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Louisiana Practice - Estoppel - No Right of Action in the Wife for Enforcement of Community Claim

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LOUISIANA PRACTICE — ESTOPPEL — NO RIGHT OF ACTION IN THE WIFE FOR ENFORCEMENT OF COMMUNITY CLAIM

In a suit by a finance company for the balance due on the purchase price of an automobile defendant and previous buyers of the automobile called their immediate vendors in warranty. Among the latter, a used car dealer was called in warranty by a married woman who had purchased the automobile in her own name with community funds. The dealer filed an exception of no right of action alleging that, as the warranty constituted a community asset, the wife was not the proper party to bring the call in warranty. The exception was overruled by the trial court and judgment was rendered for plaintiff against defendant and for each previous owner of the automobile against his immediate warrantor. On appeal, by the used car dealer of the judgment overruling the exception, *held,* affirmed. A vendor dealing exclusively with a married woman, accepting the price which she pays, and warranting the thing sold to her, is estopped from thereafter questioning her right to make the call in warranty. *Home Finance Co. v. Ayala,* 78 So.2d 222 (La. App. 1955).

Article 2404 of the Louisiana Civil Code provides: "The husband is the head and master of the partnership or community of gains; he administers its effects . . . ." It is an axiomatic rule[1] in Louisiana that the wife cannot maintain an action for the enforcement of rights which belong to the community[2] and that the

1. McDaniels v. Dodd, 40 So.2d 530, 532 (La. App. 1949); Hand v. Coker, 11 So.2d 272, 274 (La. App. 1942).

2. Casente v. Lloyd, 68 So.2d 329 (La. App. 1953); McDaniels v. Dodd, 40 So.2d 530 (La. App. 1949); Howell v. Harris, 18 So.2d 668 (La. App. 1944); Hand v. Coker, 11 So.2d 272 (La. App. 1942); Lanza v. DeRidder Coca Cola Bottling Co., 3 So.2d 217 (La. App. 1941); Robinson v. Phoenix Assurance Co., 150 So. 317 (La. App. 1933); Grantham v. Smith, 18 La. App. 519 (1931); Coker v. Harper, 8 La. App. 402 (1928); Brown v. Penn, 1 McGloin 265 (La. 1877); Beigel v. Lange, 19 La. Ann. 112 (1867).

This is true even though the wife is an out-of-state resident bringing suit in Louisiana on a claim which under Louisiana law is a community right, though in her home state she alone would be competent to bring suit. Williams v. Pope Mfg. Co., 52 La. Ann. 1417, 27 So. 851 (1900); see LA. CIVIL CODE art. 2400 (1870).

The "Married Women's Emancipation Acts" made no change in the existing law on this incapacity of the wife to bring suit for the enforcement of a community right. LA. R.S. 9:105 (1950) expressly declares: "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." See Succession of Howell, 177 La. 276, 148 So. 48 (1933); Hellberg v. Hyland, 168 La. 493, 122 So. 593 (1929); Breland v. Great States Insurance Co., 150 So. 313 (La. App. 1933).

husband alone is the proper party to bring suit.[3] Neither the simple consent of the husband[4] nor his joinder in the suit to "aid and authorize" the wife will entitle her to institute the action.[5] Should the wife and the husband join as co-plaintiffs to enforce a community right, the wife will either be dismissed as an unnecessary party[6] or her joinder will be disregarded as surplusage[7] without prejudice to the husband's right to recover. If the wife brings suit and recovery is allowed, the judgment may be reversed.[8] This absence of a right of action in the wife[9] is not confined to the initiation of law suits; it applies equally to the appeal of cases concerning a community claim.[10] It has also been held that the wife has no right to defend suits brought against the community.[11] It may be noted in this regard that other civil

3. Succession of Howell, 177 La. 276, 148 So. 48 (1933); Shield v. F. Johnson & Son Co., 132 La. 773, 61 So. 787 (1913); Holzab v. New Orleans & Carrollton R.R., 38 La. Ann. 185 (1886); Delpido v. Colony, 52 So.2d 720 (La. App. 1951); Reid v. Monticello, 33 So.2d 760 (La. App. 1948); Kientz v. Charles Dennery, 17 So.2d 506 (La. App. 1944); White v. Coca-Cola Bottling Co., 16 So.2d 579 (La. App. 1944).

4. Munch v. Central Laundry Co., 2 La. App. 123 (1925) (husband testified from witness stand that he had authorized his wife to bring suit).

5. Succession of Howell, 177 La. 276, 148 So. 48 (1933); Mitchell v. Dixie Ice Co., 157 La. 383, 102 So. 497 (1925); Fournet v. Morgan's L. & T.R. & S.S. Co., 43 La. Ann. 1202, 11 So. 541 (1891).

6. Prats v. Prats, 77 So.2d 205 (La. App. 1955); Breland v. Great States Insurance Co., 150 So. 313 (La. App. 1933).

7. Williams v. Perloff, 1 La. App. 255 (1925); Cooper v. Cappel, 29 La. Ann. 213 (1877); Brown v. Penn, 1 McGloin 265 (La. 1877); Barton v. Kavanaugh, 12 La. Ann. 332 (1857).

8. Mitchell v. Dixie Ice Co., 157 La. 383, 102 So. 497 (1925); Smith v. Brock, 200 So. 342 (La. App. 1940); Coker v. Harper, 8 La. App. 402 (1928).

9. In many cases the exception taken was that the wife had no "cause or right of action." The proper exception, however, is that the wife has no right of action to enforce a community claim. See Duplain v. Wiltz, 174 So. 652 (La. App. 1937).

10. Ford & Ford v. Brooks, 35 La. Ann. 157 (1883).

11. Suits brought to collect a debt belonging to the community must be brought against the husband: Breaux v. Decuir, 49 So.2d 495 (La. App. 1950); Fairbanks, Morse & Co. v. Bordelon, 198 So. 391 (La. App. 1940); Smithson v. Jones, 130 So. 628 (La. App. 1930); Surls v. Hienn, 20 La. Ann. 229 (1868); and not against the wife: Bruno v. Williams, 76 So.2d 41 (La. App. 1954); Boone v. David, 52 So.2d 563 (La. App. 1951); Anderson v. Edmondson, 8 So.2d 131 (La. App. 1942).

See also Knoblock & Rainold v. Posey, 126 La. 610, 52 So. 847 (1910) (defendant wife found to be agent of the community); Cefalu v. Hollowell, 12 Orl. App. 134 (La. App. 1915) (wife cannot enjoin the seizure and sale of community property).

The wife may, however, bind herself individually for a debt of the community, and hence may be sued on a debt contracted by her for the benefit of the community provided that such contract was in writing and signed by her individually. Mathews Bros. v. Bernius, 169 La. 1069, 126 So. 556 (1930); Howard v. Cardella, 171 La. 921, 132 So. 501 (1931); United Life & Acc. Ins. Co. v. Haley, 178 La. 63, 150 So. 833 (1933). This results from the exclusion of parol evidence to prove the promise to pay the debts or obligation of a third person. LA. CIVIL CODE art. 2278(3) (1870).

law jurisdictions also deny the wife a right of action to enforce a community right.[12]

The justification for these procedural rules is two-fold. The first reason is to recognize the husband's exclusive right to bring suit as head and master of the community, thus preventing unauthorized assertions by the wife of community rights which the husband might find embarrassing or otherwise objectionable.[13] The second is to protect a defendant against the possibility of double recovery.[14] The community being regarded as an entity existing separate and distinct from the identity of the spouses, if the wife were allowed recovery, the husband as head and master would not necessarily be precluded from bringing a second and identical action on behalf of the community.[15] In many cases the courts have overlooked the reasons for these rules and have applied them where there appears to be no justification for doing so. For example, in cases where the husband has joined in the wife's suit for the avowed purpose of aiding and authorizing her to prosecute the claim,[16] the courts have sustained exceptions of no right of action even though it was evident that the husband had authorized the wife's action and that if recovery had been granted he would have been judicially estopped from bringing further suit on the claim as head and master of the community.[17] The effect of the unwarranted application of these rules in such situations is to permit the defendant to hide behind rules of procedure for the purpose of delaying and perhaps discouraging the prosecution of a just claim. As a practical matter,

12. See 9 BAUDRY-LACANTINERIE, COURTOIS & SURVILLE, DU CONTRAT DE MARIAGE 647, no 700 (3d ed. 1906); 9 HUC, COMMENTAIRE DU CODE CIVIL 186, no 164 (1896); 5 MARCADE, EXPLICATION DU CODE CIVIL 565 (8th ed. 1889); CODE CIVIL arts. 1421, 1428 (France); CODIGO CIVIL ESPANOL art. 1412 (1889); CIVIL CODE IN FORCE IN CUBA, PORTO RICO, AND THE PHILIPPINES art. 1412 (U.S. Official Translation 1899); PHILIPPINES CIVIL CODE art. 165 (1949); GERMAN CIVIL CODE of 1900, arts. 1443, 1450 (Wang's transl. 1902). The majority of community property states also adhere to this view. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 358, § 124 (1943).

13. MCMAHON, LOUISIANA PRACTICE 26 (Supp. 1952).

14. *Ibid.*

15. *Ibid.*

16. Thibodeaux v. Star Checker Cab Co., 143 So. 101 (La. App. 1932) (husband and wife joined in suit, but petition asked for community damages only on behalf of the wife); Munch v. Central Laundry Co., 2 La. App. 123 (1925) (husband testified from witness stand that he had authorized wife to bring suit); Succession of Howell, 177 La. 276, 148 So. 48 (1933); Mitchell v. Dixie Ice Co., 157 La. 383, 102 So. 497 (1925) (husband joined wife's suit to "aid and authorize" her to sue); Fournet v. Morgan's L. & T.R. & S.S. Co., 43 La. Ann. 1202, 11 So. 541 (1891) (suit brought by wife which was authorized by the husband "for her use").

17. MCMAHON, LOUISIANA PRACTICE 26 (Supp. 1952).

the two grounds which justify the application of the rule denying the wife a right of action are not present in most litigation. The courts have overruled exceptions of no right of action where the husband has lent his assistance to the wife's suit by joining her in securing an attorney,[18] participating in efforts to reach a compromise of the case before suit is filed,[19] being in attendance[20] or testifying at the trial,[21] or intervening[22] or joining in the suit itself.[23] Under such circumstances both premises on which the procedural rules are predicated are destroyed.[24] It would seem that a similar situation could exist where the husband has knowledge that his wife brought suit, and yet fails to stop her.

In many instances the Louisiana courts have recognized the injustice which may result should the rule denying the wife a right of action be applied. At least four approaches have been used to circumvent its application. In some cases the courts have dealt directly with the problem by simply refusing to apply the rule.[25] In one case the court said: "It is evident that defendant has no interest in making these defenses, for it appears that [the husband] was joined, and that he authorized his wife in

18. Youngblood v. Daily & Weekly Signal Tribune, 131 So. 604 (La. App. 1930).

19. *Ibid.*

20. *Ibid.*

21. Guccione v. New Jersey Insurance Co., 167 So. 845 (La. App. 1936).

22. Succession of Berthelot, 24 So.2d 185 (La. App. 1946).

23. Guccione v. New Jersey Insurance Co., 167 So. 845 (La. App. 1936).

24. The husband's acts not only indicate his approval of the wife's conduct, but also serve as the basis on which he may be estopped from asserting a contrary contention at a later date by the institution of an identical suit for a second recovery.

25. Youngblood v. Daily & Weekly Signal Tribune, 131 So. 604, 606 (La. App. 1930) (husbands joined their wives in the negotiations leading up to their filing, in securing counsel, and participating in discussion looking to a compromise of the case before the suits were filed. The husbands were also present during the entire proceeding. The court held that "under the circumstancs we think a judgment rendered against defendant in these suits would be res judicata and fully protect defendant"); Brumfield v. Louisiana Mutual Benev. Ass'n, 123 So. 408, 409 (La. App. 1929) ("Whether the property lost was separate property of the wife or community property can be of little concern to defendant. A receipt from the wife or the husband or both of them will forever acquit defendant from any further liability on the policy."); Paul v. Arnoult, 164 La. 841, 843, 844, 114 So. 706, 707 (1927) ("Where husband and wife declare [in court] that the property was leased for the sole benefit of the wife, we do not think it lies in the mouth of the defendant to assert the contrary [that property is community property] and thereby defeat a claim which he admittedly owes to the one or other and which would be fully discharged by a payment made therein."). In connection with the above, in the case of Breland v. Great States Insurance Co., 150 So. 313, 315 (La. App. 1933), the court remarked: "In the Brumfield case [*supra*] we [the same court] declined to follow a course that would have resulted in the defeat of a claim that was justly due. In Paul v. Arnoult, the Supreme Court in the same way declined to follow a course that would have resulted in the defeat of a just claim."

suing upon her claim against defendant, and a payment of the claim made to [the wife] would undoubtedly be binding upon the husband."[26] A second approach used by the courts is to find that the wife was acting as the agent of the husband or the community, and in that capacity was competent to bring suit to enforce a community right.[27] In a recent court of appeal case the plaintiff's husband gave his consent on the witness stand that judgment might be rendered in favor of his wife. The court held *ex proprio motu* that "he thus constituted his wife as his agent and he is effectively bound by the judgment and defendant will be amply protected in the matter."[28] Though this appears to be an expeditious means of dealing with the problem, it is of questionable value in light of an early Supreme Court decision which rejected the contention that such authorization should be construed as constituting the wife to be the husband's agent.[29]

Perhaps the most resourceful device to permit the wife to prosecute a community claim has been adopted by the Supreme Court. In a suit by a school teacher for reinstatement and payment of back salary under the provisions of the Teachers Tenure Act, the court permitted the wife to sue by taking the position that even though the salary would become part of the community when paid, the right to recover the salary was personal to the wife and stemmed from her status as a teacher under a special law.[30] The court's classification of the wife's right of action as personal in order to support her right to bring suit is perhaps

26. Sarrett v. Globe Indemnity Co., 123 So. 191 (La. App. 1929).

27. Both before and after the legal emancipation of married women, the capacity of the wife to act as mandatory for the husband or for the community has been recognized. Succession of Brown, Manning Unreported Cases 216 (La. 1877-1880); Perfection Garment Co. v. Lansas, 7 La. App. 31 (1927). In 1944, this capacity of the wife was codified into the positive law by amendment to article 1787 of the Civil Code of 1870. See La. Acts 1944, No. 49, p. 126. At that time one author commented upon the supposed effect of this amendment and took the position that "all the wife now needs is the authorization of her husband to bring suit for her wages, and it would appear that such authorization as that granted by the husband in Succession of Howell [177 La. 276, 148 So. 48 (1933)] would be sufficient, as would any authorization to create an agency." Oppenheim, *The Significance of Recent Louisiana Legislation Concerning the Marital Community — Louisiana Acts 49 and 286 of 1944*, 19 TUL. L. REV. 200, 209 (1945). This position seems unsound. In view of the prior jurisprudence on the subject, the better view, it is believed, is probably that this amendment made no change in the existing substantive law.

28. Anderson v. Simmons, 75 So.2d 34, 36 (La. App. 1954).

29. Mitchell v. Dixie Ice Co., 157 La. 383, 102 So. 497 (1925); see Munch v. Central Laundry, 2 La. App. 123 (1925).

30. State v. Rapides Parish School Board, 227 La. 290, 79 So.2d 312 (1955). It is to be noted that in this case the court expressly overruled the case of Riche v. Ascension Parish School Board, 200 So. 681 (La. App. 1941), in which an identical claim was rejected on grounds of lack of right in the wife to prosecute a community claim.

more tenuous than real, but it lends itself well as a device to prevent the delay or possible discouragement of a just claim. A fourth approach by which the courts permit the wife to sue is to find that previous conduct of the defendant has estopped him from entering an exception of no right of action as a defense. Thus a defendant who defeated the claim of both spouses in one suit, by claiming that the property involved was the separate property of the wife, was estopped in a second suit brought by the wife alone from claiming that the same property belonged to the community.[31] The failure of the plaintiff to plead estoppel is not necessarily fatal, for the court may interject it on its own motion.[32]

In the instant case the court found that the conduct of the used car dealer estopped him from questioning the wife's right to prosecute a community claim. The court's use of estoppel is representative of the fourth method by which the courts protect the wife against the unwarranted application of the rule denying the wife a right of action. However, it is unwise for counsel to rely upon the court to afford the wife this protection. If the suit is for the prosecution of a community claim, the husband should be made plaintiff. If the nature of the claim is in doubt, counsel for plaintiff should take the precaution of alternative pleading. For example, suit may be brought in the name of the wife, or in the alternative in the name of the husband if the property or right be found to belong to the community.[33] In suits involving both a personal injury claim of the wife, and a claim for medical expenses incident thereto (which falls into the community), both spouses should join in the suit, the wife suing for recovery of her personal injury claim, and the husband bringing suit for the recovery of the medical expenses.[34] If error has been made in the selection of the wife as the proper party plaintiff, and even if the wife can no longer amend her petition, it has been held that the husband may correct the situation by filing an intervention in the suit to join the wife as co-plaintiff in asserting the claim.[35]

31. Guccione v. New Jersey Insurance Co., 167 So. 845 (La. App. 1936).

32. See LA. CODE OF PRACTICE art. 320 (1870); Home Finance Co. v. Ayala, 78 So.2d 222, 225 (La. App. 1955).

33. Pleading in the alternative is expressly sanctioned in Smith v. Donnelly, 27 La. Ann. 98 (1875). The nearest case found applicable to this situation is Wells v. Davidson, 149 So. 246 (La. App. 1933).

34. This joinder has been approved in Peninger v. Cox, 125 So. 754 (La. App. 1930); *cf.* Thibodeaux v. Star Checker Cab Co., 143 So. 101 (La. App. 1932) (though joined in the suit the husband was disallowed recovery for medical expenses when he failed to pray therefor).

35. Succession of Berthelot, 24 So.2d 185 (La. App. 1946).

The burden imposed by hypertechnical procedure and the injustices which often result call for a re-examination of this phase of our procedure and the formulation of more workable rules.

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LOUISIANA PRACTICE — WAIVER OF RIGHT TO CLAIM ABANDONMENT

After a ten-year delay in the prosecution of the suit, defendant filed a motion requesting the court to order plaintiff to post bond as security for court costs. Three days later defendant filed another motion asking that the suit be dismissed for reason that plaintiff had permitted more than five years to elapse without having taken any steps in the prosecution. On appeal by plaintiff from judgment of dismissal to the Orleans Court of Appeal, *held,* reversed. The defendant, by filing a motion requesting the court to order plaintiff to post bond for court costs, expressed a willingness to proceed with the trial, and thus waived its right to invoke a plea of abandonment based on five years non-prosecution. *State* ex rel. *Fred Shields v. Southport Petroleum Corp.*, 78 So.2d 201 (La. App. 1955).[1]

The filing of suit in a court of competent jurisdiction operates to interrupt prescription of a cause of action.[2] Article 3519 of the Civil Code provides that this interruption will be considered as never having occurred if plaintiff allows five years to elapse without having taken any "steps in the prosecution" of the suit.[3] A step in the prosecution is "some *formal* move before

1. A companion case now pending before the Supreme Court is State *ex rel.* Shields, Inc. v. Southport Petroleum Corp., 78 So.2d 201 (La. App. 1955). The court of appeal transferred this case to the Supreme Court for lack of jurisdiction.

2. LA. R.S. 9:5801 (1950): "The filing of a suit in a court of competent jurisdiction shall interrupt all prescriptions affecting the cause of action therein sued upon, against all defendants, including minors and interdicts." See LA. CIVIL CODE art. 3518 (1870).

3. LA. CIVIL CODE art. 3519 (1870), *as amended*, La. Acts 1954, No. 615, p. 1119: "If the plaintiff in this case, after having made his demand, abandons or discontinues it, the interruption shall be considered as having never happened.

"Whenever the plaintiff having made his demand shall at any time before obtaining final judgment allow five years to elapse without having taken any steps in the prosecution thereof, he shall be considered as having abandoned the same.

"Any appeal, now or hereafter pending in any appellate court of the State, in which five years have elapsed without any steps having been taken in the prosecution thereof, shall be considered as abandoned, and the court in which said appeal is pending shall summarily dismiss such appeal." See Note, 3 LOUISIANA LAW REVIEW 835 (1940).