaps should be classified as separate debts.⁷⁰ It has previously been observed that if the community enjoys the income from the separate property, it bears the obligations of a usufructuary in regard to expenses incurred on account of that property. Paraphernal property of the wife in some instances is outside this principle, for if the conditions of article 2386 are met, income from paraphernalia administered by the wife inures to her separate estate and does not enter the community of gains. In such cases, all expenses incurred on account of the paraphernalia should be classified as separate debts.⁷¹ Certain obligations imposed by law create separate debts: tort liability,⁷² presumably fines imposed for violation of law,⁷³ some quasi-con-

note 179 *infra*. *But cf.* Johnson v. Johnson, 235 La. 226, 103 So.2d 263 (1958): After judicial separation, the spouses continued to operate a former community business for two years. Business creditors of this period were entitled to payment by preference on partition of the community on the theory that the spouses had formed a partnership. The court recognized that the creditors were not community creditors.

68. Maggio v. Papa, 206 La. 38, 51, 18 So.2d 645, 649-50 (1944): "It is well settled that the surviving spouse's interest in the community property cannot be sold to pay the funeral expenses incurred after the dissolution of the community of acquets and gains resulting from the death of the departed spouse and that this expense should be deducted from the deceased's half interest in the community." *Accord*, Womack v. McCook Bros. Funeral Home, 194 La. 296, 193 So. 652 (1940); Succession of Pizzati, 141 La. 701, 75 So. 498 (1917); Payton v. Jones, 38 So.2d 631 (La. App. Orl. Cir. 1949); Succession of Lewis, 12 So.2d 7 (La. App. 1st Cir. 1943); Succession of Solis, 119 So. 768 (La. App. Orl. Cir. 1929). *But see* McCook v. Comengys, 160 La. 701, 125 So. 860 (1929). Husband being out of state when wife died, her friends arranged the funeral. Husband was held liable, apparently by quasi-contract, to the undertaker. *Id.* at 705, 125 So. at 861: "The proof shows that defendant was not, prior to the demand for payment, informed as to the price of the casket, and that he is a man of limited means, but as he was present at the funeral and permitted the casket to be used without inquiry or protest, which under the harrowing circumstances existing, might reasonably have been expected, he is, in our opinion liable to the plaintiff for the replacement cost of the casket, together with such sum in excess thereof as will compensate the plaintiff for such possible loss as he might have sustained." Similar efforts to hold the husband liable for funeral expenses of the wife were unsuccessful in Pace v. Trichel, 98 So.2d 690 (La. App. 2d Cir. 1957).

69. This is in accordance with the theory that such acquisitions are a re-investment of separate funds. See Comment, 25 LA. L. REV. 95 (1964). *Of* Huie, *Separate Ownership of Specific Property Versus Restitution from Community Property in Louisiana*, 26 TUL. L. REV. 427 (1952).

70. See note 48 *supra*.

71. *Of* Shevlin v. Grimmer, 119 So. 894 (La. App. 2d Cir. 1929).

72. See Adams v. Golson, 187 La. 363, 174 So. 876 (1937). Tort liability of the community is possible. See text accompanying note 237 *infra*.

73. No Louisiana case was found which considered the question. Early Span-

tractual obligations,⁷⁴ and in some cases, damages for breach of contract⁷⁵ come within this category.⁷⁶ Louisiana has not yet been faced with the problem of classifying the debt resulting from a trustee's breach of trust. Factors deserving consideration are numerous and variable enough⁷⁷ that the classification

ish law supports the text, for it provided that one spouse should not lose separate property nor the moiety of the community for a crime of the other. LEYES DE TOBO L. 77 (1505): "Por el delicto que el marido, ó la muger cometiere aunque sea de heregia, ó de otra qualquier qualidad no pierda el uno por el delicto del otro sus bienes, ni la mitad de las ganancias avidos durante el matrimonio: mandamos que sean avidos por bienes de ganancias todo lo multiplicado durante el matrimonio, fasta que por el tal delicto los bienes de qualquier dellos sean declarantos por sentencia, aunque el delicto sea qualidad que imponga la pena ipso juris." The provision was carried forward in substance in NUEVA RECOPIACION bk. 5, tit. 9, L. 10 (1567) and NOVISIMA RECOPIACION bk. 10, tit. 4, L. 10 (1805). The principle was approved by Spanish writers throughout the years. See 1 ASSO Y MANUEL, INSTITUCIONES DEL DERECHO CIVIL DE CASTILLA 95 (7th ed. 1806) [hereinafter cited as ASSO Y MANUEL]; AZEVEDO, COMMENTARIORUM IURIS CIVILIS IN HISPANIAE REGIAS (1597), transl. in ROBBINS, COMMUNITY PROPERTY LAWS 198-202 (1940) [hereinafter cited as AZEVEDO with page reference to ROBBINS transl.]; 2 LLAMAS Y MOLINA, COMENTARIO A LAS LEYES DE TOBO 507-17 (3d ed. 1853) [hereinafter cited as LLAMAS Y MOLINA]; MATIENZO, COMMENTARIA (1597), transl. in ROBBINS, COMMUNITY PROPERTY LAWS 128-30 (1940) [hereinafter cited as MATIENZO with page reference to ROBBINS transl.]. The principle was preserved in SPANISH CIVIL CODE art. 1410 (1889), but in weakened form, for in some circumstances, "*las multas y condenas pecuniarias*" of either spouse may be enforced against community property, a claim to reimbursement arising in favor of the innocent spouse. 9 MANRESA 625-26 is unsympathetic to the innovation. Cf. *Bergman v. State*, 187 Wash. 622, 60 P.2d 699 (1936); *McFadden v. Watson*, 51 Ariz. 110, 74 P.2d 1181 (1938), which seems to parallel the old Spanish law. In France, however, the community is liable for fines against the husband; but when a sentence of civil death was possible, French law provided that such a sentence did not confiscate the wife's interest in the community. See 3 PLANIOL no. 1086-1989; FRENCH CIVIL CODE arts. 1424, 1425 (1804).

74. If a wife received a *dation en paiement* of property which is classified as paraphernal, and the transaction is such that it gives the grantor an action to recover the property for payment of a thing not due, it seems the wife and not the community should be liable to him. *But cf. Cousins v. Kelsey*, 33 La. Ann. 880 (1881). Wife acted as depositary to the knowledge of the husband. *Held*, the community is liable to the depositor for the return of the thing. The implication is that the wife alone is liable if she acted without the husband's knowledge.

75. Since compensatory damages are in lieu of performance, liability should be community or separate depending on whether the community or a separate estate was liable for the performance of the contract. Where a wife enters a listing contract with a real estate broker but is unable to convey title to the property listed because it belongs to the community, her separate estate is liable for the broker's fee, or for liquidated damages if the contract so stipulates. *Nelson v. Holden*, 219 La. 37, 52 So. 2d 240 (1951); *Mathews Bros. v. Bernius*, 169 La. 1069, 126 So. 556 (1930); *Uchello v. Arnold*, 135 So. 81 (La. App. Orl. Cir. 1931).

76. *Cf. Sciambra v. Sciambra*, 153 So. 2d 441, 444 (La. App. 4th Cir. 1963), *cert. denied*: "Likewise, the \$1980.00 rent allowed for the community property occupied by the mother and aunt of the husband, was the legal obligation of the husband (LSA-C.C. Art. 239), which he could not impose upon the dissolved community. This item was fixed on expert testimony, and the Trial Court was correct. To charge this rent to the community would, in effect, permit the husband to exploit the community for his personal benefit."

77. Some of the factors are the following: Is the trustee receiving compensation? If so, is that compensation community or separate property? Is the trustee

need not be the same in all cases, but it is suspected that the injured beneficiary will be allowed redress against the community and the trustee-spouse.⁷⁸

The modern law governing divorce and separation from bed and board has made possible a new group of separate debts. The Code provides that the husband cannot lawfully contract a community debt during the pendency of a suit for separation or divorce.⁷⁹ It has been twice decided that debts contracted by the husband during this period are not nullities but are his separate debts.⁸⁰ Since the Code amendment making a judgment of separation from bed and board retroactive to the date of filing suit,⁸¹ it may well follow that debts incurred by either spouse during the pendency of the suit are now separate debts, as the debts were contracted, in legal effect, after the dissolution of the community. Alimony *pendente lite* is a useful test case. The cases are in conflict whether alimony *pendente lite* is a community debt or the husband's separate debt.⁸² *Messersmith v. Messersmith*⁸³ makes alimony *pendente lite* a commu-

also a beneficiary of the trust? Is the trustee also a settlor of the trust, as is possible under the new Trust Code? Which spouse is the trustee? Did the other spouse have knowledge of or participate in the breach of trust? Did the other spouse benefit from the breach of trust?

78. Perhaps the closest analogy is that of a father who, during the second community, receives money belonging to his child of the first marriage. The second community is held liable for principal and interest. See *Harrell v. Crow*, 214 La. 543, 38 So. 2d 226 (1948); *Succession of Waechter*, 131 La. 505, 59 So. 918 (1912); *Succession of Boyer*, 36 La. Ann. 506 (1884). Although the decisions can be otherwise explained, it is believed that the fiduciary relationship was a large factor.

79. LA. CIVIL CODE art. 150 (1870): "From the day on which the action for separation shall be brought, it shall not be lawful for the husband to contract any debt on account of the community, nor to dispose of the immovables belonging to the same, and any alienation by him made after that time shall be null, if it be proved that such alienation was made with the fraudulent view of injuring the rights of the wife." The article is also applicable to divorce suits. *Ohanna v. Ohanna*, 129 So. 2d 249 (La. App. 4th Cir. 1961), *cert. denied*. The article was probably derived from FRENCH CIVIL CODE art. 271 (1804). Some Spanish writers expressed the opinion that the community was modified upon a separation in fact of the spouses. If the separation was the fault of the husband, the wife was entitled to a share of his future acquisitions (as they fell into the community) but he is entitled to no share of her future acquisitions. The same principle applies in reverse if the separation was the fault of the wife. See AZEVEDO 146; MATTEZZO 41-45. On like reasoning, liability for debts would also be modified by separation.

80. *Landreneau v. Ceasar*, 153 So. 2d 145 (La. App. 3d Cir. 1963), *cert. denied*; *Ohanna v. Ohanna*, 129 So. 2d 249 (La. App. 4th Cir. 1961), *cert. denied*.

81. LA. CIVIL CODE art. 155 (1870), as amended.

82. Community: *Messersmith v. Messersmith*, 229 La. 495, 86 So. 2d 169 (1956); *Uchello v. Uchello*, 220 La. 1061, 58 So. 2d 385 (1952); *White v. White*, 159 La. 1065, 106 So. 567 (1925); *Hill v. Hill*, 115 La. 489, 39 So. 503 (1905); *Dauterive v. Sternfels*, 164 So. 349 (La. App. 1st Cir. 1935). Separate: *Talbert v. Talbert*, 199 La. 882, 7 So. 2d 173 (1942).

83. 229 La. 495, 86 So. 2d 169 (1956).

nity debt on the theory that the community was dissolved only on the date of the judgment of separation; *Talbert v. Talbert*,⁸⁴ an earlier case, held it was the husband's separate debt on the theory that the judgment was retroactive to the date of filing suit.⁸⁵ If the court continues the reasoning of these cases, the 1962 amendment makes alimony *pendente lite* the husband's separate debt.⁸⁶ Other debts incurred during the pendency of a suit for separation may be classified as separate debts for the same reason.⁸⁷

Rights of Community Creditors

Community creditors enjoy a favored position in Louisiana law. Their position may be summarized in four propositions. Community property is liable for community debts. The community creditor may also satisfy his claim from the husband's separate estate, but usually not from the wife's separate estate. On dissolution of the community, its creditors enjoy a priority over the interests of both spouses and their separate creditors in relation to the community property. After dissolution of the community, community debts may follow community property. There is authority for all four propositions, but all save the first need further testing.

Liability of Community Property

It is elementary that community property is liable for community debts.⁸⁸ That the community property was acquired in

84. 199 La. 882, 7 So. 2d 173 (1942).

85. *Tanner v. Tanner*, 229 La. 399, 86 So. 2d 80 (1956) finally resolved the controversy whether a judgment of separation from bed and board was retroactive by deciding it was not. The decision was legislatively overruled by amendment to art. 155.

86. Community liability seems more equitable. This alimony is a continuation of the husband's obligation to support his wife. Living expense of the family is a community obligation. Thus as long as community assets are available, alimony should come from them.

87. Significantly, *Talbert v. Talbert*, 199 La. 882, 7 So. 2d 173 (1942) classified as separate debts the medical expenses and "personal" expenses of the husband during the pendency of the suit. *Cf. Gastauer v. Gastauer*, 143 La. 749, 79 So. 326 (1918) (judgment against the husband during pendency of suit for separation of property is his separate debt because the judgment of separation of property is retroactive to the date of filing suit).

88. *DAGGERT 50*. See *First Nat'l Bank of Abbeville v. Broussard*, 202 La. 315, 11 So. 2d 602 (1942); *Trahan v. Wilson*, 130 La. 541, 58 So. 178 (1912); *Paul v. Hoss*, 28 La. Ann. 852 (1876); *Hawley v. Crescent City Bank*, 26 La. Ann. 230 (1874); *Rusk v. Warren*, 25 La. Ann. 314 (1873); *Willard v. Peyton*, 24 La. Ann. 342 (1872); *Dancy v. Martin, Cobb & Co.*, 23 La. Ann. 323 (1871); *Baird v. Lemee*, 23 La. Ann. 424 (1871); *Succession of Kerley*, 18 La. Ann. 583 (1866); *Commissioners of Exchange & Banking Co. v. Bein*, 12 Rob. 578 (La.

the wife's name does not alter the rule.⁸⁹ However, if the property is acquired by the wife in such circumstances as to create an estoppel by deed which precludes the husband from showing that the property is in truth community property,⁹⁰ the community creditor cannot proceed directly to seize and sell the property since the title available to the adjudicatee would not be marketable.⁹¹ Instead the creditor must first proceed directly against the wife to have the property judicially declared to be community property.⁹² Other qualifications to the general rule are created by special provisions of law which exempt certain property from seizure.⁹³ The community, like other debtors, enjoys the benefit of such exemptions.

Liability of the Separate Estates

The community creditor may also hold the husband's separate estate liable for community debts.⁹⁴ This doctrine, appar-

1846); *Beal v. Ward*, 127 So. 423 (La. App. Or. Cir. 1930); *cf. Poindexter v. Louisiana & A. Ry.*, 170 La. 521, 128 So. 297 (1930); *Oriol v. Herndon*, 38 La. Ann. 759 (1886).

89. See, *e.g.*, *Fortier v. Barry*, 111 La. 776, 35 So. 900 (1904); *Cosgrove v. His Creditors*, 41 La. Ann. 274, 6 So. 585 (1889); *Trezevant v. Holmes*, 38 La. Ann. 146 (1886); *Desobry v. Schlater*, 25 La. Ann. 425 (1873); *First Nat'l Bank of Ville Platte v. Coriel*, 145 So. 775 (La. App. 1st Cir. 1933); *Favrot v. Paine & Bourgeois*, 118 So. 775 (La. App. 1st Cir. 1928). *Carlton v. Durr*, 120 So. 124, 126 (La. App. 2d Cir. 1928): "Our attention is called to Act 186 of 1920, which provides that when the community property stands in the name of the wife, it cannot be sold or mortgaged without the consent of the wife, and it is argued that property standing in the name of the wife cannot be seized and sold for the debts of the community, or for the debts of her husband. Community property, under the law and jurisprudence may always be subjected to community debts." See also *Theus v. Smith*, 189 So. 305 (La. App. 2d Cir. 1939), *cert. denied*. Presumably the recent amendment to art. 2334 placing similar restrictions on alienation of property acquired in the joint names of the spouses will receive a similar interpretation. *But cf. Smith v. McCall*, 122 So. 149 (La. App. 2d Cir. 1929) (community creditors could not garnish the wife's bank account (community property) in an action against husband and to which wife was not a party defendant). In some community property states, statutes exempt the wife's earnings from debts of the husband and thus of the community. See 1 DE FUNIAK 461. Louisiana has no such statute; art. 2334, in limited cases, makes the wife's earning her separate property.

90. If the act of sale recites that the wife is purchasing with paraphernal funds under her administration and that she is purchasing for her separate estate, there is an estoppel by deed against the husband if he signs the instrument as a party or as a witness. See Comment, 25 LA. L. REV. 95 (1964).

91. *Neuhauser v. Barthe*, 110 La. 825, 34 So. 793 (1903).

92. *Ibid.* The wife would have the burden of rebutting the presumption that the property is community property. This ability of the community creditor to bring such property into the community where the husband could not do so is the basis for the statement that the estoppel by deed is not applicable to community creditors. See *Pfister v. Casso*, 161 La. 940, 109 So. 770 (1926); *Willis v. Gordon*, 94 So. 2d 99 (La. App. 1st Cir. 1957); *Morrow, Matrimonial Property Law in Louisiana*, 34 TUL. L. REV. 3, 17 (1959).

93. See, *e.g.*, LA. CONST. art. XI.

94. See *Poindexter v. Louisiana & A. Ry.*, 170 La. 521, 128 So. 297 (1930);

ently accepted without question in Louisiana, is hard to harmonize with other principles of community property. In the first place, the doctrine seems to treat the husband as sole and absolute owner of the community. An equally fundamental objection is that the doctrine denies the historic notion that husband and wife are partners who share equally the gains and losses of the common endeavor.⁹⁵ Equality is denied first because the wife's separate property is ordinarily not liable for community debts⁹⁶ and second, even though use of the husband's separate property gives him a claim to reimbursement from the community,⁹⁷ such claims are so difficult to prove that many will be lost.⁹⁸ How then did the doctrine become established over these objections?

It is uncertain how and when the doctrine became crystallized. The husband's control and management of the community may have led courts to treat him as the owner of it.⁹⁹ It was

Gosserand v. Monteleone, 164 La. 397, 113 So. 889 (1927); Succession of McCloskey, 144 La. 438, 80 So. 650 (1919); Miguez v. Delcambre, 125 La. 176, 51 So. 108 (1910); Elizardi v. Kelly, 115 La. 716, 39 So. 851 (1905); Succession of Lamm, 40 La. Ann. 312, 4 So. 43 (1888); Hawley v. Crescent City Bank, 26 La. Ann. 230 (1874); Tucker v. Carlin, 14 La. Ann. 734 (1859); Bank of Montgomery v. Calhoun, 146 So. 51 (La. App. 2d Cir. 1933); Succession of Saux, 2 McGloin 38 (La. App. Or. Cir. 1884).

95. FUERO REAL bk. 3, tit. 20, L. 14 (1255): "*Todo deudo que marido, e la muger fici eran en uno, paguenlo otrosi, en uno . . .*" LEYES DEL ESTILO, L. 207 (1310): "*Todo el debdo el marido, et la muger fizieren en uno, payuenlo otrosi, en uno. Et es a saber, que el debdo que faze el marido, maguer la muger non lo otorque, nin sea en la carta del debdo, tenuta es la meytad del debdo.*" The thought that debts are shared equally also appears in NUEVA RECOPIACION bk. 5, tit. 9, L. 3 (1557) and NOVISIMA RECOPIACION bk. 10, tit. 4, L. 2 (1805). Our own Code twice states the principle that debts and losses of the community are to be shared equally. LA. CIVIL CODE arts. 2403, 2409 (1870). Matienzo explains that as the profits of the partnership are shared equally, so must the debts be shared. MATIENZO 83. Cf. GUTIERREZ, PRACTICARUM QUÆSTIONEM CIRCA LEGES REGIÆ HISPANIA (1606), transl. in ROBBINS, COMMUNITY PROPERTY LAWS 258 (1940) [hereinafter cited as GUTIERREZ with page reference to ROBBINS transl.].

96. See text accompanying note 115 *infra*.

97. See Denegre v. Denegre, 30 La. Ann. 275 (1878); Pennison v. Pennison, 157 So. 2d 628 (La. App. 4th Cir. 1963); cf. Maggio v. Papa, 206 La. 38, 18 So. 2d 645 (1944); Pior v. Giddens, 50 La. Ann. 216, 23 So. 337 (1897).

98. See Huie, *Separate Claims to Reimbursement from Community Property in Louisiana*, 27 TUL. L. REV. 143 (1953).

99. Prudhomme v. Edens, 6 Rob. 64, 67 (La. 1843): "The husband, being head and master of the community, all contracts entered into during the marriage must be considered as made by him, and for his advantage, whether they be made in his own name, or in the names of both the husband and the wife." This dicta may illustrate a common opinion. However, compare Theall v. Theall, 7 La. 226 (1834) with Guice v. Lawrence, 2 La. Ann. 226 (1847). There was

early decided, for example, that the husband's separate creditors could seize community property to satisfy their claims.¹⁰⁰ Second, the failure of the Code to establish a mode for settling the community on its dissolution led to a series of improvisations. It was decided that if the husband was the surviving spouse, he could use community property to pay community debts,¹⁰¹ or if he died first, that the community should be settled in his succession.¹⁰² From these practices it would be easy to infer that the husband's liability for community debts was such as to make his separate property liable for them. Third, in the nineteenth century the husband undoubtedly contracted in his own name most of the community debts.¹⁰³ This invited application of the principle that one who obligates himself personally binds all his property, present and future.¹⁰⁴ Finally, French law makes the husband's separate estate liable for community debts.¹⁰⁵

Although there is dictum stating that the husband's sep-

French doctrine to support the idea that the husband was the owner of the community. See POTHIER, TRAITÉ DE LA COMMUNAUTE n° 3 (1861 ed.) [hereinafter cited as POTHIER]; 7 TOULLIER, DROIT CIVIL FRANÇAIS n° 75-76 (1833). This opinion was shared by some Spanish writers. See the resume in Berdejo, *En Torno a la Naturaleza Juridica de la Comunidad de Gananciales delCodigo Civil*, 187 REVISTA GENERAL DE LEGISLACION Y JURISPRUDENCIA 7, 8-14 (1950).

100. Davis v. Compton, 13 La. Ann. 396 (1858). See text accompanying note 179 *infra*.

101. Succession of Fitzwilliams, 3 La. Ann. 489 (1848). *Accord*, Maggio v. Papa, 206 La. 38, 18 So. 2d 645 (1944); Tomme v. Tomme, 174 La. 123, 139 So. 901 (1932); Miguez v. Delcambre, 125 La. 190, 51 So. 108 (1910); Elizardi v. Kelly, 115 La. 716, 39 So. 851 (1905); Pior v. Giddens, 50 La. Ann. 216, 23 So. 337 (1897); Succession of Theurer, 38 La. Ann. 510 (1886). *Cf.* Turner v. O'Neal, 24 La. Ann. 543 (1872). There is some indication that the surviving widow may also do so. See Saloy v. Chexnaidre, 14 La. Ann. 567 (1859); Succession of Pratt, 12 La. Ann. 457 (1857); Cook-Douglas Co. v. Prudhomme, 127 So. 104 (La. App. 2d Cir. 1930); Gaddis Co. v. Litton, 121 So. 334 (La. App. 2d. Cir. 1929).

102. See Succession of Keppel, 113 La. 246, 36 So. 955 (1904); Succession of Calloway, 49 La. Ann. 968, 22 So. 225 (1897); Succession of McLean, 12 La. Ann. 222 (1857). Apparently the community could not ordinarily be settled in the wife's succession. See Guillory v. Latour, 138 La. 142, 70 So. 66 (1915); Succession of Fernandez, 50 La. Ann. 564, 23 So. 457 (1898); Verrier v. Lorio, 48 La. Ann. 717, 19 So. 677 (1896).

103. The disabilities of married women assured this. *Cf.* note 99 *supra*.

104. LA. CIVIL CODE art. 3182 (1870): "Whoever binds himself personally, is obliged to fulfill his engagements out of all his property, movable and imovable, present and future."

105. See 3 PLANIOL nos. 1072-1073. See also Berdejo, *En Torno a la Naturaleza Juridica de la Comunidad de Gananciales delCodigo Civil*, 187 REVISTA GENERAL DE LEGISLACION Y JURISPRUDENCIA 7, 47-48 (1950) for the similar position of Spanish law.

arate estate is liable for community debt as early as 1859,¹⁰⁶ the rule appears to have become settled only during the Reconstruction period.¹⁰⁷ The court of that period so misunderstood the fictitious community and the power of the surviving husband to pay community debts that it allowed him to sell property of the former community as if the community were still in existence.¹⁰⁸ The court reasoned that the surviving head and master should have the power to sell community property because his separate property was liable for community debts.¹⁰⁹ Shortly after the Reconstruction court was replaced, it was settled that the surviving husband could not convey the interest of the wife's heirs in the community,¹¹⁰ but the liability of the husband's separate estate for community debts lingers on.¹¹¹

Although the theoretical basis for making the husband's separate property liable for community debts seems dubious, it may be sound policy to do so. Practically, it relieves the creditor

106. *Tucker v. Carlin*, 14 La. Ann. 734 (1859): "The husband is the head and master of the community, and is bound for the debts of the community, not only to the extent of its effects, but to the extent of his separate estate and entire fortune." Neither explanation of nor authority for such liability is given.

107. See *Hawley v. Crescent City Bank*, 26 La. Ann. 230 (1874).

108. See *ibid.*; *Phelan v. Ax*, 25 La. Ann. 379 (1874). Cf. *Glasscock v. Clark*, 33 La. Ann. 584 (1881).

109. *Hawley v. Crescent City Bank*, 26 La. Ann. 230, 232 (1874): "The debts of the community during its existence are the debts of the husband. The property of the community is liable for the payment of them. Even more, the community property may be taken to pay the debts of the husband contracted before the marriage. . . . Upon the dissolution of the community by death of the wife, the responsibility of the husband in regard to the community debts is not changed. He is absolutely and personally bound for their payment; and his separate property may be seized and sold for their acquittal. This being his position, he has under his control the community property which by law is expressly subjected to the payment of the community debts; and he has, so far as the final settlement and liquidation of the community after its dissolution is concerned, the same rights he had during its existence; because he is, after the dissolution, under the same responsibilities for the community debts that he was before. It is but just that he should have these powers." The fallacy in this reasoning is that LA. CIVIL CODE art. 2409 (1870) makes the husband liable for only *half* the debts not acquitted at the dissolution of the community. If he is indeed liable for the whole of them, it is more than strange that the Code is silent on such an important matter.

110. *Glasscock v. Clark*, 33 La. Ann. 584 (1881), *overruling* *Phelan v. Ax*, 25 La. Ann. 379 (1873). *Accord*, *Festivan v. Clement*, 135 La. 938, 66 So. 304 (1914); *George v. Delaney*, 111 La. 760, 35 So. 894 (1904); *Tugwell v. Tugwell*, 32 La. Ann. 848 (1880); *Bennett v. Fuller*, 29 La. Ann. 663 (1877); *German v. Gay*, 9 La. 580 (1836). Query: What effect does this have on the power of the surviving husband to use community property to pay community debts? It is still law that he may do so according to *Tomme v. Tomme*, 174 La. 123, 139 So. 901 (1932).

111. See *Poindexter v. Louisiana & A. Ry.*, 170 La. 521, 128 So. 297 (1930); *Gosserand v. Monteleone*, 164 La. 397, 113 So. 899 (1927); *Succession of McCloskey*, 144 La. 433, 80 So. 650 (1919); *Miguez v. Delcambre*, 125 La. 190, 51 So. 108 (1910); *Bank of Montgomery v. Calhoun*, 146 So. 51 (La. App. 2d Cir. 1933); *Beal v. Ward*, 127 So. 423 (La. App. Or. Cir. 1930).

extending credit to the community from the inconvenience of discriminating community assets in the husband's name from his separate property. More basic is the question whether the community of gains is a system of limited liability. Limited liability is not an unthinkable result of a community property system. The wife's liability for community debts is analogous to the liability of a partner *in commendam*,¹¹² and in some community property states, the separate property of neither spouse is liable for community debts.¹¹³ If the liability of the husband's separate estate is preserved, consideration should be given to limiting this liability to community debts in fact contracted by the husband and not extending it to community obligations incurred without his consent by the wife.¹¹⁴

As a general rule, community creditors may not hold the wife's separate property liable for community debts during the existence of the community.¹¹⁵ The attempts of community creditors to obtain satisfaction from the wife's paraphernal property were persistent, acrimonious, and uniformly unsuccessful as long as the disabilities of married women remained

112. Less so today than formerly as the wife may now bind herself for community debts.

113. *Arizona*: *Nelson v. Nelson*, 91 *Ariz.* 215, 370 P.2d 952 (1962); *Forsythe v. Paschal*, 34 *Ariz.* 380, 271 *Pac.* 865 (1921); *Cosper v. Valley Bank*, 28 *Ariz.* 373, 237 *Pac.* 175 (1925). *Washington*: *Achilles v. Hooper*, 40 *Wash.* 2d 664, 245 P.2d 1005 (1952); *Schramm v. Steele*, 97 *Wash.* 309, 166 *Pac.* 634 (1917); *Stockland v. Bartlett*, 4 *Wash.* 730, 31 *Pac.* 24 (1892).

114. This limitation has been employed in one class of cases. The community is liable for attorney fees for services rendered the wife in a divorce or separation suit, but the husband's separate property is not liable therefor. See *Tanner v. Tanner*, 229 *La.* 399, 86 *So.2d* 80 (1956). Community liability for this expense is now preserved by statute, *LA. CIVIL CODE* art. 155 (1870), as amended, which legislatively overruled *Tanner* on another issue. *Tanner* is probably still a correct statement of the liability of the husband's separate property. *Cf.* 3 *PLANIOL* no. 1340.

115. DAGGETT 53: "The wife's property as we have constantly seen has always been most carefully guarded from attack for the debts of the husband or by community creditors other than in the exceptional cases already instanced." *Smith v. Viser*, 117 *So.2d* 673, 674 (*La. App.* 2d *Cir.* 1960): "It is probable that there are no principles more elementary, more fundamental, more firmly imbedded in the law of Louisiana, and more clearly understood, than the principles that the wife is not personally liable for a community debt; that the husband is head and master of the community, and that creditors thereof must obtain satisfaction of their claims from the husband who is individually liable for community debts, or, in certain instances, by proceeding against the community property." See *Personal Fin., Inc. v. Simms*, 148 *So.2d* 176 (*La. App.* 1st *Cir.* 1962); *Rouchon v. Rocamora*, 84 *So.2d* 873 (*La. App.* *Orl. Cir.* 1956); *Blackshear v. Landey*, 46 *So.2d* 688 (*La. App.* *Orl. Cir.* 1950); *Ward v. Trimble*, 20 *So.2d* 765 (*La. App.* 2d *Cir.* 1945); *Winter v. Gani*, 199 *So.* 600 (*La. App.* 1st *Cir.* 1941); *First State Bank & Trust Co. v. Brown*, 150 *So.* 86 (*La. App.* 1st *Cir.* 1933).

intact.¹¹⁶ Since 1926, the married women's emancipation statutes have made it possible for a wife to bind herself and her separate estate for community debts,¹¹⁷ although these statutes deny any intent to alter community property law.¹¹⁸ The courts have been reluctant to find that the wife bound her separate estate for a community debt.¹¹⁹ The judicial requirement that there be clear and convincing evidence of the wife's intent to bind her separate property for a community debt probably means that there must be an instrument in writing.¹²⁰ Practically the only cases which hold the wife personally liable for a community debt are those in which she is a co-obligor *in solido* with her husband on a promissory note.¹²¹

Solidary liability of the community and the wife's separate estate was impossible before the married women's emancipation acts.¹²² Indeed, as late as 1923, the court disallowed such solidary liability because of the right of contribution inherent in a

116. See *Queyroz v. Capmartin*, 40 La. Ann. 262, 4 So. 497 (1888); *Bartoli v. Huguenard*, 39 La. Ann. 411, 2 So. 196 (1887); *Stuffer v. Puckett*, 30 La. Ann. 811 (1878); *Storther v. Hamlet*, 28 La. Ann. 839 (1876); *Succession of Clark*, 27 La. Ann. 269 (1875); *Fluke v. Martin*, 26 La. Ann. 279 (1874); *Abat v. Atkinson*, 21 La. Ann. 239 (1869); *Kennedy v. Bossiere*, 16 La. Ann. 445 (1862); *Draughon v. Ryan*, 16 La. Ann. 309 (1861); *Graham v. Egan*, 13 La. Ann. 546 (1858); *Hill & Co. v. Tippet*, 10 La. Ann. 554 (1855); *Kelly v. Robertson*, 10 La. Ann. 303 (1855); *Seignouret & Co. v. Gardanne*, 9 La. Ann. 4 (1854); *Hanna v. Pritchard*, 6 La. Ann. 730 (1851); *Hellwig v. West*, 2 La. Ann. 1 (1847); *Davidson v. Stuart*, 10 La. 146 (1836). For the few exceptions under the old law, see *DAGGETT* 50-53.

117. LA. R.S. 9:103 (1950): "Married women may obligate themselves personally in any form, or dispose of or hypothecate their property, as security or otherwise, for the benefit of their husbands or of the community between them and their husbands."

118. *Id.* 9:105: "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 acquets and gains or the laws prescribing what is deemed the separate property of the spouses."

119. See, e.g., *O'Dowd v. McNeill*, 110 So. 2d 755 (La. App. Orl. Cir. 1959); *Rouchon v. Rocamora*, 84 So. 2d 873 (La. App. Orl. Cir. 1956); *Fairbanks, Morse & Co. v. Bordelon*, 198 So. 391 (La. App. 1st Cir. 1940); *Wilson & Gandy v. Cummings*, 150 So. 436 (La. App. 2d Cir. 1933). Whether the wife has bound herself for a community debt is a problem to be distinguished from the problem of whether the wife's contract creates a separate or community debt.

120. *Wilson & Gandy v. Cummings*, 150 So. 436 (La. App. 2d Cir. 1933) says that the wife's liability cannot be proved by parol because it is a promise to pay the debt of a third person, required to be in writing by LA. CIVIL CODE art. 2278(3) (1870).

121. *United Life & Accident Ins. Co. v. Haley*, 178 La. 63, 150 So. 833 (1933); *Howard v. Cardella*, 171 La. 921, 132 So. 501 (1931); *Friendly Loans, Inc. v. Morris*, 142 So. 2d 810 (La. App. 1st Cir. 1962); *Perdido Fin. Co. v. Falgout*, 77 So. 2d 896 (La. App. Orl. Cir. 1955); cf. *Brock Furniture Co. v. Carroll*, 86 So. 2d 715 (La. App. 1st Cir. 1956); *Accounts Supervision Co. v. Mathews*, 50 So. 2d 664 (La. App. 2d Cir. 1951); *Holahan v. Misuraca*, 112 F. Supp. 504 (E.D. La. 1953).

122. LA. CIVIL CODE art. 2398 (1870): "The wife, whether separated in property or by judgment, or not separated, can not bind herself for her husband, nor

solidary obligation.¹²³ Solidary liability is now possible,¹²⁴ but thus far the question of contribution has not been resolved. *Shropshire v. His Creditors*¹²⁵ held that where husband and wife are solidary obligors and she pays the debt, on dissolution of the community she is subrogated to the rights of the creditor paid in order to force contribution from the co-obligor.¹²⁶ This seems a just result in accord with general principles of reimbursement.¹²⁷ Suppose, however, husband and wife are solidary obligors on a note which represents a community debt, and the community pays the debt. Can the community demand contribution from the wife's separate estate? Or may her share of the debt be compensated against her portion of the community on dissolution? In this situation it seems fair to deny contribution by treating the wife as a surety.¹²⁸ Otherwise the wife's portion of the community could be reduced to zero if enough solidary obligations were contracted and discharged by the community. Regardless of the problems of adjusting the rights of the community and the wife's separate estate, such solidary obligations confer two advantages on the community creditor who obtains them. Such creditor obtains additional security, and a procedural convenience if the community is dissolved by the husband's death. In that event, he may proceed directly against the wife for the whole debt without presenting a claim against the succession.¹²⁹

conjointly with him, for debts contracted by him before or during the marriage." See *Millaudon v. Carson*, 25 La. Ann. 380 (1873); *Trudeau v. Row*, 23 La. Ann. 197 (1871); *Dancy v. Martin, Cobb & Co.*, 23 La. Ann. 323 (1871); *Wiley v. Hunter*, 2 La. Ann. 806 (1847). The article was in effect repealed by the later married women's emancipation acts. See LA. R.S. 9:103 (1950).

123. *Honeycutt v. Whitten*, 152 La. 1045, 1048, 95 So. 216, 217 (1923): "Article 2398, C.C., in plain terms says that the wife cannot bind herself conjointly with the husband. The reason for this rule is that under the equitable doctrine of contribution among joint and solidary obligors a legal situation would arise in which one of the spouses might, as a result of such conventional agreement, acquire a claim against the other in contravention of the laws limiting the right and authority of husband and wife to enter into such contracts." See also *Ring v. Schilkoffsky*, 158 La. 361, 104 So. 115 (1925), denying solidary liability.

124. *Howard v. Cardella*, 171 La. 921, 132 So. 501 (1931) decided that Act 132 of 1926 and Act 233 of 1928 made solidary liability possible.

125. 15 La. Ann. 705 (1860).

126. *Ibid.* The court did not explain how husband and wife could legally bind themselves as solidary obligors.

127. *Cf. Denègre v. Denègre*, 30 La. Ann. 275 (1878).

128. It is elementary that if the principal debtor pays the debt he is not entitled to contribution from his surety who bound himself *in solido* with the principal debtor. See *Union Nat'l Bank v. Legendre*, 35 La. Ann. 787 (1883). French law treats the wife as a surety, as between husband and wife, when she is bound *in solido* with him. See FRENCH CIVIL CODE art. 1431 (1804); 3 *PLANIOL* 1094.

129. See *Succession of Mathews*, 158 So. 233 (La. App. Or. Cir. 1935); *cf. Friendly Loans Inc. v. Morris*, 142 So. 2d 810 (La. App. 1st Cir. 1962). Like-

The general rule that the wife is not personally liable for community debts remains true after dissolution of the community.¹³⁰ The wife may renounce the community,¹³¹ or accept with benefit of inventory,¹³² and be relieved from personal liability for community debts. The origin of the wife's power to renounce the community and be relieved of liability for community debts is lost in the obscurity of medieval legal history.¹³³ A plausible explanation is that the privilege developed as a counterpart to the husband's absolute control of community affairs which gave him unlimited power to create debts, and the legal doctrine which made the surviving wife liable for a share of community debts:¹³⁴ renunciation offered an effective if costly device by which the widow could escape the result of her husband's improvidence and mismanagement. An integral part of French and Spanish law,¹³⁵ the wife's privilege to renounce the community on its dissolution, was codified in the first Louisiana Civil Code,¹³⁶ and has remained in our law notwithstanding the significant increase in the power of the wife to obligate the community,¹³⁷ the decision that the wife owns a moiety of the community during every moment of its existence,¹³⁸ and legis-

wise, the wife's liability would seem to remain even if she renounced the community.

130. See *Schreiber v. Beer's Widow & Heirs*, 150 La. 676, 91 So. 149 (1922). Although the widow is presumed to accept the community, she may renounce until she has accepted in fact.

131. LA CIVIL CODE art. 2410 (1870): "Both the wife and her heirs or assigns have the privilege of being able to exonerate themselves from the debts contracted during the marriage, by renouncing the partnership or community of gains." See also *id.* arts. 2412, 2418.

132. LA. R.S. 9:2821 (1950): "At the dissolution for any cause of the marriage community, the wife may accept the community of acquets and gains under the benefit of inventory, in the same manner and with the same benefits and advantages as are allowed heirs to accept a succession under the benefit of inventory."

133. POTHIER n° 92 relates that the privilege was first extended to noble ladies at the time of the Crusades in order that they might not be crushed by the extravagant debts of their husbands incurred in such expeditions. 3 PLANIOL no. 1218 dismisses this as fanciful and suggests that the privilege is a vestige from an earlier era in which the wife's interest in the community was a right of succession.

134. See DIDIER, *L'OPTION DE LA FEMME COMMUN EN BEINS* 11-22 (1957); De los Mozos, *La Renuncia a la Sociedad Legal de Gananciales*, 13 ANUARIO DE DERECHO CIVIL 63, 131-37 (1960); cf. BEISSAUD, *HISTORY OF FRENCH PRIVATE LAW* no. 566 (Howell transl. 1912). Significantly, ancient opinion in France and Spain considered the husband the sole proprietor of the community. See note 99 *supra*. He could not renounce the community — nor can he in Louisiana. *Succession of Baum*, 11 Rob. 314 (La. 1845).

135. French: FRENCH CIVIL CODE art. 1453 (1804); 3 PLANIOL nos. 1217-1220; POTHIER n° 92-95. Spanish: LEYES DE TORO, L. 60 (1505); ACEVEDO 192-97; GUTIERREZ 256-57; 2 LLAMAS Y MOLINA 311-14; MATIENZO 123-27.

136. La. Civil Code p. 338, art. 72 (1808).

137. See text accompanying note 203 *infra*.

138. *Phillips v. Phillips*, 160 La. 813, 107 So. 584 (1926). The wife's power

lation authorizing the wife to accept the community with benefit of inventory.¹³⁹ Thus it is still law that until she makes herself liable by acts equivalent to acceptance, the widow is not liable for community debts.¹⁴⁰ She may make herself liable by taking "an active concern in the effects" of the community.¹⁴¹ "Active concern" must not be misunderstood: it is not participation in community affairs which fixes her liability; rather it is failure to have an inventory made¹⁴² and her intermeddling with community assets after the husband's death which operates as a tacit acceptance of the community.¹⁴³ Likewise, the widow may not renounce if she has concealed or fraudulently disposed of community assets.¹⁴⁴ In either case she is liable for one half of the community debts.¹⁴⁵ Indeed, it appears that the only case in which the wife can be made liable for more than half of a community debt on dissolution of the community is when she is a solidary co-obligor on a note representing a community debt.¹⁴⁶ Whether in this situation other creditors could proceed against the wife for half of their debt on the theory

to renounce is hard to reconcile with this decision. Perhaps the matter is best rationalized by considering the wife's power to renounce as a protective device awarded her in return for the husband's extensive power to manage the community. How this decision affects the ultimate disposition of the wife's share of the community if she renounces it has not been decided. Previously it was held that her share of the community goes to the husband. See *Jacob v. Falgout*, 150 La. 21, 90 So. 426 (1922); *Ferrand v. Heirs of Bres*, 35 La. Ann. 908 (1883); *Fabre v. Hepp*, 7 La. Ann. 5 (1852). These cases, however, relied on the theory that the wife had only an inchoate interest in the community.

139. LA. R.S. 9:2821 (1950) derived from La. Acts 1882, No. 4.

140. See *Shreiber v. Beer's Widow & Heirs*, 150 La. 676, 91 So. 149 (1922); *Reihl v. Martin*, 29 La. Ann. 15 (1877); *Ludeling v. Felton*, 28 La. Ann. 849 (1876); *Cockburn v. Wilson*, 20 La. Ann. 39 (1868).

141. LA. CIVIL CODE art. 2412 (1870). See *Martin Davie & Co. v. Carville*, 110 La. 862, 34 So. 807 (1903); *Collins v. Babin*, 16 La. Ann. 290 (1861); *Saloy v. Chexnaidre*, 14 La. Ann. 567 (1859); *Scott v. Rusk*, 2 La. Ann. 266 (1847); *Armato v. Ross*, 177 So. 491 (La. App. Orl. Cir. 1937).

142. See LA. CIVIL CODE art. 2413 (1870). *Cf.* *Chapman v. Kimball*, 6 Rob. 94 (La. 1843).

143. See cases cited in note 141 *supra*. See also *Lauderdale v. Gardner*, 8 Mart.(O.S.) 716 (La. 1820).

144. LA. CIVIL CODE art. 2418 (1870). See *Bonner v. Gill*, 5 La. Ann. 629 (1850); *Lynch v. Benton*, 12 Rob. 113 (La. 1845).

145. LA. CIVIL CODE art. 2409 (1870). See cases cited in notes 141, 144 *supra*. See also *Morris v. Covington*, 2 La. Ann. 259 (1847); *Succession of Plauche*, 2 La. Ann. 575 (1847); *cf.* *Jeaudron v. Boudreaux*, 1 Rob. 383 (La. 1842) (the widow who accepts is liable for no specific debt but for one-half of the total owed).

146. See *Friendly Loans Inc. v. Morris*, 142 So.2d 810 (La. App. 1st Cir. 1962); *Succession of Mathews*, 158 So. 233 (La. App. Orl. Cir. 1935). One other possible exception arises when the wife and the community are judgment debtors *in solido* for the wife's tort. See, *e.g.*, *Vail v. Spampinato*, 238 La. 259, 115 So.2d 343 (1959). If the community is dissolved before the judgment is satisfied, it seems the judgment creditor could hold the wife liable for the whole debt.

that she had lost the power to renounce the community by taking an active concern in its effects has not yet been decided.¹⁴⁷

Priority of Community Creditors

On dissolution of the community its creditors enjoy a priority. In the first place, after death of the wife a community creditor having a judgment may proceed directly against the surviving husband and seize and sell community property to satisfy a community debt.¹⁴⁸ *Washington v. Palmer*¹⁴⁹ allows the judgment creditor of the community the same right after dissolution of the community by divorce. Second, community creditors enjoy a priority over the separate creditors of the spouses,¹⁵⁰ even if the separate creditor is a secured creditor,¹⁵¹ as to community property. It appears that the priority of the community creditor precludes the separate creditors from seizing and selling the undivided interest of the debtor-spouse in the unliquidated community.¹⁵² There is some indication that if the husband is a community creditor, he enjoys the priority

147. Query: Could the wife under these circumstances accept the community with benefit of inventory? Can any wife who has taken an active concern in the affairs of the community accept with benefit of inventory?

148. See *Harman & Stringfellow v. Legrande*, 151 La. 253, 91 So. 726 (1922); *Simpson v. Bulkley*, 140 La. 589, 73 So. 691 (1917); *Luria v. Cote Blanche Co.*, 114 La. 385, 38 So. 279 (1905); *Succession of Hooke*, 46 La. Ann. 353, 15 So. 150 (1894); *Succession of Cason*, 32 La. Ann. 790 (1880); *Paul v. Hoss*, 28 La. Ann. 852 (1876); *Hawley v. Crescent City Bank*, 26 La. Ann. 230 (1874); *Ricker v. Pearson*, 26 La. Ann. 391 (1874); *Baird v. Lemee*, 23 La. Ann. 424 (1871); *Succession of Saux*, 2 McGloin 38 (La. App. Orl. Cir. 1884). So also a mortgagee may secure executory process on a mortgage securing a community debt, by proceeding against the surviving spouse, whether husband or wife. See LA. CODE OF CIVIL PROCEDURE art. 2671 (1960); *Landry v. Grace*, 167 La. 1042, 120 So. 770 (1929); *Twomey v. Papalia*, 142 La. 621, 77 So. 479 (1917); *Schlieder v. Boulet*, 124 La. 658, 50 So. 617 (1909); *Landreaux v. Louque*, 43 La. Ann. 234, 9 So. 32 (1891).

149. 213 La. 79, 34 So. 2d 382 (1948).

150. *Zeigler v. His Creditors*, 49 La. Ann. 144, 174, 21 So. 666, 678 (1896): "It has been repeatedly held that community creditors are entitled to a priority on community property over the separate creditors of the spouses. This preference is secured neither by a privilege nor a mortgage, technically, but is the result of the tenure or character of the interest of the spouse in the property. It is analogous to the right to the preference of the partnership creditors over the creditors of the individual partners." See *Succession of Keppel*, 113 La. 246, 36 So. 955 (1904); *Thompson v. Vance*, 110 La. 26, 34 So. 112 (1903); *Pior v. Giddens*, 50 La. Ann. 216, 23 So. 337 (1897); *Healey v. Ashbey*, 47 La. Ann. 636, 17 So. 195 (1895); *Newman v. Cooper*, 46 La. Ann. 1485, 16 So. 481 (1894); *Rawlins v. Giddens*, 46 La. Ann. 1136, 15 So. 501 (1894); *Webre v. Lorio*, 42 La. Ann. 178, 7 So. 460 (1890); *Landreneau v. Ceasar*, 153 So. 2d 145 (La. App. 3d Cir. 1963), cert. denied. *But cf.* *Johnson v. Johnson*, 235 La. 226, 103 So. 2d 263 (1958).

151. See *Healey v. Ashbey*, 47 La. Ann. 636, 17 So. 195 (1895); *Newman v. Cooper*, 46 La. Ann. 1485, 16 So. 481 (1894). *But see* *Alter v. O'Brien*, 31 La. Ann. 452 (1879) (creditor for wife's funeral expenses (a separate debt) was given priority by his privilege over mortgagee of community property).

152. See *Pior v. Giddens*, 50 La. Ann. 216, 23 So. 337 (1897). *But see*

of community creditors as against separate creditors, but that his claim is junior to those of other community creditors.¹⁵³ If so, logically the same rule should apply when the wife is a community creditor.¹⁵⁴ Otherwise, community creditors participate concurrently, or according to any preference a privilege or mortgage may entitle them, as the case may be.¹⁵⁵

The priority of the community creditor is superior to any claim of ownership on the community property by the surviving spouse or the heirs of the deceased spouse.¹⁵⁶ The question has frequently been litigated in regard to the priority of the community creditor over the wife's interest in the community. The wife's interest was repeatedly characterized as "residuary"¹⁵⁷ prior to the decision in *Phillips v. Phillips*¹⁵⁸ that the

Webre v. Lorio, 42 La. Ann. 178, 180, 7 So. 460 (1890): "There is nothing in the jurisprudence of this state, in the Code, or the decisions of this court, to prevent the surviving spouse from disposing of his or her part of the community property subject to the debts and charges of the community. Therefore the individual creditors of either can subject it by seizure and sale to the payment of his debt, subject of course to the debts of the community." Such remedy is comfortless as the property so burdened is unmarketable. The separate creditor's remedy, as indicated by *Pior v. Giddens*, is first to provoke a liquidation of the community.

153. See *Succession of Merrick*, 35 La. Ann. 296 (1883).

154. *Cf. Succession of Dejean*, 5 La. Ann. 593 (1850). However, restitution to the wife has always been favored by the courts, and she may be permitted to participate equally with other community creditors.

155. See *Norman Mayer & Co. v. Montgomery*, 187 La. 374, 174 So. 880 (1937); *Succession of Broussard*, 142 La. 99, 76 So. 253 (1917).

156: *Demoruelle v. Allen*, 218 La. 603, 617, 50 So.2d 208, 212 (1950): "But neither the spouses nor the heirs have anything to claim out of the acquets and gains 'until all debts are paid or liquidated.'" *Accord*, *Tomme v. Tomme*, 174 La. 123, 139 So. 901 (1932); *Harmon & Stringfellow v. Legrande*, 151 La. 253, 91 So. 726 (1922); *Latour v. Latour*, 134 La. 342, 64 So. 133 (1914); *Kelly v. Kelly*, 131 La. 1024, 60 So. 671 (1913); *Succession of Landry*, 128 La. 333, 54 So. 870 (1911); *Miguez v. Delcambre*, 125 La. 175, 51 So. 108 (1910); *Succession of Emonot*, 109 La. 359, 33 So. 368 (1902); *Childs v. Lockett*, 107 La. 270, 31 So. 751 (1902); *Messick v. Mayer*, 52 La. Ann. 1161, 27 So. 815 (1900); *Succession of Fernandez*, 50 La. Ann. 564, 23 So. 457 (1898); *Berthelot v. Fitch*, 45 La. Ann. 389, 12 So. 625 (1893); *Bartoli v. Huguenard*, 39 La. Ann. 411, 2 So. 196 (1887); *Dickson v. Dickson*, 36 La. Ann. 453 (1884); *Durham v. Williams*, 32 La. Ann. 968 (1880); *Cestac v. Florane*, 31 La. Ann. 493 (1879); *Riley v. Condran*, 26 La. Ann. 294 (1874); *Ricker v. Pearson*, 26 La. Ann. 391 (1874); *Phelan v. Ax*, 25 La. Ann. 379 (1873); *Sadler v. Kimbrough*, 24 La. Ann. 534 (1872); *Baird v. Lemee*, 23 La. Ann. 424 (1871); *Ware v. Jones*, 19 La. Ann. 428 (1867); *Succession of Kerley*, 18 La. Ann. 583 (1866); *Depas v. Riez*, 2 La. Ann. 30 (1847); *Succession of Ogden*, 10 Rob. 457 (La. 1845); *Succession of Thomas*, 12 Rob. 215 (1845); *Hart v. Foley*, 1 Rob. 378 (La. 1842); *Lawson v. Ripley*, 17 La. 238 (1841); *German v. Gay*, 9 La. 580 (1836); *Succession of Lewis*, 12 So. 2d 7 (La. App. 1st Cir. 1943).

157. See, e.g., *Harmon & Stringfellow v. Legrande*, 151 La. 253, 91 So. 726 (1922); *Miguez v. Delcambre*, 125 La. 175, 51 So. 108 (1910); *Messick v. Mayer*, 52 La. Ann. 1161, 27 So. 815 (1900); *Succession of Fernandez*, 50 La. Ann. 564, 23 So. 457 (1898); *Berthelot v. Fitch*, 45 La. Ann. 389, 12 So. 625 (1893); *Dickson v. Dickson*, 36 La. Ann. 453 (1884); *Ware v. Jones*, 19 La. Ann. 428 (1867); *Succession of Kerley*, 18 La. Ann. 583 (1866).

158. 160 La. 813, 107 So. 584 (1926).

wife was an "owner" of an interest in the community at every moment of its existence. The two concepts are not incompatible, for designating the wife's interest as "residuary" merely restates the proposition that the wife's claim to one-half of the community is subordinate to the claims of community creditors.¹⁵⁹ That the wife's claim is residuary in this sense is easily demonstrated. If the wife accepts the community, she is liable for half of its debts.¹⁶⁰ More fundamentally, the wife's claim is one-half the community of *gains*, and the existence of gains cannot be determined until the debts and losses are paid.¹⁶¹ Thus the wife is an owner, but her ownership is analogous to that of a partner, subject to divestment by partnership creditors.¹⁶² The interest of the husband is precisely the same in this respect.¹⁶³

Community Debts Follow Community Property

The priority of the community creditor over claims of ownership by either spouse, on dissolution of the community, becomes important if the surviving spouse conveys his or her interest in the community property before community debts are paid. In these circumstances, community debts may follow community property, rendering it liable for the payment of these

159. *Cf. Ware v. Jones*, 19 La. Ann. 428, 430 (1867): "The land, being community property, one half of it belongs to the widow, and the other to the heirs. The title so vested continues in the parties, subject to be divested at any time by the creditors themselves, or by the administrator acting for them. When it is said that the rights of the heirs are merely residuary, nothing more is meant than they take only what remains of a succession after its charges are paid. They are not the less owners of the property they inherit, because it is followed by and subject to the charges against it." *Accord, Dickson v. Dickson*, 36 La. Ann. 453 (1884).

160. See LA. CIVIL CODE art. 2409 (1870).

161. See *Kelly v. Kelly*, 131 La. 1024, 60 So. 671 (1913); *Depas v. Riez*, 2 La. Ann. 30 (1847); *Hart v. Foley*, 1 Rob. 378 (La. 1842); *Lawson v. Ripley*, 17 La. 238 (1841). *Cf. 9 MANRESA* 601: "*Sólo puede considerarse como ganancia verdadera, partible entre los cónyuges a la disolución del matrimonio, la diferencia entre el activo y el pasivo; si no hay sobrante, no hay ganancias.*"

162. See *Mourain v. Delamarre*, 2 La. Ann. 142 (1847); *Akin v. Oakey*, 10 Rob. 410 (La. 1845); *Tyler v. His Creditors*, 9 Rob. 372 (La. 1844); *Clairborne v. His Creditors*, 13 La. 279 (1839); *Ward v. Brandt*, 11 Mart.(O.S.) 331 (La. 1822). *But see Berdejo, En Torno a la Naturaleza Jurídica de la Comunidad de Gananciales del Código Civil*, 187 REVISTA GENERAL DE LEGISLACION Y JURISPRUDENCIA 7 (1950); *De los Mozos, La Renuncia a la Sociedad Legal de Gananciales*, 13 ANUARIO DE DERECHO CIVIL 63, 106-22 (1960), both critical of views which consider the matrimonial community as a form of partnership.

163. See *Demoruelle v. Allen*, 218 La. 603, 50 So.2d 208 (1950); *Tomme v. Tomme*, 174 La. 123, 139 So. 901 (1932); *Succession of Landry*, 128 La. 333, 54 So. 870 (1911); *Bartoli v. Huguenard*, 39 La. Ann. 411, 2 So. 196 (1887); *Succession of Lewis*, 12 So.2d 7 (La. App. 1st Cir. 1943).

debts in the hands of a third person.¹⁶⁴ *Thompson v. Vance*¹⁶⁵ is the leading case. After dissolution of the community, the surviving husband, Zeigler, conveyed his interest in immovable community property to Vance, who mortgaged it to Thompson. When Thompson foreclosed, the Zeigler children intervened, asserting that their mother's claim against the community for restitution of paraphernalia descended to them by heirship, and had now been judicially fixed in amount, thus entitled them to the priority of a community creditor. The court sustained the intervention and ordered that they be paid in preference to the mortgagee.¹⁶⁶ Since Zeigler had only a defeasible title, reasoned the court, his vendee acquired only a defeasible title.¹⁶⁷ It was specifically decided that claims of community creditors need not be recorded in order to affect community property in the hands of a third person.¹⁶⁸

That the principle that community debts follow immovable community property without recordation survived the subsequently developed public records doctrine¹⁶⁹ is doubtful. *Hum-*

164. See *Thompson v. Vance*, 110 La. 26, 34 So. 112 (1903); *Zeigler v. His Creditors*, 49 La. Ann. 144, 21 So. 666 (1898); *Succession of Giddens*, 48 La. Ann. 356, 19 So. 125 (1896); *Webre v. Lorio*, 42 La. Ann. 178, 7 So. 460 (1890); *Ealer v. Lodge*, 36 La. Ann. 115 (1884); *Durham v. Williams*, 32 La. Ann. 968 (1880); *Moore v. Blount*, 160 So. 319 (La. App. 2d Cir. 1935); *Elmer v. Prescott*, 1 Orl. App. 103 (La. App. Orl. Cir. 1904).

165. 110 La. 26, 34 So. 112 (1903).

166. *Id.* at 42, 34 So. at 119.

167. *Id.* at 32-33, 34 So. at 115: "Upon the dissolution of the community by the death of Mrs. Zeigler, the surviving spouse became seized of the undivided one-fourth of the property, and the title so vested continued in him, subject, however, to be divested at any time by the community creditors. This right of ownership being subordinated to the paramount claims of the community creditors, the rights of an alienee of the surviving spouse necessarily became subordinated to the rights of the community creditors.

"When, therefore, Vance purchased Zeigler's interest in the property, he acquired no greater rights than the latter had, which was simply the residuum, and when he mortgaged it to Thompson, the latter took the mortgage cum onere, and can enforce it only to the extent of his mortgagor's interest.

"These consequences result from a long line of decisions which have rock-bedded in the jurisprudence of this state the principle that community creditors are entitled to a priority on community property over separate creditors of the spouses; that no act of the surviving spouse, in his own name or as tutor, and no act of the heirs, whether of age or not, can deprive the creditor of this right; that the rights of community creditors are paramount to the right of ownership which the surviving spouse acquired in the property at the dissolution of the community; and that hence, no creditor of the spouses can acquire any right upon the property except being subordinated to the payment of community debts."

168. *Id.* at 36, 34 So. at 117: "So long as the community is not liquidated or settled, the children have a claim upon community property for the debts due them by the community, a protection really higher and greater than through either mortgage or privilege. It springs, as we have said, from the tenure itself under which the property is held." See also *id.* at 40-41, 34 So. at 118.

169. *McDuffie v. Walker*, 125 La. 152, 51 So. 100 (1910) is usually cited as the fountainhead of the public records doctrine.

*phreys v. Royal*¹⁷⁰ shows that after divorce, the former husband may convey good title to the community immovables, provided the former wife has not recorded the divorce judgment in the conveyance records of the parish in which the immovable is situated.¹⁷¹ On this basis, *Speights v. Nance*¹⁷² held that a divorced wife could not enforce her unrecorded claims as a community creditor against the husband's undivided interest in immovable property which he had conveyed to a third person.¹⁷³ The difficulty with the decision is that a community creditor may have no instrument which the law of registry requires to be recorded.¹⁷⁴ The claim of the community creditor becomes a burden on the community property which will follow it into the hands of a third person only on dissolution of the community. At that time what instrument does the community creditor have which he can record? *Thompson v. Vance* has never been overruled,¹⁷⁵ but *Speights* indicates that the creditor must now record his claims, at least if the community is dissolved by a judgment of divorce. There is not, as yet, any indication whether the creditor must now do so if the community is dissolved by death of one spouse.¹⁷⁶

Rights of Separate Creditors

Creditors of the Husband

The husband's separate creditors enjoy several advantages enjoyed by community creditors. Since the husband is personally liable for his separate debts, his separate estate is liable for these debts as a matter of course.¹⁷⁷ That the wife's separ-

170. 215 La. 567, 41 So. 2d 220 (1949).

171. *Ibid.* The ex-wife had no claim of ownership to the property as against the ex-husband's vendee.

172. 142 So. 2d 418 (La. App. 2d Cir. 1962).

173. *Ibid.* The opinion is unclear whether it was necessary for the wife to record the judgment of divorce in the conveyance records, or whether she had to record her claim as a community creditor. None of the cases allowing community debts to follow community property were mentioned or discussed.

174. See LA CIVIL CODE art. 2266 (1870): "All sales, contracts and judgments affecting immovable property, which shall not be so recorded, shall be utterly null and void, except between the parties thereto." See also LA. R.S. 9:2721 (1950).

175. The decision was considered controlling and followed in *Moore v. Blount*, 160 So. 319 (La. App. 2d Cir. 1935).

176. It is still law, apparently, that the public records doctrine will not defeat the rights of the deceased's heirs to half the community property. See *Long v. Chailan*, 187 La. 507, 175 So. 42 (1937); *Succession of James*, 147 La. 944, 86 So. 403 (1920); *George v. Delaney*, 111 La. 760, 35 So. 894 (1904). *But cf.* *Chachere v. Superior Oil Co.*, 192 La. 193, 187 So. 321 (1939).

177. See LA: CIVIL CODE art. 3182 (1870).

ate property is not liable for such debts is equally elementary.¹⁷⁸ The husband's separate creditors have been allowed, however, to subject community property to their debts.¹⁷⁹ Even the husband's prenuptial creditors have been allowed to do so, although article 2403 expressly forbids it.¹⁸⁰ Apparently this has been allowed on the theory that since the husband, as head and master of the community, could voluntarily use community assets to pay his separate debts, his separate creditors should be able to compel him to do so.¹⁸¹

Community liability for the husband's prenuptial debts has been severely criticized as treating the husband as sole owner of the community.¹⁸² Upon the decision that the wife owns a half interest in the community during every moment of its existence,¹⁸³ the ability of the husband's separate creditors to hold

178. DAGGETT 53. However, since 1926 it has been possible for the wife to become surety for her husband's debts. See text accompanying note 117 *supra*.

179. See *Hawley v. Crescent City Bank*, 26 La. Ann. 230 (1874); *Davis v. Compton*, 13 La. Ann. 396 (1858); *Succession of Curtis*, 10 La. Ann. 662 (1855); *Glenn v. Elam*, 3 La. Ann. 611 (1848); *Guice v. Lawrence*, 2 La. Ann. 226 (1847); *Stafford v. Sumrall*, 21 So.2d 83 (La. App. 1st Cir. 1945); *Magnolia Petroleum Co. v. Crigler*, 12 So.2d 511 (La. App. 2d Cir. 1943), *cert. denied*; *First Nat'l Bank of Ville Platte v. Coreil*, 145 So. 395 (La. App. 1st Cir. 1933); *Favrot v. Paine & Bourgeois*, 118 So. 775 (La. App. 1st Cir. 1925); *cf. Succession of Schwenck*, 43 La. Ann. 1110, 10 So. 185 (1891); *Heirs of Gee v. Thompson*, 41 La. Ann. 348, 6 So. 548 (1889); *Belair v. Dominguez*, 26 La. Ann. 605 (1874).

180. See *Hawley v. Crescent City Bank*, 26 La. Ann. 230 (1874); *Davis v. Compton*, 13 La. Ann. 316 (1858); *Glenn v. Elam*, 3 La. Ann. 611 (1848); *Guice v. Lawrence*, 2 La. Ann. 226 (1847); *Stafford v. Sumrall*, 21 So.2d 396 (La. App. 1st Cir. 1945).

181. *Davis v. Compton*, 13 La. Ann. 396 (1858): "Art. 2372 C.C. [2403] declares that 'the debts of both husband and wife anterior to the marriage must be acquitted out of their own personal and individual effects.' This Article must be interpreted in connection with Article 2373 [2404] of the same Code, which pronounces the husband to be the head and master of the partnership or community of gains and permits him to administer its effects, dispose of the revenues which they produce and alienate them, by an encumbered title, without the consent and permission of his wife. Article 2372 [2403] entitles either the wife or husband, when debts of either originating before the marriage have been paid out of the community, to be reimbursed the amount so paid at the dissolution and settlement of the community. As the husband has the right to alienate the effects of the community without the consent of his wife, creditors of the husband before marriage ought also to have the right to seize the effects of the community to satisfy their claims."

182. 1 DE FUNIAK 438-39. Early Spanish law denied community liability for prenuptial debts of either spouse. See FUERO REAL bk. 3, tit. 20, L. 14 (1255); LEYES DE ESTILO L. 207 (1310); *cf. 1 ASSO Y MANUEL 95-96; AZEVEDO 196*. French law, on the contrary, makes the community liable for prenuptial debts of both spouses. FRENCH CIVIL CODE art. 1409 (1804). The divergence is probably due to the difference between the French and Spanish community. The Spanish community has always been a community of acquets and gains; the French legal community is a community of movables and gains into which the movables owned by each spouse at the time of marriage enter the community as its original capital. See FRENCH CIVIL CODE art. 1401 (1804).

183. *Phillips v. Phillips*, 160 La. 813, 107 So. 584 (1926).

the community liable for their claims became ripe for reappraisal. The tentative reappraisal in *Fazzio v. Krieger*¹⁸⁴ suggests that the separate creditor may no longer obtain satisfaction from the community. In *Fazzio*, the husband was unemployed, but his second wife was employed. The first wife sued for child support. The court held that the *husband's half* of his second wife's income was properly taken into consideration in fixing the amount of alimony because such alimony is not a debt within the meaning of article 2403.¹⁸⁵ In dictum, the court states that the earlier cases allowing the husband's separate creditors to make community property liable for their claims "would still be authority for the proposition that the husband's half interest in the community is liable for his debts contracted before marriage, subject, of course, to community debts."¹⁸⁶ Does the court mean that the husband's prenuptial creditor must wait until the community is dissolved and proceed against the husband's half interest in the residuum after community debts are paid? Or does it mean that the separate creditor may seize one-half the community at any time? Or that the separate creditor may seize and sell, during the existence of the community, the husband's undivided half interest in it?

Each alternative presents grave inconveniences. If the husband's separate creditors must postpone enforcement of their claims until the community is dissolved and liquidated, marriage becomes a way of avoiding prenuptial debts indefinitely.¹⁸⁷

184. 226 La. 511, 76 So.2d 713 (1954).

185. *Id.* at 522, 76 So.2d at 716: "[W]e are of the opinion that the obligation of the defendant in the instant case is an obligation imposed by law and is clearly not a debt within the meaning of Article 2403 of the Civil Code, and that therefore the trial judge was correct in considering the husband's half of the income of the second community in fixing the amount awarded for the maintenance and support of his children by a former marriage." The court's reasoning that the obligation was not a debt is not convincing. That the obligation to support the legitimate children of a spouse by a former marriage is a separate debt is at least a debatable proposition. Current Spanish law makes this a community obligation. SPANISH CIVIL CODE art. 1408 (1889). Arizona holds that alimony to a former wife is an obligation of the second community. *Gardner v. Gardner*, 95 Ariz. 202, 388 P.2d 417 (1964).

186. *Fazzio v. Krieger*, 226 La. 511, 524, 76 So.2d 713, 717 (1954).

187. De Funiak argues that people do not marry to accomplish this. 1 DE FUNIAK 440-41. Nevertheless if such is the result of marriage, inevitably some people will take advantage of it, regardless of the reason for which they married, as the experience of Washington shows. Mecham, *Creditor's Rights in Community Property*, 11 WASH. L. REV. 80, 87 (1936): "The first class has been an easy one for our courts. It consists of those instances in which a creditor attempts to enforce a prenuptial debt against community property—usually the husband's salary or earnings—and discovers to his sorrow that by committing matrimony, the debtor has placed his earnings beyond the reach of that debt. Inquiry directed to the credit managers of several retail business houses disclosed that this situa-

Further, the law of prescription would require some adjustment to prevent loss of such creditor's claims during the existence of the community. The eventual right against the husband's share of the community, if there be any residuum after community debts are paid, seems small comfort to the creditor who must wait an indefinite period before he can enforce it. If the husband's separate creditor may seize half of the community assets at any time, then the separate creditor has power to partition the community.¹⁸⁸ If the creditor seizes and sells half the community assets, does the community continue? If so, what are its assets? Under the reasoning in *Fazzio*, all that would remain would be the wife's share of the community. How there could be a later partition between husband and wife in conformity with article 2406¹⁸⁹ is unclear. On the other hand, if the seizure operates as a dissolution of the community, the creditor has power to dissolve the community in circumstances in which the spouses could not do so. Finally, if the creditor is able to seize the husband's undivided interest during the existence of the community, one of two results seems to follow. Either the community is no longer between husband and wife but between wife and stranger, or the community is effectively dissolved.

These inconveniences suggest that the earlier decisions allowing the husband's separate creditor to subject community assets to his claim may have been a concession to practicality which creates fewer inconveniences than the available alternatives.¹⁹⁰ The community receives the income of the husband's

tion is one of more frequent occurrence than might be supposed. There seems to be no 'out' for the creditor in this case short of refusing to deal on an open account basis with unmarried persons, and that is an impossible alternative." Cf. BROCKELBANK, *THE COMMUNITY PROPERTY LAW OF IDAHO* 284 (1962).

188. The modes of dissolving the community are established by law. See Comment, 25 LA. L. REV. 241 (1964). None of these heretofore have depended upon the will of husband's separate creditors. Significantly also, the action for separation of property is not even available to the husband. *Hotard v. Hotard*, 12 La. Ann. 145 (1857).

189. LA. CIVIL CODE art. 2406 (1870): "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; and it is the same with respect to the profits arising from the effects which both husband and wife brought reciprocally in marriage, and which have been administered by the husband, or by husband and wife conjointly, although what has been thus brought in marriage, by either the husband or the wife, be more considerable than what has been brought by the other, or even although one of the two did not bring anything at all."

190. Significantly, Spanish law now allows the prenuptial obligations of husband and wife to be enforced against community property if the debtor spouse has insufficient separate property to satisfy them. See SPANISH CIVIL CODE art. 1410 (1889). As previously noticed, the community is liable for such debts in French law. FRENCH CIVIL CODE art. 1409 (1804).

separate estate and that of his labor. Thus he has no separate income with which to pay his prenuptial debts and can pay them only by selling separate property (thus reducing the income available to the community) or by using community funds. The community suffers diminution in either event. Allowing the separate creditor to seize, but giving the community a right to reimbursement against the husband's separate estate is a fair solution.¹⁹¹ If that solution is now impossible due to article 2403, then the separate creditor's enforcement of his claim should be postponed until dissolution of the community. For all its inconveniences, this appears to be the position of the wife's prenuptial creditors,¹⁹² and it is the position of the husband's separate creditors generally in Arizona and Washington.¹⁹³

The creditor who deals with the husband during the marriage should not be obliged to determine at his peril whether the husband is acting as the legal representative of the community or is acting in his individual capacity. Since the husband is normally the legal representative of the community, every debt he incurs during marriage is presumed to be a community debt.¹⁹⁴ Nevertheless, some debts incurred by the husband during marriage are separate debts, as when he acquires separate property under an onerous title. Formerly such separate creditors could hold the community liable for their claims.¹⁹⁵ After *Fazzio*, it is unclear what rights against the community such creditors have. Although their rights are likely to be the same as those granted to the husband's prenuptial creditors, they may be entitled to greater rights since their claims stem from debts incurred during the marriage.

On dissolution of the community, the rights of the husband's separate creditors seem settled. They may subject to their claims the debtor's share of the community, but such share cannot be determined until community debts are paid.¹⁹⁶ Neces-

191. The right to reimbursement is well settled. See *Jefferson v. Stringfellow*, 148 La. 223, 86 So. 744 (1920); *Harris v. Harris*, 160 So. 2d 359 (La. App. 4th Cir. 1964).

192. See *Walters v. Wilson*, 3 Mart. (N.S.) 135 (La. 1824); *Flogny v. Hatch*, 12 Mart. (O.S.) 82 (La. 1822); *Keyser v. James*, 153 So. 2d 97 (La. App. 1st Cir. 1963).

193. See cases cited in note 113 *supra*.

194. See *Draughon v. Ryan*, 16 La. Ann. 309 (1861). See also DAGGETT 50; Morrow, *Matrimonial Property Law in Louisiana*, 34 TUL. L. REV. 3, 35 (1959). Cf. 9 MANRESA 609.

195. See *Succession of Curtis*, 10 La. Ann. 662 (1855); *First Nat'l Bank of Ville Platte v. Coreil*, 145 So. 395 (La. App. 1st Cir. 1933).

196. Thus it appears the separate creditor may not seize prior to payment of

sarily the separate creditors' rights against community property are junior to those of community creditors.¹⁹⁷ If, however, the husband himself is a community creditor, his separate creditors may claim all the rights which accrue to him thereby and they may assert these rights judicially.¹⁹⁸

Creditors of the Wife

The wife's separate creditors may subject her separate property to their claims.¹⁹⁹ In respect to community property, the wife's separate creditors are less favorably situated than community creditors and the husband's separate creditors. The wife's prenuptial creditors²⁰⁰ and her separate creditors generally²⁰¹ cannot subject community property to their claims. At the dissolution of the community, her separate creditors are subordinate to community creditors in relation to community property.²⁰² Because of this difference in rights, it is important to determine which of the wife's creditors are also community creditors.

The power of the wife to obligate the community has been thought a matter of difficulty due to article 2404 making the husband head and master of the community; and refined theories of quasi-contract, agency, and ratification have been advanced to explain exceptions to the supposed rule that only the husband can obligate the community.²⁰³ As previously observed, whether a debt is a community debt or a separate debt usually depends on the nature of the debt, not on which spouse incurs it. The courts early recognized this principle and enforced obligations against the community which were incurred

community debts. See *Pior v. Giddens*, 50 La. Ann. 216, 23 So. 337 (1897). *But see* *Webre v. Lorio*, 42 La. Ann. 178, 7 So. 460 (1890).

197. See cases cited in note 150 *supra*.

198. See *Heirs of Gee v. Thompson*, 41 La. Ann. 348, 6 So. 548 (1889).

199. See, *e.g.*, *Dickerman v. Reagan*, 2 La. Ann. 440 (1847); *Shevnin v. Grimmer*, 119 So. 894 (La. App. 2d Cir. 1929).

But cf. 3 PLANIOL 1071: "Personal creditors of the wife can proceed only against the interests belonging to her. Hence they are limited to the naked ownership of her separate property, because its usufruct belongs to the community."

200. See *Greenleeze v. Penny*, 1 La. 241 (1830); *Waters v. Wilson*, 3 Mart. (N.S.) 135 (La. 1824); *Flogny v. Hatch*, 12 Mart.(O.S.) 82 (La. 1822); *Keyser v. James*, 153 So.2d 97 (La. App. 1st Cir. 1963); *cf.* *Childers v. Johnson*, 6 La. Ann. 634 (1851).

201. See, *e.g.*, *Schaeffer v. Trascher*, 165 La. 315, 115 So. 575 (1928); *Demack Motors Co. v. Hallick*, 119 So. 572 (La. App. Orl. Cir. 1929).

202. See cases cited in note 150 *supra*.

203. See *Morrow, Matrimonial Property Law in Louisiana*, 34 TUL. L. REV. 3, 36 (1959).

by the wife.²⁰⁴ As long as married women lacked capacity to contract without authorization by the husband or the judge,²⁰⁵ the principle could be comfortably applied: without proper authorization the wife's contract was null; if properly authorized the contract was valid, but it was a community obligation if the contract inured to the benefit of the community, for the husband's authorization was taken as assent that the community be bound.²⁰⁶ During this period, the great effort by creditors was to hold the wife liable for community debts, not to hold the community liable for the wife's debts.²⁰⁷ The married women's emancipation acts made it possible for the wife to contract without authorization by the husband or the judge,²⁰⁸ and thereby removed the factor which had supported community liability for debts incurred by the wife. Since that time, the great effort by creditors has been to hold the community liable for the wife's debts.

Various theories have been successfully employed to make the community liable for debts incurred by the wife. If the wife is a public merchant, the community, by disposition of law, is liable with her for her business debts.²⁰⁹ Similarly, there is no difficulty in holding the community liable if the wife manifestly is acting as agent of the community.²¹⁰ In these cases the implication is that the wife, as agent, is not personally liable for the debt.²¹¹ Other cases base community liability on the hus-

204. *Scanlan & Co. v. Warwick*, 10 La. Ann. 30-31 (1855): "It is clear as a general rule that debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund; and it is immaterial whether contracted by the husband or wife." See also *Trudeau v. Row*, 23 La. Ann. 197 (1871); *Fluke v. Martini*, 26 La. Ann. 279 (1874); *Graham v. Egan*, 13 La. Ann. 546 (1858); *Chauviere v. Fliege*, 6 La. Ann. 56 (1851); *Wiley v. Hunter*, 2 La. Ann. 806 (1847).

205. The disabilities of married women and the exceptions thereto remain in the Code. See LA. CIVIL CODE arts. 121-135, 1786, 1787, 2397, 2398 (1870).

206. See *Kennedy v. Bossiere*, 16 La. Ann. 445 (1862). FRENCH CIVIL CODE art. 1419 (1804) as interpreted by the courts makes the husband solidarily liable with the wife when she contracts a community obligation with his authorization. See 3 *PLANIOL* 1091, 1092. There is no corresponding article in the Louisiana Code.

207. See cases cited in note 116 *supra*.

208. See LA. R.S. 9:101-105 (1950).

209. See LA. CIVIL CODE art. 131 (1870). See also *Charles Lob's Sons, Ltd. v. Karnofsky*, 177 La. 229, 148 So. 34 (1933); *Thorne v. Egan*, 3 Rob. 329 (La. 1842); *King v. Dearman*, 105 So.2d 293 (La. App. 1st Cir. 1958).

210. See LA. CIVIL CODE art. 1787 (1870). See also *Neiman-Marcus Co. v. Viser*, 140 So.2d 762 (La. App. 2d Cir. 1962); *Motion Picture Advertising Service v. Modica*, 139 So. 80 (La. App. Orl. Cir. 1932); *Smithson v. Jones*, 130 So. 628 (La. App. 2d Cir. 1930); *Perfection Garment Co. v. Lanasa*, 7 La. App. 31 (La. App. Orl. Cir. 1927); *cf. David v. Edwards*, 108 So.2d 828 (La. App. 2d Cir. 1959).

211. *But cf. Perdido Finance Co. v. Falgout*, 77 So.2d 896 (La. App. Orl.

band's obligation to supply the wife's "necessaries,"²¹² or on theories of implied agency, or of ratification.²¹³

Community liability for necessities usually occurs while the spouses are separated in fact. The wife obtains the food, clothing, and shelter she must have, on credit, and the creditor presents the bill to the husband who is held liable on his obligation to support his wife.²¹⁴ It is doubtful that liability extends much beyond such basic items; jewelry, for instance, apparently is not a necessary.²¹⁵ The amount of necessities for which the community can be held liable in this manner is relative, varying with the husband's income;²¹⁶ but there is no community liability at all if the husband is furnishing necessities in an amount which the court deems sufficient.²¹⁷ If the community is held liable, it seems the wife is not personally liable.²¹⁸ In each case in which the community has been held liable under this theory,

Cir. 1955) (wife signed her own and husband's name as co-makers of promissory note; on finding she was authorized to sign husband's name, the court held them solidarily liable).

212. See LA. CIVIL CODE art. 120 (1870).

213. *Columbia Fin. Corp. v. Robitcheck*, 142 So.2d 625, 626 (La. App. 4th Cir. 1962), *rev'd on other grounds*, 243 La. 1084, 150 So.2d 23 (1963): "A husband, as head and master of the community is responsible for the purchases made by the wife:

(a) When they are necessities which he has otherwise refused to furnish;

(b) If he either expressly or impliedly authorized the wife to make the purchase;

(c) If he later ratifies the purchase either expressly or impliedly."

214. *Tricketts v. Viser*, 137 So.2d 424 (La. App. 2d Cir. 1962) (furniture); *Smith v. Viser*, 117 So.2d 673 (La. App. 2d Cir. 1960) (groceries); *D. H. Holmes Co. v. Huth*, 49 So.2d 875 (La. App. Or. Cir. 1951) (clothing); *D. H. Holmes Co. v. Van Ryper*, 173 So. 584 (La. App. Or. Cir. 1937), *aff'd sub nom. D. H. Holmes Co. v. Morris*, 188 La. 431, 177 So. 417 (1937) (clothing); *Feibleman & Co. v. O'Rourke*, 124 So. 620 (La. App. Or. Cir. 1929) (clothing); *Spring v. Barr*, 120 So. 544 (La. App. Or. Cir. 1929) (housing); *Overton v. Nordyke*, 10 La. App. 317 (La. App. Or. Cir. 1929) (medical expenses).

215. *D. H. Holmes Co. v. Morris*, 188 La. 431, 436, 177 So. 417, 418 (1937): "There is nothing in that doctrine to compel a husband to pay for jewelry bought by his wife, in her own name, and for her own use or adornment, while she is living separate and apart from him."

216. See, e.g., *D. H. Holmes Co. v. Huth*, 49 So.2d 875 (La. App. Or. Cir. 1951); *cf. Gus Mayer Co. v. Gasquet*, 7 Or. App. 199 (La. App. Or. Cir. 1910) (where the wife bought items equal to one-tenth of husband's annual income the day after she left him, the husband was held not liable).

217. See *Schaeffer v. Trascher*, 165 La. 315, 115 So. 575 (1928); *Aisene v. Gehbauer*, 70 So.2d 781 (La. App. Or. Cir. 1954); *Mathews Furniture Co. v. LaBella*, 44 So.2d 160 (La. App. Or. Cir. 1950); *Keller-Zander, Inc. v. Copeland*, 196 So. 527 (La. App. Or. Cir. 1940), *cert. denied*; *Surety Credit Co. v. Monteleone*, 119 So. 576 (La. App. Or. Cir. 1929). The power of the wife to so obligate the community for necessities may terminate when the husband begins paying alimony pendente lite. *Compare Lopez v. Pampalone*, 8 La. App. 729 (Or. Cir. 1928) *with Overton v. Nordyke*, 10 La. App. 317 (Or. Cir. 1929).

218. See *Smith v. Viser*, 117 So.2d 673 (La. App. 2d Cir. 1960).

the debt was by its nature a community obligation,²¹⁹ and the community could properly be held liable without reference to which spouse incurred the debt. Limiting community liability to "necessaries" may be prudent, however, to prevent abuses otherwise difficult to restrain or repair. This limitation, on the other hand, should not be employed to relieve the community of liability from the debt resulting from the wife's acquisition of substantial community property.²²⁰

There is language in some cases which indicates that the wife is presumed to be agent of the community.²²¹ Leaving aside the cases in which her agency was manifest,²²² such dicta are apparently responsible only for the decision that the community is liable for the wife's purchases, subsequent to a separation in fact, on an account opened during the marriage, in the absence of express notice to the creditor revoking the wife's presumptive authority as agent.²²³ Apparently the court will be hard to convince that such revocation was communicated.²²⁴

219. Support of the family is a community obligation. See text accompanying note 52 *supra*.

220. *Mathews Furniture Co. v. LaBella*, 44 So.2d 160 (La. App. Or. Cir. 1950) seems misguided. While separated, wife purchased furniture on credit. The court refused to hold the community liable as for necessities without proof that the husband had failed to provide them. By any criterion the furniture was community property; therefore the community ought to pay for it. *Rouchon v. Rocamora*, 84 So.2d 873 (La. App. Or. Cir. 1956) reaches the correct result by a doubtful application of the "necessaries" theory. The wife leased the premises in which she and her husband lived. The court properly held that the community and not the wife was liable for the rent.

221. *Keyser v. James*, 153 So.2d 97, 99 (La. App. 1st Cir. 1963): "In situations where the wife contracts debts during the marriage, the law presumes an agency relationship between the community as principal and the wife as agent." Cf. 3 *PLANIOL* no. 1099: "Wife is empowered to represent her husband as of right, under an implied mandate, in the so-called household management acts, that means the acquisition of necessary household provisions and other current expenses." However, in French law, the wife's implied agency terminates if the spouses are separated in fact. *Id.* no. 1100.

222. See cases cited in note 210 *supra*.

223. *Goldring's Inc. v. Seeling*, 139 So.2d 538, 540 (La. App. 4th Cir. 1962): "Having permitted his wife to establish an account with Plaintiff, and having paid her bills without question, the husband cannot, because of their later separation, refuse to pay her previous purchases of customary wearing apparel. In this regard, he ratified the action of his wife as agent for the community to purchase her necessary wearing apparel and kindred articles, which agency continued until expressly revoked. The husband has failed in his defense that he gave notice of revocation of Plaintiff.

"Husband's liability for necessities furnished his wife results from implied agency in wife to contract on husband's behalf; and this presumption continues until the occurrence of some event that changes the legal situation." *Neiman-Marcus Co. v. Viser*, 140 So.2d 762 (La. App. 2d Cir. 1962) held the husband liable for wife's purchases on an account after judicial separation but prior to notification to the creditor. The decision seems correct as the agency was express; husband had opened the account and delivered the "charga-plate" to his wife.

224. *Goldring's Inc. v. Seeling*, 139 So.2d 538, 540 (La. App. 4th Cir. 1963):

Although the decision is not entirely convincing, the moral seems obvious: if community liability is to be restricted to necessities after a separation in fact, the husband must close all charge accounts. If the restriction of community liability, after such separation, to necessities is sound, allowing unlimited liability by implied agency theories seems dubious. Agency theories failed, for obvious reasons, to make the ex-husband liable for debts incurred by his ex-wife in operation of a former community business which she purchased in partition proceedings following divorce.²²⁵

The ratification theory of community liability appears to be a blend of ideas drawn from agency, estoppel, and perhaps quasi-contract. The thought is that if the husband knows of a purchase of some article by the wife and he allows it to be installed in the community residence without protest, he "ratifies" the purchase as an act of an authorized representative of the community.²²⁶ There is a fundamental flaw in this theory. It is applied to acquisitions of property (furniture, household appliances) which are presumed to be community property. If the court is unable to find ratification of the wife's purchase, the debt is her separate debt, and as a corollary it seems the

"He testified that he called at Plaintiff's place of business and notified someone in the office, he could not identify, that he would not pay any more of his wife's purchases. The lady in charge of the office testified they had no record of such notification. It seems hardly reasonable to believe that Plaintiff would risk selling to a wife once her husband notified it he would no longer be responsible therefor."

225. *Thompson v. Waterhouse*, 157 So.2d 300, 301 (La. App. 4th Cir. 1963): "Plaintiff contends it was the duty of Waterhouse to notify him of the change in ownership, and having failed to do so, he was responsible for debts incurred by his wife after her purchase.

"This contention of Plaintiff is untenable. Irrespective of the fact that the community owned the business and the husband was bound for its debts, once the same was sold by judicial process at public auction, whether to the divorced wife or a third person, the husband was not responsible for debts contracted thereafter by the new owner. The judicial advertisement of the proposed partition sale at auction was notice to the public." Does the court imply that the husband would be liable if there had been an amicable partition without judicial sale? Cf. *Johnson v. Johnson*, 235 La. 226, 103 So.2d 226 (1958).

226. *Montgomery v. Gremillion*, 69 So.2d 618, 619 (La. App. 2d Cir. 1953): "It is well settled in Louisiana that the husband is liable for purchases by his wife when such are not necessities if the husband knew of the purchases and did nothing at the time to repudiate the debt and permitted the articles so purchased to be used for the benefit of the community. His responsibility arises from his silence and inaction which are circumstances showing consent and ratification. The acts of the husband from which ratification can be inferred are such as must appear clearly and unequivocally, and ratification will not be inferred where the acts can be otherwise explained." See *Conley v. Johnson*, 98 So.2d 847 (La. App. 2d Cir. 1957); *Hammond Fin. Co. v. Renfro*, 87 So.2d 216 (La. App. 1st Cir. 1956); *Breaux v. Decuir*, 49 So.2d 495 (La. App. 1st Cir. 1950); *Miller-Morgan Co. v. Beverung*, 9 Orl. App. 287 (La. App. Orl. Cir. 1912).

property must be her separate property.²²⁷ This result is achieved without any inquiry whether the wife has any paraphernal funds under her administration in spite of settled jurisprudence that such funds are a necessary prerequisite to the wife's augmentation of her separate estate by acquisitions under onerous title.²²⁸ The married women's emancipation acts did not alter this rule.²²⁹ Thus a finding of a separate debt, and consequently separate property, for want of ratification of the purchase by the husband appears to be an unwarranted deviation from settled principles of classification of property. The better mode of classifying the debt in these cases appears to be to determine whether the acquired property is community or separate according to usual rules of classification of property. If it is community property, surely the purchase price is a community debt; if the property is paraphernal, so also is the debt. The husband's management of the community is not prejudiced by this procedure, for if he objects to an acquisition of community property by the wife, he may annul the sale.²³⁰

The law of negotiable instruments requires some modification of the preceding statements as *Columbia Finance Corp. v. Robitcheck*²³¹ illustrates. The wife purchased an air conditioning unit for the community residence and signed a negotiable note for the unpaid balance. In the indorsee's suit on the note, the court of appeal held that the husband had ratified the purchase and gave judgment against the community.²³² The Supreme Court reversed and gave judgment against the wife only.²³³ Since the husband's signature was not on the note, he could not be held liable *on the note* under the Uniform Negotiable Instruments Law,²³⁴ and since the court refused to allow an indorsee to sue on the original obligation underlying the

227. See *Rahier v. Rester*, 11 So. 2d 87 (La. App. 1st Cir. 1942); *Lacaze v. Kelsoe*, 185 So. 676 (La. App. 2d Cir. 1939).

228. See Comment, 25 LA. L. REV. 95 (1964).

229. See LA. R.S. 9:105 (1950). Cf. *Johnson v. Johnson*, 213 La. 1092, 36 So. 2d 396 (1948).

230. See *Thomas v. Winsey*, 76 So. 2d 33 (La. App. 1st Cir. 1954).

231. 243 La. 1084, 150 So. 2d 23 (1963), reversing 142 So. 2d 625 (La. App. 4th Cir. 1962).

232. *Columbia Fin. Corp. v. Robitcheck*, 142 So. 2d 625 (La. App. 4th Cir. 1962).

233. *Columbia Fin. Corp. v. Robitcheck*, 243 La. 1084, 150 So. 2d 23 (1963).

234. LA. R.S. 7:18 (1950): "No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name."

note; the husband could not be held liable for the note.²³⁵ Thus it appears that if the wife signs a negotiable note, but the husband does not, and delivers this to the vendor, the community is liable for the purchase price if the vendor sues, since he may disregard the note and sue on the original obligation; but if the note is negotiated, the wife only is liable to the indorsee, at least in the absence of an assignment of the original obligation to him. If the wife borrows money and gives a negotiable note to evidence the debt, there may well be no community liability if the husband does not sign the note.²³⁶ Clearly the husband is not liable on the note. Community liability would have to be predicated on the underlying obligation and it remains to be seen whether the courts will be willing to inquire into the use made of the borrowed funds in order to classify the debt, or whether they will test community liability by theories of agency or ratification. Practically, the creditor may have a difficult task if he must prove ratification.

The wife may obligate the community by her torts as well as by her contracts. The husband is not liable for the wife's torts because of his relationship to her.²³⁷ The community, however, is liable for the wife's torts if it is "shown affirmatively that she was expressly or impliedly authorized to and was, at the time of the commission of the act, actually attending to the affairs or business of the community."²³⁸ In automobile accident cases, the doctrine required a finding that the wife was on a community mission. At first narrowly interpreted,²³⁹ the concept of community mission has been expanded to cover almost any legitimate pursuit in which the wife uses an automobile.²⁴⁰ Although the plaintiff must allege that the wife was on a community mission at the time of the tort, it appears that the community has the burden of proof if it is to avoid liability on the ground that the wife was not on a community mission.²⁴¹

235. *Columbia Fin. Corp. v. Robitcheck*, 243 La. 1084, 1091, 150 So.2d 23, 26 (1963).

236. *But cf. Hammond Fin. Co. v. Renfro*, 87 So.2d 214 (La. App. 1st Cir. 1956). Wife assumed payment of note of another. Husband held liable on theory he ratified the transaction by making several payments on the note. The case is questionable in view of the *Robitcheck* decision.

237. See *Martin v. Brown*, 240 La. 674, 124 So.2d 904 (1960); *Adams v. Golson*, 187 La. 363, 174 So. 876 (1937).

238. *Adams v. Golson*, 187 La. 363, 372, 174 So. 876, 879 (1937).

239. See, e.g., *Wise v. Smith*, 186 So. 85 (La. App. 2d Cir. 1939); *Tuck v. Harmon*, 151 So. 803 (La. App. 2d Cir. 1934); cf. *Neibaum v. Campisi*, 16 So.2d 257 (La. App. Orl. Cir. 1944).

240. See *Brantley v. Clarkson*, 217 La. 425, 432, 46 So.2d 614, 617 (1950).

241. See *Martin v. Brown*, 240 La. 674, 124 So.2d 904 (1960); Note, 21 LA. L. REV. 647 (1961).

Community liability does not relieve the wife of liability for her tort; they are liable in *solido*.²⁴² Community liability for the wife's torts is of small practical importance today in automobile accident cases, as the wife usually will be insured under the vehicle owner's liability insurance policy. However, community liability may become important by its extension to other type tort cases.²⁴³

Conclusion

The status of creditors' rights in a community property system has been the subject of complaint.²⁴⁴ Indeed, satisfactory adjustment of the relations between the spouses and third persons is one of the most rigorous tests which a workable community property system must pass.²⁴⁵ The Louisiana community system has done so. The rights of creditors in the Louisiana community system have been reduced to a fairly coherent, though complex, body of law. That the community still flourishes after the emancipation of married women, the transformation of property values (making movables key sources of wealth), and the development of a credit economy, is evidence of the adaptability of our law and its capacity to provide creditors with the protection they need.

Some improvements on the present law may be suggested. First, recognition that as a general rule a debt is classified as community or separate according to its nature, not according to which spouse incurred it, would eliminate most of the anomalies in classification of debts. Second, the rights of separate

242. See *Vail v. Spampinato*, 238 La. 259, 115 So.2d 343 (1959); *Brantley v. Clarkson*, 217 La. 425, 46 So.2d 614 (1950); *Galle v. Ingraham*, 140 So.2d 741 (La. App. 4th Cir. 1962).

243. *Cf. Moses v. Metropolitan Cas. Ins. Co. of N.Y.*, 221 La. 364, 59 So.2d 421 (1952). Husband, lessor, agreed to keep stairway lighted. Wife was in charge of premises. Pursuing her hobby, photography, wife turned out lights. Tenant fell down stairs. The husband's insurer was liable as wife was agent of husband.

244. CLARK, *COMMUNITY OF PROPERTY AND THE FAMILY IN NEW MEXICO* 27-28 (1956): "In New Mexico, and perhaps a majority of the community states, this area of the law is one of the most disorderly, impractical and confusing." See also Mecham, *Creditors' Rights in Community Property*, 11 WASH. L. REV. 80 (1936).

245. *Cf. BROCKELBANK, THE COMMUNITY PROPERTY LAW OF IDAHO* 261-62 (1962):

creditors, particularly those of the husband, against the community need clarification. Third, a frank recognition that the wife is able to obligate the community in certain cases would resolve most of the present difficulties in this area.

Karl W. Cavanaugh

TERMINATION OF THE COMMUNITY¹

The community begins with the marriage and ordinarily regulates the property rights of the husband and wife, as between themselves, so long as the marriage lasts. Exceptionally, this matrimonial property regime may terminate while the marriage subsists. Problems arise if the different events and procedures which terminate the community are not carefully distinguished, for principles applicable to one event or procedure are not necessarily applicable to another.

The events and procedures which terminate the marital community may be classified according to two characteristics. First, termination of the community may be direct or consequential. Termination is direct if it results from a procedure designed primarily to terminate the community; otherwise, it is consequential. Second, termination of the community may be judicial or natural. If the termination occurs as a result of court action, it is judicial; otherwise, it is natural. Thus the causes for termination may be characterized as follows: (1) separation of property,² direct and judicial; (2) death,³ conse-

1. Throughout this Comment, "termination" will be used, rather than the term "dissolution," as "dissolution" may connote the process of liquidating the community's assets—a topic beyond the scope of this Comment.

2. Although the Louisiana Civil Code does not expressly declare that the separation of property dissolves the community, yet such is the legitimate conclusion to be drawn from the provisions on this subject. See *Spencer v. Rist*, 16 La. Ann. 318 (1861); *Holmes v. Barbin*, 15 La. Ann. 553 (1860).

3. The community ceases to exist on the death of either partner. See LA. CIVIL CODE arts. 136, 2406 (1870); *Vaccaro v. United States*, 55 F. Supp. 932 (E.D. La. 1944), *aff'd*, 149 F.2d 1014 (5th Cir. 1945); *Poutz v. Bistes*, 15 La. Ann. 636 (1860); *Stewart v. Pickard*, 10 Rob. 18 (La. 1845); *Hart v. Foley*, 10 Rob. 378 (La. 1842); *Griffin v. Waters*, 1 Rob. 149 (La. 1841); *Broussard v. Bernard*, 7 La. 216 (1834); *Succession of Evans*, 8 Orl. App. 196 (La. App. Orl. Cir. 1911).