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Termination of the Community

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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).

quential and natural; (3) absence,⁴ judicial in that court action is needed to have community declared terminated, and direct or consequential depending on the circumstances; (4) separation from bed and board,⁵ consequential and judicial; (5) divorce,⁶ consequential and judicial; (6) annulment of a putative marriage,⁷ consequential and judicial; and, (7) inception of bad faith in a putative marriage,⁸ consequential and natural. Civil death⁹ and general confiscation of goods,¹⁰ both of which would be classified as consequential and judicial, are of historical interest as examples of procedures which formerly terminated the marital community, but form no part of modern civil law.¹¹

SEPARATION OF PROPERTY¹²

The action for separation of property, now the only action that is always direct,¹³ originated in the Roman dotal system,¹⁴

4. See LA. CIVIL CODE art. 65 (1870); *Pedlahore v. Pedlahore*, 151 La. 288, 91 So. 738 (1922); *cf. Azar v. Azar*, 239 La. 941, 120 So.2d 485 (1960); *accord*, FRENCH CIVIL CODE art. 124. For the almost unanimous opinion of the French commentators, see 1 SIREY, CODES ANNOTÉS 87, n.9 summary (3d ed. 1861). For the Spanish provisions, see 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 187 (1943).

5. See LA. CIVIL CODE arts. 123, 136, 155 (1870); *Cassagne v. Cassagne*, 207 La. 1033, 22 So.2d 559 (1945); *Roux v. Jersey Ins. Co.*, 98 So.2d 906 (La. App. Orl. Cir. 1957).

6. There is no basic difference between separation from bed and board and divorce with respect to the community. See LA. CIVIL CODE arts. 123, 136, 155, 159 (1870); *Crochet v. Dugas*, 126 La. 285, 52 So. 495 (1910).

7. See LA. CIVIL CODE arts. 136, 2406 (1870). Termination of the putative community is based on the theory that an annulment dissolves the putative marriage the same as a divorce dissolves the marriage. See 3 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 1159 (1959).

8. See *Fulton Bag & Cotton Mills v. Fernandez*, 159 So. 339 (La. App. Orl. Cir. 1935) (dictum); 1 DALLOZ ENCYCLOPEDIA, *Communauté* n° 1739 (1951).

9. Abolished in France by Law of May 31, 1854 (D.C. 54.4.91).

10. Spanish punishment for high treason was provided for in *NOVISIMA RECOPIACIÓN* bk. 10, tit. 4, L. 10-11 (1805). Though such laws have been repealed in Spain and Mexico, the ramifications of the termination are still felt with respect to the rights of the innocent spouses. See 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 188 (1943).

11. See notes 9 and 10 *supra*.

12. Separation of property is a matrimonial property regime in which the spouses do not enjoy a community of property. The separation of property spoken of in this Comment is the action for separation of property, which is only one cause for the regime of separation of property. The other causes are by prenuptial contract and a judgment of separation from bed and board. See LA. CIVIL CODE arts. 136, 155, 2392, 2425 (1870).

13. Direct action is used in this Comment to describe an action which is designed primarily to terminate the community. The only other direct action is that available to the spouse of an absentee under LA. CIVIL CODE art. 64 (1870).

14. See Daggett, *The Wife's Action for a Separation of Property*, 5 TUL. L.

unrelated to community property.¹⁵ Dowry was given the husband to help defray expenses of the marriage; to accomplish this purpose it was under his control during the marriage.¹⁶ However, the wife or her heirs were entitled to return of the dowry upon dissolution of the marriage.¹⁷ Later Roman law allowed the wife to secure return of the dowry even during the marriage, if the dowry were in danger of depletion by the husband's mismanagement, his own financial difficulties, or his failure to reinvest the dowry as required by law.¹⁸ The French Code drew from these Roman provisions,¹⁹ but modified them so that the successful action for separation of property had the additional effect of terminating the community.²⁰ In turn, most of the Louisiana provisions on the action for separation are literal translations of the French articles and have changed little since 1808.²¹ The Louisiana action has the effect of securing the return of an existing dowry and paraphernal funds, and it terminates the community.²²

As the successful action for separation of property alters the basic property relations between the spouses, and thereby

REV. 55 (1930); 3 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 1161 (1959).

15. Both the French and Spanish systems have their origins in Germanic customary law. See, e.g., *Cole's Widow v. His Executors*, 7 Mart.(N.S.) 41, 48 (La. 1828): "The doctrine of the community of acquets and gains, was unknown to the Roman law; and although now common, we believe, to the greater number of European nations, its origin cannot be satisfactorily traced. The best opinion appears that it took rise with the Germans."

16. See CORBETT, THE ROMAN LAW OF MARRIAGE 177 (1931); cf. 1 MOREAU & CARLETON, PARTIDAS bk. 3, tit. 2. L. 5 (1820): "The ancient sages therefore thought proper to give to the husband the administration and use of the wife's estate, to supply his wants, when he stood in need, on the condition to furnish his wife with what was necessary." LA. CIVIL CODE art. 2387 (1870).

17. See 3 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 1163 (1959); cf. LA. CIVIL CODE arts. 2371, 2372, 2373, 2374 (1870).

18. See CORBETT, THE ROMAN LAW OF MARRIAGE 198 (1931); 13 SCOTT, THE CIVIL LAW 180 (1932).

19. See 3 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 1161 (1959); 2 TROPLONG, DROIT CIVIL EXPLIQUÉ, *Du contrat de mariage* no 576 (1850).

20. FRENCH CIVIL CODE art. 1451: "*La communauté dissoute par la séparation soit corps de et de biens. . .*" The Spanish did the same. See 2 MOREAU & CARLETON, PARTIDAS bk. 4, tit. XI, L. 26 (1820).

21. See Daggett, *The Wife's Action for a Separation of Property*, 5 TUL. L. REV. 55 (1930). The provisions now appearing as LA. CIVIL CODE arts. 2426 and 2437 (1870) were added respectively in the 1825 and 1870 revisions.

22. See, e.g., *Robertson v. Davis*, 9 La. Ann. 268 (1854); *Davock v. Darcy*, 6 Rob. 342 (La. 1844).

affects third persons, policy has dictated that the action be carefully limited and regulated. First, only the wife may bring the action,²³ a limitation originating in the dotal system in which the wife brought the dowry into the marriage and only she was concerned with its return during the marriage. The continued existence of this restriction in our present system seems justifiable, as the husband, who has complete control of the community, has no need of the protection which the action seeks to afford. Second, the creditors of the wife cannot bring the suit, even in her name, without her consent.²⁴ The justification for this rule lies in the fact that the dowry was intended for the benefit of the husband and his interest was considered to outweigh that of the wife's creditors.²⁵ Third, the Code provides that the wife can bring the suit only when her dowry is in danger or has not been reinvested as prescribed by law.²⁶

All these limitations presuppose that the wife has brought a dowry into the marriage. The Supreme Court, however, has stated that the grounds for the action given in the Code are merely illustrative,²⁷ and that the wife may bring the action, even though she has no dowry, if she needs to prevent her future earnings from falling into a mismanaged community.²⁸ Thus, except for the automatic termination of the community, provided for by the Code, the only direct connection between the action for separation of property and community property has been made by the courts.

23. See *Campbell v. Bell*, 12 La. Ann. 193 (1857).

24. See LA. CIVIL CODE arts. 1991, 2433 (1870); *Cosgrove v. His Creditors*, 41 La. Ann. 274, 6 So. 585 (1889).

25. See note 16 *supra*.

26. See LA. CIVIL CODE arts. 2425-2426 (1870).

27. It was not until *Davock v. Darcy*, 6 Rob. 342 (La. 1844) that a court held the article now appearing as LA. CIVIL CODE art. 2425 (1870) was merely illustrative.

28. See *Jones v. Jones*, 119 La. 677, 44 So. 429 (1907); *Walmsley v. Theus*, 107 La. 417, 31 So. 869 (1901); *Succession of Déjan*, 40 La. Ann. 437, 4 So. 89 (1888); *Brown & Learned v. Smyth*, 40 La. Ann. 325, 4 So. 300 (1888); *Kirkpatrick v. Finney & Byrnes*, 30 La. Ann. 223 (1878); *Webb v. Bell*, 24 La. Ann. 75 (1872); *Spencer v. Rist*, 16 La. Ann. 318 (1861); *Holmes v. Barbin*, 15 La. Ann. 553 (1860); *Mock v. Kennedy*, 11 La. Ann. 525, 66 Am. Dec. 203 (1856); *Wolfe & Clark v. Lowry*, 10 La. Ann. 272 (1855); *Penn v. Crockett*, 7 La. Ann. 343 (1852); *Jones v. Widow & Heirs of Morgan*, 6 La. Ann. 630 (1851); *Davock v. Darcy*, 6 Rob. 342 (La. 1844).

The existence of the action for separation of property is a potential threat to the creditors of the husband and of the community, since a successful action brings the wife, as another secured creditor, into competition with existing creditors.²⁹ For this reason the action can be used to defraud creditors and others with an interest in the property under the husband's control by manufacturing false claims to reduce the assets available to these other creditors. Therefore, the law allows creditors to attack the action both before and after the judgment is rendered.³⁰ The judgment may be attacked on the following grounds: (1) that the requirements for publication, designed to put the creditors on notice, have not been followed;³¹ (2) that the judgment is the result of a consent decree;³² (3) that the judgment has not been executed by either a *dation en paiement* to the wife³³ or a bona fide uninterrupted suit to obtain pay-

29. See LA. CIVIL CODE art. 2376 (1870).

30. *Id.* art. 2434: "The creditors of the husband may object to the separation of property decreed and even executed with a view to defraud them. They may even become parties to the suit for a separation of property, and be heard against it."

31. *Id.* art. 2429: "The separation of property, obtained by the wife, must be published three times in the public newspapers, at farthest within three months after the judgment which ordered the same."

"If there be no paper published in the place where the judgment is rendered, the publication must be made in that which is published in the place nearest to it."

But courts have held that failure to publish, of itself, is not a ground for absolute nullity. See *Jones v. Jones*, 119 La. 687, 44 So. 432 (1907); *Brown & Learned v. Smyth*, 40 La. Ann. 325, 4 So. 300 (1888); *Raiford v. Thorn*, 15 La. Ann. 81 (1860); *DeBlanc v. DeBlanc*, 4 La. 419 (1832); *Turnbull v. Cebra*, 1 Mart. (N.S.) 611 (La. 1823).

32. Although the wife may have acquired a judgment declaring separation of property, if the judgment resulted from a non-contested suit, the creditors of the husband and community may attack the validity of the judgment on this ground. LA. CIVIL CODE art. 2427 (1870): "[S]eparation of property . . . can only be ordered by a court of justice, after hearing all parties. It can in no case, be referred to arbitration." See *Driscoll v. Pierce*, 115 La. 156, 38 So. 949 (1905). But voluntary acquiescence by a party to a judgment of separation of property precludes his right to assert its nullity. See *King v. King*, 155 La. 19, 98 So. 742 (1923); *Andrews v. Sheehy*, 125 La. 217, 51 So. 122 (1909); *Succession of Corrigan*, 42 La. Ann. 65, 7 So. 74 (1890); *Dipuma v. Anselmo*, 137 So. 2d 76 (La. App. 1st Cir. 1962).

33. To obtain a separation of property the wife's interest must be in immediate danger, thus if the wife's claim is not satisfied once she has the judgment, the presumption is that she had no need for the judgment. LA. CIVIL CODE art. 2428 (1870): "The separation of property, although decreed by a court of justice, is null, if it has not been executed by the payment of the rights and claims of the wife, made to appear by an authentic act as far as the estate of the husband can meet them. . . ." See *LaRose v. Naquin*, 150 La. 353, 90 So. 676 (1922); *Morrison v. Citizens' Bank*, 27 La. Ann. 401 (1875); *Bertie v. Walker*, 1 Rob. 431 (La. 1842).

ment,³⁴ though there are two exceptions to this rule;³⁵ and (4) that the action and judgment is a fraud on the rights of the creditors.³⁶ The availability of such collateral attacks has the important effect of making termination of the community by separation of property tentative and uncertain. The community is deemed never to have terminated if the judgment of separation of property is successfully attacked; but until such time the termination stands as valid. If creditors succeed in nullifying the judgment, interim acts involving the spouses and their property are subject to the rules usually applicable to the com-

34. The requirement that there must be a bona fide uninterrupted suit has the same rationale as the requirement for a *dation en paiement*, being alternative methods of enforcing the claim that the wife has received by her judgment for separation of property. See note 33 *supra*. LA. CIVIL CODE art. 2428 (1870): "The separation of property . . . is null, if it has not been executed . . . or at least [attempted] by a *bona fide* non-interrupted suit to obtain payment." See *LaRose v. Naquin*, 150 La. 353, 90 So. 676 (1922).

The court has set no certain time for bringing the suit to execute the judgment of separation of property, other than it must be a reasonable time. A delay from July to October was held not such an unusual delay as to cause nullity in *Bertie v. Walker*, 1 Rob. 431 (La. 1842). From the first part of November to the end of March in the following year it was also held not to be an unreasonable delay in *Comier v. Ryan*, 10 La. Ann. 688 (1855). On the other hand, eleven months' delay was held unreasonable and entailed nullity in *Nachman v. LeBlanc*, 28 La. Ann. 345 (1876).

The French allow a definite time, 15 days, in which the suit must be brought. FRENCH CIVIL CODE art. 1444.

However, there is a line of cases containing dictum that a judgment for separation of property based upon sufficient proof, and accompanied by a money judgment against the husband which has not been promptly executed, will be good as far as the termination of the community is concerned, although void with respect to the money judgment. See *Walmsley v. Theus*, 107 La. 417, 31 So. 869 (1901); *Vickers v. Block*, 31 La. Ann. 672 (1879); *Jones v. Morgan*, 6 La. Ann. 630 (1851); *Henderson v. Trousdale*, 10 La. Ann. 548 (1855). For a discussion and analysis of these cases, see *Jones v. Jones*, 119 La. 677, 44 So. 432 (1907), indicating it is noteworthy that the language of LA. CIVIL CODE art. 2428 (1870), provides the separation of property is null, not that the money judgment is null.

35. The exceptions are: (1) where the wife has reduced her claim to a money judgment, but the husband's financial condition is in such a state that the execution of the judgment would be in vain, *Holmes v. Barbin*, 13 La. Ann. 474 (1858); and (2) where the wife is already in possession of her paraphernal property and her claim is thus satisfied without the execution of the judgment, *Chafe v. Frocheimer*, 35 La. Ann. 205 (1883).

36. LA. CIVIL CODE art. 2434 (1870), quoted in note 30 *supra*. See *Pelletier v. State Nat'l Bank*, 117 La. 335, 41 So. 640 (1906). The creditors have a right to demand production of the evidence upon which the judgment for separation of property was based. See *Campbell v. Bell*, 12 La. Ann. 193 (1857). But if the creditors suspect fraud, they must allege it. See *Brown & Learned v. Smyth*, 40 La. Ann. 325, 4 So. 300 (1888); *Levistones v. Brady*, 11 La. Ann. 696 (1856); *Turner v. Lockett*, 2 La. Ann. 885 (1847). The creditors may attack the validity of the separation of property if the wife has not proved that the disorder of the husband's affairs endanger her present separate property, or her future acquisitions. See *Bransford v. Bransford*, 46 La. Ann. 1214, 15 So. 678 (1894). If the wife can meet all these attacks, her judgment is sustained. See *Bird v. Duralde*, 23 La. Ann. 319 (1871).

munity property system.³⁷

Article 2432³⁸ provides that the judgment of separation of property is retroactive to the time of filing the suit. Such retroactivity is necessary to achieve the purpose of the action for separation of property — protection of the wife's interest. As the right of action comes into existence only after the danger to the wife's interest has materialized, it is only reasonable that the remedial effects should be retroactive. Of course, when there is neither dowry nor paraphernal property to be returned, the need for retroactivity is less urgent. The limitations placed on the action, nonetheless, justify retroactivity even in the case where the wife's future earnings are the only asset at stake. As a general rule, the wife's earnings fall into the community until it is terminated;³⁹ thus the sooner the termination is deemed effective by using the retroactive rule, the sooner the wife's earnings are classified as the wife's separate property.⁴⁰

The separation of property is necessarily judicial.⁴¹ Though voluntary separations have been attempted in some cases,⁴² the courts have struck down the separation, on the authority of the code article which explicitly states that a voluntary separation is null and has no effect.⁴³

The action for separation of property must be distinguished from the action of the wife to recover her paraphernal funds provided in articles 2387 and 2391. The action for separation of property comes from Roman law, independent of a community property system.⁴⁴ The action of the wife for return of paraphernal funds neither recovers the dowry nor terminates an existing community,⁴⁵ the function of separation of property.

37. See *Campbell v. Bell*, 12 La. Ann. 193 (1857); *Hanna v. Pritchard*, 6 La. Ann. 730 (1851).

38. LA CIVIL CODE art. 2432 (1870): "The judgment which pronounces the separation of property, is retroactive as far back as the day on which the petition for the same was filed."

39. See LA CIVIL CODE arts. 2334, 2386, 2402 (1870).

40. *Id.* art. 2393.

41. *Id.* art. 2427: "The wife must petition for the separation of property and it can only be ordered by a court of justice, after hearing all parties. It can, in no case, be referred to arbitration.

"Every voluntary separation of property is null, both as respects third persons and the husband and wife between themselves."

42. See *Sonnier v. Fris*, 220 La. 1085, 58 So.2d 393 (1952); *Humphreys v. Royal*, 215 La. 567, 41 So.2d 220 (1949); *Brown v. Tauzin*, 185 La. 86, 168 So. 502 (1936); *Driscoll v. Pierce*, 115 La. 156, 38 So. 949 (1905); *Joffrion v. Bordelon*, 14 La. Ann. 618 (1859); *Hotard v. Hotard*, 12 La. Ann. 145 (1857).

43. LA CIVIL CODE art. 2427 (1870).

44. See notes 14 and 15 *supra*.

45. LA CIVIL CODE art. 2387 (1870): "The wife who has left to her husband

Therefore, the limitations of the action for separation of property are not applicable; thus, the wife may sue for restitution at any time during the marriage.⁴⁶

DEATH

Death of one of the spouses is a natural event which terminates the community.⁴⁷ Though this seems a logical, as well as desirable, effect of death, it has not always been so in the French community system.⁴⁸ In France prior to the fourteenth century, death did not terminate the community if there were either major or minor children of the marriage.⁴⁹ The acquisitions of the surviving spouse continued to fall into the community, although the acquisitions of the children did not.⁵⁰ Nor did the remarriage of the survivor terminate the community, which became instead a three-sided relationship (*triparté*).⁵¹ Obviously, this system of the continued community led to much confusion, especially on the remarriage of the surviving spouse.⁵² Consequently, near the beginning of the fourteenth century the law was changed, the community continuing only during the minority of children.⁵³ Though this law remained in effect in parts of France even into this century, it was not included in the French Code,⁵⁴ perhaps not because of the confusion arising

the administration of her paraphernal property, may afterwards withdraw it from him."

Id. art. 2391: "The wife has, even during marriage, a right of action against her husband for the restitution of her paraphernal effects and their fruits, as above expressed."

See *Falconer v. Falconer*, 167 La. 595, 120 So. 19 (1929); *Wilkinson v. Wilkinson*, 147 La. 315, 84 So. 794 (1920); *Jenkins v. Maier*, 118 La. 130, 42 So. 722 (1907); *Bordes v. Duprat*, 52 La. Ann. 306, 26 So. 821 (1899); *Smith v. Reddick*, 42 La. Ann. 1055 (1890); *Joly v. Weber*, 35 La. Ann. 806 (1883); *Hawes v. Bryan*, 10 La. 136 (1836); *Gilbeaux's Heirs v. Cormier*, 8 Mart. (N.S.) 228 (La. 1829). *But see* *Viguerie v. Viguerie*, 133 La. 406, 63 So. 89 (1913), overruled by *Carter v. Third District Homestead*, 195 La. 555, 197 So. 230 (1940). Moreover, granting a mortgage does not defeat the wife's right to sue for and recover her paraphernal funds. See *Burns v. Thompson*, 39 La. Ann. 377, 1 So. 913 (1887); *Pascal v. Folse*, 48 La. Ann. 1227, 20 So. 750 (1896); *DeLesdernier v. DeLesdernier*, 45 La. Ann. 1364, 14 So. 191 (1893).

46. See LA. CIVIL CODE arts. 2387, 2391 (1870); *Burns v. Thompson*, 39 La. Ann. 377, 1 So. 913 (1887); *Joly v. Weber*, 35 La. Ann. 806 (1883).

47. See LA. CIVIL CODE arts. 136, 2406 (1870); *Culpepper v. Slater*, 131 So. 2d 76 (La. App. 2d Cir. 1961).

48. See 2 TROPLONG, DROIT CIVIL EXPLIQUÉ, *Du contrat de mariage* no 531 (1850).

49. *Ibid.*

50. *Ibid.*

51. *Ibid.* "Triparté" was used because there were three groups participating — the children of the first marriage, the surviving spouse, and the new spouse.

52. *Ibid.*

53. *Ibid.*

54. See 1 DALLOZ, ENCYCLOPEDIA, *Communauté* no 1653 (1951).

from the accounting for the assets, but because of the lack of social justification for continuing the community when the marital relationship had ceased.⁵⁵ The Louisiana Codes, unlike the French tradition, have always provided for termination of the community upon the death of either spouse.⁵⁶ There were, however, some early cases in which the underlying theory of the continued community was mooted, but early in the nineteenth century the continuation of the community after death was ruled impossible in our law.⁵⁷

The rule that the community is absolutely terminated is not changed by the concept that the community has a *fictitious* existence after its termination for the payment of debts,⁵⁸ though at times the courts have had difficulty in reaching this conclusion. Although there is support for the concept inasmuch as the community creditors have a priority on the community assets over the separate creditors of the spouses, the court's difficulty results from a misunderstanding of the implications of the term "fictitious community" which is used to describe the concept. The estate tax cases⁵⁹ present the most obvious examples of the court's difficulty, the problem in these cases being one of deciding whether assets of the estate or the community are to be reduced by the cost of administering the "fictitious community."⁶⁰ The nature of the administration is that

55. See 2 TROPLONG, DROIT CIVIL EXPLIQUÉ, *Du contrat de mariage* no 531 (1850).

56. LA. CIVIL CODE arts. 136, 2406 (1870).

57. The difficulty arose from the custom of continuing the community after the death of one of the spouses until an inventory was made, based upon the authority of practice and the FUERO REAL (1255). This custom was rejected as repugnant to the Louisiana community system by *Broussard v. Bernard*, 7 La. 216 (1834) and *Pizerot v. Meuillon's Heirs*, 3 Mart.(O.S.) 97 (La. 1813).

58. See *Demoruelle v. Allen*, 218 La. 603, 50 So.2d 208 (1950); *Tomme v. Tomme*, 174 La. 123, 139 So. 901 (1932); *Guillory v. Latour*, 138 La. 142, 70 So. 66 (1915); *Newman v. Cooper*, 46 La. Ann. 1485, 16 So. 481 (1894); *Succession of Hooke*, 46 La. Ann. 353, 15 So. 150 (1894); *Landreaux v. Louque*, 43 La. Ann. 234, 9 So. 32 (1891); *Insurance Co. v. Levi*, 42 La. Ann. 432, 7 So. 625 (1890); *Succession of Dumestre*, 42 La. Ann. 411, 7 So. 624 (1890); *Union Homestead Ass'n v. Cooil*, 4 Orl. App. 179 (La. App. Orl. Cir. 1907).

59. See *McCullough v. United States*, 134 F. Supp. 673 (W.D. La. 1955); *Vaccaro v. United States*, 55 F. Supp. 932 (E.D. La. 1944), *aff'd*, 149 F.2d 1014 (5th Cir. 1945).

60. The tax in these cases is calculated as a percentage of the decedent's estate. Thus the amount of the tax is decreased when the estate is reduced by the cost of administering the "fictitious community." Cases have held over governmental opposition that, the community being terminated, the whole cost of administration is chargeable to the decedent's estate, regardless of benefit to the surviving spouse. See *McCullough v. United States*, 134 F. Supp. 673 (W.D. La. 1955); *Vaccaro v. United States*, 55 F. Supp. 932 (E.D. La. 1944), *aff'd*, 149 F.2d 1014 (5th Cir. 1945); *accord*, *Succession of Helis*, 226 La. 133, 75 So.2d 221 (1954).

after the death of his wife the husband controls the community until it is settled; or if the husband predeceases his wife, his succession usually handles these duties of the "fictitious community."⁶¹ The reason the administration is given to the husband or his estate can be supported by two interrelated theories: (1) The husband or his estate is always liable for the debts of the community, whereas the wife or her heirs may accept the community with benefit of inventory or renounce it, thus possibly being relieved of their interest in the community and its debts;⁶² and (2) the courts have settled on this procedure since no procedure is prescribed by the Code.⁶³

The term "fictitious community" should not imply that the original community has continued, but should only describe a state of settlement—the community assets while in liquidation. This is evidenced by numerous cases which, referring to the fictitious existence of the community after dissolution, hold that the spouses' interest in the community attaches immediately on the death of either spouse.⁶⁴ The interest of the spouses in the community is restricted to the residuum of the community property after all the debts have been paid;⁶⁵ to determine this residuum the property must be inventoried and the debts paid. The term "fictitious community" is merely a convenient phrase to describe the state of the property while this residuum is being determined. Unless there are debts, there is no need for the "fictitious community."⁶⁶

ABSENCE

The Code provides that if a person has been absent for a

61. *Guillory v. Latour*, 138 La. 142, 150, 70 So. 66, 68 (1915): "[S]uch liquidation and payment cannot be effected in the succession of the wife; and . . . the administration of the wife's succession has no power to provoke the sale of community property for the payment of community debts." See *Succession of Helis*, 226 La. 133, 75 So.2d 221 (1954) (McCaleb, J., dissenting); *Succession of McLean*, 12 La. Ann. 222 (1857).

62. See LA. R.S. 9:2821 (1950). See also *Balis v. Mitchell*, 48 So.2d 691 (La. App. 1st Cir. 1950), where this law was given as a justification for the "fictitious community."

63. Though the Louisiana Civil Code provides many rules and presumptions to be made during the liquidation of the community's assets, there is no procedural framework set up for their accomplishment. For a favorable discussion for the administration being given the husband or his succession, see Comment, 22 *TUL. L. REV.* 486 (1948).

64. See, e.g., *Succession of Hooke*, 46 La. Ann. 353, 15 So. 150 (1894); *Landreaux v. Louque*, 43 La. Ann. 234, 9 So. 32 (1891); *Succession of Dumestre*, 42 La. Ann. 411, 7 So. 624 (1890); *Insurance Co. v. Levi*, 42 La. Ann. 432, 7 So. 625 (1890).

65. See *Tomme v. Tomme*, 174 La. 123, 139 So. 901 (1932).

66. See *Succession of Dumestre*, 42 La. Ann. 411, 7 So. 624 (1890).

certain period, his presumptive heirs may petition to be sent into provisional possession of his estate, as if it were known that he was dead.⁶⁷ Provision is made, however, for the spouse of the absentee to prevent this provisional possession by electing to continue the community.⁶⁸ This right of election is not dependent on the demand of the presumptive heirs for provisional possession. If the absentee is the wife, the husband continues the administration of the community as if she were present;⁶⁹ if the husband is the absentee, the wife manages the community, though it has not been clarified by the courts whether the wife has the powers of the head and master.⁷⁰

The French Code provides that the "provisional community" terminates thirty years after the spouse of the absentee elected to continue the community.⁷¹ The Louisiana Code contains no such rule, but it does allow known heirs to have absolute possession if the absence lasts thirty years.⁷² It is assumed that if they have this power, they may have the "provisional commu-

67. LA. CIVIL CODE art. 57 (1870): "When a person shall not have appeared at the place of his domicile or habitual residence, and when such person shall not have been heard of, for five years, his presumptive heirs may, by producing proof of the fact, cause themselves to be put by the competent judge into provisional possession of the estate which belonged to the absentee at the time of his departure, or at the time he was heard of last, on condition of their giving security for their administration."

Id. art. 58: "If the absentee has left a power of attorney, his presumptive heirs cannot cause themselves to be put into provisional possession, until seven years shall have elapsed since the last intelligence of him has been received."

68. *Id.* art. 64: "The husband or wife of the absentee, who is not separated in estate from him or her, and who wishes to continue to enjoy the benefit of the community or partnership of matrimonial gains, which existed between them, may prevent the provisional possession or exercise of all the rights which may depend upon the death of the absentee, and claim and preserve for himself or herself in preference to any other person, the administration of the estate of his or her absent husband or wife."

"If on the contrary the husband or wife of the absentee chooses rather to have the community dissolved, he or she may exercise and claim all his or her rights, both legal and conventional, on his or her giving security for such things as may be liable to be restored."

"The wife who elects to have the community continued, has, notwithstanding, the right of renouncing it afterwards."

69. See *Pedlahore v. Pedlahore*, 151 La. 288, 91 So. 738 (1922); 2 TROPLONG, *DROIT CIVIL EXPLIQUÉ, Du contrat de mariage* nos 540-541 (1850).

70. In French law it seems as though the wife's powers of administration are limited to ordinary administration and not the administration that the husband enjoys as head and master of the community. See 2 TROPLONG, *DROIT CIVIL EXPLIQUÉ, Du contrat de mariage* nos 540-541 (1850); cf. LA. CIVIL CODE art. 50 (1870).

71. FRENCH CIVIL CODE art. 124.

72. LA. CIVIL CODE art. 70 (1870), as amended: "If the absence has lasted thirty years a presumption of death shall follow and the known heirs of the absentee may petition the court and cause themselves to be put in absolute possession of the property and estate of the absentee by the judge, and thereafter deal with such property as the absolute and unconditional owners."

nity" declared dissolved by the legal presumption of death.⁷³

Instead of electing to continue the community, the spouse of the absentee may elect to dissolve the community at any time and exercise all legal and conventional rights which ordinarily mature on termination of the community.⁷⁴ The absentee's share of the community would then become subject to the code provisions for provisional possession by the presumptive heirs.⁷⁵

DIVORCE AND SEPARATION FROM BED AND BOARD

As the Louisiana Code states that the effects of divorce are the same as separation from bed and board with respect to the community, the two procedures of automatic⁷⁶ termination may be treated together.⁷⁷ One of the major problems of termination

73. *Ibid.* But cf. LA. R.S. 9:1441 (Supp. 1963): "A person on active duty in one of the armed services of the United States, who has been reported missing under circumstances which have induced the armed service to which he was attached to accept the presumption of his death, shall likewise be presumed dead under the law of this state."

Id. 9:1442: "A. The succession of a person presumed dead, as provided in R.S. 9:1441, may be opened, administered, and his heirs or legatees sent into absolute possession of his estate, by the district court of the parish where he was domiciled at the time of entering the armed service, and in the same manner as the succession of a deceased person, except as otherwise provided in R.S. 9:1443. His heirs and legatees sent into possession of his property judicially may thereafter deal with such property as the absolute and unconditional owners, and third persons may deal with them as such.

"B. If it is subsequently discovered that the person presumed dead is alive, and within thirty years of the date of the judgment of possession he demands the return of his property, the persons sent into possession thereof as his heirs or legatees shall return to him all such property which they still own, subject to the mortgages and other encumbrances which they have placed thereon. These persons shall also repay him the value of all property of which they were sent into possession and which they have alienated, and the amount of the mortgages and other encumbrances which they placed on property returned to him. The persons sent into possession as his heirs or legatees shall return to him the annual revenues of his property as provided in Article 68 of the Civil Code."

Id. 9:1443: "In a proceeding to open the succession of a person presumed dead, as provided in R.S. 9:1441, or in any other action or proceeding whatever in which the presumption of death is an issue, this presumption may be proved by a certified copy of an official certificate of the armed service to which he was attached, or of pertinent excerpts from his service record, indicating that the armed service has accepted the presumption of his death."

74. See LA. CIVIL CODE art. 64 (1870).

75. See *Pedlahore v. Pedlahore*, 151 La. 288, 91 So. 738 (1922).

76. Neither party is required to ask for a termination of the community in a suit for separation from bed and board or divorce. Courts have held that it is an automatic and necessary consequence of LA. CIVIL CODE arts. 123, 136, 155 (1870). See *McNeal v. McNeal*, 233 La. 269, 96 So.2d 563 (1957); *Conrad v. Conrad*, 170 La. 312, 127 So. 735 (1930), *overruling* *White v. White*, 153 La. 313, 95 So. 791 (1923); *Davis v. Davis*, 23 So.2d 651 (La. App. 2d Cir. 1945).

77. LA. CIVIL CODE art. 159 (1870): "The effects of a divorce shall not only be the same as are determined in the case of a separation from bed and board, but it shall also dissolve forever the bonds of matrimony, between the parties, and place them in the same situation with respect to each other as if no marriage had ever been contracted between them."

by separation from bed and board or divorce was whether the termination was retroactive to date of filing suit. The problem arose as a result of confusing the separation from bed and board with the action for separation of property. Some decisions have implied that since the phrase separation from bed and board "carries with it separation of goods and effects," so that "a decree of divorce or separation from bed and board is necessarily a decree of dissolution of community," then an action for either divorce or separation from bed and board is equivalent to an action for separation of property.⁷⁸ It is submitted, however, that termination of the community by the action for separation of property is distinct from termination of the community as a consequence of separation from bed and board or divorce.⁷⁹ The action for separation of property has the purpose of protecting the wife's property interest, while the termination which results from separation from bed and board or divorce is more akin to that which results from the death of one of the spouses: both result from the dissolution of the matrimonial relationship.⁸⁰

In light of this distinction between the action for separation of property and that for divorce or separation from bed and board, when all other effects of the judgment of divorce or separation board, it seems that the community must terminate at the time from bed and board become operative — when the judgment becomes final.⁸¹ However, the Louisiana jurisprudence in this area has a checkered history, confusing the retroactive date for termination, appropriate in an action for separation of property,⁸² with the effective date for termination in an action for divorce or separation from bed and board.⁸³ In the latter case

78. See *Conrad v. Conrad*, 170 La. 312, 127 So. 735 (1930); *Williams v. Goss*, 43 La. Ann. 868, 9 So. 750 (1891).

79. See *Hill v. Caze*, 136 La. 625, 67 So. 520 (1915). It is admitted that a judgment of separation from bed and board creates a state of separation of property, but this does not mean that it is related to an action for separation of property merely because the latter, for unrelated reasons, also creates a state of separation of property. See also note 12 *supra*.

80. See *Demoruelle v. Allen*, 218 La. 603, 50 So. 2d 208 (1950); *Crochet v. Dugas*, 126 La. 285, 52 So. 495 (1910); *McCaffrey v. Benson*, 40 La. Ann. 10, 3 So. 393 (1888).

81. See *Cassagne v. Cassagne*, 207 La. 1033, 22 So. 2d 559 (1945).

82. See LA. CIVIL CODE art. 2432 (1870).

83. The first case to use the retroactive rule for a judgment of separation from bed and board was *Gastauer v. Gastauer*, 131 La. 1, 58 So. 1012 (1912). This case was relied on by *Talbert v. Talbert*, 199 La. 882, 7 So. 2d 173 (1942); *Dewenter v. Mott*, 27 So. 2d 444 (La. App. 1st Cir. 1946); *Alpha v. Aucoin*, 167 So. 835 (La. App. Or. Cir. 1936). The cases refusing to apply the retroactive rule are *Ruffino v. Hunt*, 234 La. 91, 99 So. 2d 34 (1958); *Abraham v. Abraham*, 233 La. 808, 98 So. 2d 197 (1957); *Coney v. Coney*, 230 La. 821,

the need for retroactivity does not exist. The error of decisions holding to the retroactive view seems to lie in a misinterpretation of an earlier case, in which a suit for separation from bed and board coincided with a suit for separation of property.⁸⁴ Undoubtedly, both the rationale and the need for the community dies with dissolution of the marriage; but if the marriage, or the obligation to live as man and wife, lasts until the judgment is final, why should the community not have the same life?

It has been suggested that a retroactive judgment of separation from bed and board is needed to protect the wife's interest, since the community is managed by the husband while suit is pending.⁸⁵ The relationship of the spouses during a suit for separation from bed and board or divorce could cause the husband to engage in drastic transactions involving the community with the intent of injuring the wife's financial interest. But injunction and other forms of relief specifically provided the wife⁸⁶ seem to be much better than a retroactive judgment. The retroactive judgment is not a preventive, but a corrective, measure, giving rise to a right of action against the husband

89 So.2d 326 (1956); *Abunza v. Olivier*, 230 La. 445, 88 So.2d 815 (1956); *Eiermann v. Modenbach*, 198 La. 1062, 5 So.2d 335 (1941); *In re Koretke Brass Co.*, 195 La. 415, 196 So. 917 (1940); *Romero v. Leger*, 133 So.2d 897 (La. App. 3d Cir. 1961).

84. See *Gustauer v. Gastauer*, 131 La. 1, 58 So. 1012 (1912).

85. See *The Work of the Louisiana Supreme Court for the 1955-1956 Term — Persons*, 17 LA. L. REV. 303, 306 (1957). The best argument that can be made for applying the retroactive rule to judgments of separation from bed and board or divorce is that the legislature gave implied consent to this application when amending article 155 of the Louisiana Civil Code, in 1944. La. Acts 1944, No. 200, provided that when the community was re-established upon reconciliation of the parties, the re-establishment was effective as of the date the suit for separation from bed and board was filed.

86. LA. CIVIL CODE art. 149 (1870): "During the suit for separation, the wife may, for the preservation of her rights, require an inventory and appraisal to be made for the movables and immovables which are in possession of her husband, and an injunction restraining him from disposing of any part thereof in any manner."

Id. art. 150: "From the day on which the action of 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 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."

LA. CODE OF CIVIL PROCEDURE art. 3751 (1960): "The pendency of an action or proceeding in any court, state or federal, in this state affecting the title to, or asserting a mortgage or privilege on, immovable property does not constitute notice to a third person not a party thereto unless a notice of the pendency of the action or proceeding is made, and filed or recorded, as required by article 3752."

Id. art. 3944: "Either party to an action for separation from bed and board or divorce may obtain injunctive relief without bond prohibiting the other party from disposing of or encumbering community property."

for the value of assets improperly alienated during the suit. This correction could be valueless if the husband had completely dissipated his own and the community's assets in agreements with good faith third parties. However, if the husband's improvidence threatens the wife's income, she may sue for separation of property; the retroactive judgment would afford immediate protection.⁸⁷ There is no reason to prevent the wife from bringing this action, whether she is plaintiff or defendant in the separation or divorce suit.⁸⁸ Moreover, since the wife's earnings while living separate and apart from her husband do not fall into the community,⁸⁹ a retroactive judgment is not needed to protect them.

Prior to 1962, retroactive judgment for separation from bed and board was without statutory mandate. In that year the Code was amended to include the retroactivity rule⁹⁰ after a series of cases concluded that the retroactivity rule of separation of property was inappropriate for a judgment of separation from bed and board, and hence, that the community terminated only when the judgment became final.⁹¹ The retroactive judgment creates no serious problems as long as validly acquired rights of third persons are protected. Nonetheless, the statutory rule is inconsistent with the rationale of the marital community. When the French courts had difficulty in determining whether the judgment of separation from bed and board should be retroactive, their Code was amended to allow retroactivity without effect on third parties,⁹² but the amendment has been criticized by French writers.⁹³ It is assumed that our article⁹⁴

87. See *Tanner v. Tanner*, 229 La. 399, 86 So.2d 80 (1956).

88. *Ibid.*

89. See LA. CIVIL CODE art. 2334 (1870), as amended.

90. *Id.* art. 155, as amended, La. Acts 1962, No. 178.

91. See note 83 *supra*.

92. FRENCH CIVIL CODE art. 252. This article was amended in 1886 to make the judgment retroactive; it was again amended in 1919 to make clear that the retroactive effect was only to apply to property.

93. See 3 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 1156 (1959).

94. LA. CIVIL CODE art. 155 (1870), as amended: "The judgment of separation from bed and board carries with it the separation of goods and effects and is retroactive to the date on which the petition for same was filed, but such retroactivity shall be without prejudice (a) to the liability of the community for attorney's fees and cost incurred, or, (b) to rights validly acquired in the interim between the commencement of the action and recordation of the judgment."

The specific protection given to attorney's fees results from a conflict in the jurisprudence whether the wife's attorney's fees could be a debt of the community if the suit was not successful, turning on the issue of the wife's ability to contract debts on behalf of the community, and if the community could be liable for these attorney's fees should it be terminated retroactively to the date

holding the community liable for rights validly acquired makes the Louisiana rule the same as the French, though the language of the Louisiana rule is not so clear.

As in the case of termination of the community by death, there has been language concerning the community terminated by separation or divorce which refers to its "fictitious existence" after termination.⁹⁵ The spreading fiction seems to flow from legislation⁹⁶ which allows the wife judicially separated or divorced, like the widow, to accept the community with benefit of inventory.⁹⁷ Thus, since both widows and wives, divorced or separated, have the same opportunities to incur or avoid the community debts, a similar use of the "fictitious community" is both logical and desirable.

TERMINATION OF THE PUTATIVE COMMUNITY

A marriage may be a nullity, but a community — a "putative community" — may arise due to the good faith of one or both spouses in contracting the marriage.⁹⁸ Louisiana recognizes that annulment of the marriage terminates the putative community⁹⁹ and produces essentially the same effects as divorce.¹⁰⁰ The good faith of either spouse is sufficient to establish the putative community; it also allows the other spouse, regardless of good faith, to share in the community. However, when only one spouse enters a null marriage in good faith, his subsequent bad faith should end the civil advantages of the marriage

of filing of the suit. For a holding that attorney's fees are not a debt of the community, but a separate debt of the wife, see *Alpha v. Aucoin*, 167 So. 835 (La. App. Orl. Cir. 1936); *cf. Dauterive v. Sternfels*, 164 So. 349 (La. App. 1st Cir. 1935) (medical expenses). For holdings that attorney's fees are a debt of the community, see *Tanner v. Tanner*, 229 La. 399, 86 So. 2d 80 (1956); *Talbert v. Talbert*, 199 La. 882, 7 So. 2d 173 (1942); *Vicknair v. Terracina*, 168 La. 417, 122 So. 276 (1929); *Spiller v. Spiller*, 170 La. 813, 129 So. 212 (1930); *Munchow v. Munchow*, 136 La. 753, 67 So. 819 (1915); *Benedict v. Holmes*, 104 La. 528, 29 So. 256 (1900); *Sciambra v. Sciambra*, 153 So. 2d 441 (La. App. 4th Cir. 1963).

95. See *Washington v. Palmer*, 28 So. 2d 509 (La. App. 2d Cir. 1947).

96. LA. R.S. 9:2821 (1950), originally enacted as La. Acts 1882, No. 4.

97. See *Washington v. Palmer*, 28 So. 2d 509 (La. App. 2d Cir. 1947).

98. LA. CIVIL CODE art. 117 (1870): "The marriage, which has been declared null, produces nonetheless, its civil effect as it relates to the parties and their children, if it has been contracted in good faith."

Id. art. 118: "If only one of the parties acted in good faith, the marriage produces its civil effects only in his or her favor, and in favor of the children born of the marriage."

99. LA. CIVIL CODE art. 136 (1870).

100. *Ibid.*; *cf.* 3 *PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE)* no. 1150 (1959).

for both spouses.¹⁰¹ This termination of civil advantages of a putative marriage would seem to terminate the community, but it is possible that some time could elapse before annulment proceedings or settlement of an estate would reveal the termination. Due to the non-notoriety of the termination, the termination should be without prejudice to rights validly acquired by third parties dealing with the putative community whose termination had not been recognized.¹⁰²

CIVIL DEATH AND GENERAL CONFISCATION

Formerly in the French community system and in the Spanish community system, the punishments of civil death¹⁰³ and general confiscation¹⁰⁴ respectively terminated the community.¹⁰⁵ Civil death, imposed on convicted felons, was a deprivation of all civil rights. It imitated the effects of natural death.¹⁰⁶ General confiscation of all the property of one partner in the community was imposed for high treason and was somewhat akin to civil death. Both methods of punishment were intended to punish the guilty party only.¹⁰⁷ Thus the innocent spouse became a partner with the government until the former community was liquidated.¹⁰⁸ The community was terminated, not so much because both spouses could no longer contribute to the community, but because the civilly dead could not own property or perform any juridical act.¹⁰⁹ The main questions that arose during the existence of civil death were what happened when the civilly dead were granted amnesty and whether it was necessary to have an authentic act re-establish the community or whether it would be re-established automatically.¹¹⁰

101. See *Fulton Bag & Cotton Mills v. Fernandez*, 159 So. 339 (La. App. Orl. Cir. 1935) (dictum). An example would be a situation in which the putative wife of a man with a previously undissolved marriage discovers the impediment and does nothing.

102. The annulment could be retroactive without prejudice to rights validly acquired in the interim. Cf. LA. CIVIL CODE art. 155 (1870).

103. Abolished in France by Law of May 31, 1854 (D.C. 54.4.91).

104. Spanish punishment for high treason was provided for in *NOVISIMA RECOMPILACIÓN* bk. 10, tit. 4, L. 10-11 (1805). I DE FUNLAK, *PRINCIPLES OF COMMUNITY PROPERTY* § 188 (1943): "But such laws have been repealed by Mexico and in Spain."

105. See *ibid.*; 2 TROPLONG, *DROIT CIVIL EXPLIQUÉ, Du contrat de mariage* nos 539-540 (1850).

106. See 2 TROPLONG, *DROIT CIVIL EXPLIQUÉ, Du contrat de mariage* nos 539-540 (1850).

107. *Ibid.*

108. *Ibid.*

109. *Ibid.*

110. *Ibid.*

The question was never definitively answered before civil death was abolished.

INSANITY

Though it has been advocated in several suits,¹¹¹ insanity on the part of one of the spouses cannot be grounds to terminate the community. The community and the marital relationship may be greatly affected by this event, but the proper remedy is interdiction of the party.¹¹² When the husband is the interdict, there should be no problem with respect to the community as long as the wife is appointed curatrix; but if she were not so appointed, and the curator's administration endangered her interest, she might attempt an action for separation of property, though there is no precedent for this action under these circumstances.

RE-ESTABLISHMENT OF THE COMMUNITY

French law has always allowed re-establishment of the community upon reconciliation of the parties separated from bed and board, requiring only an authentic act duly recorded.¹¹³ The Louisiana Civil Code did not initially provide for re-establishment and the courts refused to adopt such a rule.¹¹⁴ In 1944, however, the legislature provided for re-establishment comparable to the authentic act requirement of the French law.¹¹⁵ The re-establishment of the community is effective retroactively to the date of filing suit for judicial separation but without prejudice to rights validly acquired in the interim.¹¹⁶

111. See *Succession of Bothick*, 52 La. Ann. 863, 28 So. 458 (1899); *Hotard v. Hotard*, 12 La. Ann. 145 (1857); 22 LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS nos 230-232 (4th ed. 1887).

112. See note 111 *supra*.

113. FRENCH CIVIL CODE art. 1451.

114. See *Reichert v. Lloveras*, 188 La. 447, 177 So. 569 (1937); *Succession of LeBesque*, 137 La. 567, 68 So. 956 (1915); *American Hoist & Derrick Co. v. Frey*, 127 La. 183, 53 So. 486 (1910); *Crochet v. Dugas*, 126 La. 285, 52 So. 495 (1910); *Ford v. Kittredge*, 26 La. Ann. 190 (1874); *DeBlanc v. DeBlanc*, 18 So. 2d 619 (La. App. Orl. Cir. 1944).

115. LA. CIVIL CODE art. 155, as amended, La. Acts 1944, No. 22: "Upon reconciliation of the spouses, the community may be re-established by the husband and the wife jointly, as of the date of the filing of the suit for separation from bed and board, by an act before a notary and two witnesses, which act shall be recorded in the conveyance records of the parish in which said parties are domiciled."

116. *Ibid.*

It seems that a community terminated by any mode other than separation from bed and board cannot be re-established by authentic act. The language of the re-establishment article, "upon reconciliation of the parties,"¹¹⁷ definitely applies to a separation from bed and board, and it seems unlikely that this language could be interpreted to mean that a couple who had been divorced and remarried could re-establish the community from the date of the suit for divorce. It is remotely possible that the language could be interpreted to allow re-establishment by authentic act of a community terminated by absence. However, on return of the absentee spouse, the marital community probably is re-established by operation of law, as the Code provides termination of provisional possession in such circumstances. Can a community terminated by the wife's successful action for separation of property be re-established by authentic act? It is certainly possible that the financial condition of the husband which provoked the suit may be cured, but the "reconciliation" language of the article seems to make it wholly inapplicable. The action for separation of property is not prompted by an estrangement of the spouses, but only by the peril of the financial interest of the wife; thus a real "reconciliation" is impossible. If re-establishment is desirable in such situation, further legislation seems necessary.

Charles A. Snyder

THE MARITAL FOURTH AND THE WIDOW'S HOMESTEAD

The community property system provides a measure of financial security to the surviving spouse on the death of the other by dividing the community estate into equal shares for the patrimony of each spouse. Such security is insufficient if the community is small or insolvent; hence the lawmaker has provided additional benefits.¹ Two of these benefits are the widow's

117. *Id.* art. 155, as amended, La. Acts 1962, No. 178.

1. These benefits are: the inheritance of the surviving spouse, provided by LA. CIVIL CODE art. 915 (1870); the usufruct of the surviving spouse, provided by *id.* art. 916; the marital fourth, provided by *id.* art. 2382; the widow's homestead, provided by *id.* art. 3252.