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Settlement of Community Rights

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The power of the husband to donate movables by particular title is the primary source of potential injury to the wife. This power has been too liberally interpreted to provide an effective balance between the rights of the wife and the discretion necessary for the husband to administer the community, particularly in modern times when the greatest wealth consists of movable property.

Alterations in the present system of control and management of the community should be carefully weighed in light of two considerations: as the husband and his separate estate are liable for community debts even after termination of the community, he should have sufficient discretion to administer it effectively; the wife does not need protection against the bona fide acts of her husband as she can absolve herself from his mismanagement by renouncing the community on its termination.

Autley B. Newton

SETTLEMENT OF COMMUNITY RIGHTS

In the Louisiana community property system, most property acquired during marriage is held by the conjugal partnership or community of acquets and gains, rather than by the spouses in their individual capacities.¹ Thus, upon the community's termination, there must be some sort of settlement so that the spouses or their heirs may receive their appropriate shares. Generally, a settlement entails computation of the total value of the community assets, subtraction of the community debts outstanding, and division of the residue between the former husband and wife, or their heirs.

SETTLEMENTS — JUDICIAL OR CONVENTIONAL

Although the law contemplates that there shall be a liquida-

1. LA. CIVIL CODE art. 2332 (1870): "The partnership, or community of acquets or gains, needs not to be stipulated; it exists by operation of law, in all cases where there is no stipulation to the contrary. But the parties may modify or limit it; they may even agree that it shall not exist."

Id. art. 2399: "Every marriage contracted in this State, superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary."

See also *id.* arts. 2334, 2404: Comments, 25 LA. L. REV. 95 (1964).

tion of the community after its dissolution,² Louisiana law prescribes no detailed procedure by which this liquidation is to be effected in all cases. If all interested persons concur, frequently the community may be settled without judicial proceedings.³ If the interested persons cannot agree, judicial proceedings are necessary.

JUDICIAL SETTLEMENTS

Judicial settlement may be required in two distinct situations. The first situation arises when the community is terminated by the death of one spouse. In such case the Code of Civil Procedure contemplates that the community shall be settled in the succession proceedings.⁴ The surviving spouse must petition to be put in possession of his half of the community.⁵ Frequently the petition for possession is simply a formality, but the surviving spouse is entitled to immediate possession only if the succession is relatively free from debt.⁶ If the succession requires administration, the succession representative, not the surviving spouse, is entitled to corporeal possession of all property of the community.⁷ These rules imposed by the Code of Civil Procedure are based on practical considerations. The Louisiana inheritance tax statute requires most successions to be opened judicially.⁸ Convenience and economy recommend settle-

2. *Tomme v. Tomme*, 174 La. 123, 128, 139 So. 901, 903 (1932): "The law contemplates that there shall be a liquidation, a settlement of the community affairs after its dissolution, without which there is no way of ascertaining the new value thereof. Under no theory can it be said that the former husband owes his divorced wife anything unless a liquidation of the community shows some net amount remaining in his hands after the property is disposed of and the debts are paid."

3. *E.g.*, *Saunier v. Saunier*, 217 La. 607, 47 So.2d 19 (1950); *Haddad v. Haddad*, 120 La. 218, 45 So. 109 (1907). No cases were found holding that there could be a conventional settlement after the death of one spouse, thus it seems probable that a conventional settlement is possible only when the community is dissolved during the lives of the spouses.

4. LA. CODE OF CIVIL PROCEDURE arts. 3001-3004, 3031 (1960).

5. *Id.* art. 3001. The judgment of possession is required because of the Louisiana inheritance tax statute [see note 8 *infra*], and not because of the substantive law of community property.

6. *Ibid.*

7. *Cf. id.* arts. 3004, 3211; *Simpson v. Colvin*, 138 So.2d 438 (La. App. 3d Cir. 1962).

8. LA. R.S. 47:2413 (1950), as amended by La. Acts 1960, No. 35, § 1, provides: "A. It is unlawful for any heir, legatee or other beneficiary of a donation mortis causa to take or be in possession of any part of the things or property comprising the inheritance, legacy or other donation, or to dispose of the same or any part thereof, until he has obtained the authority of the court to that effect, except as provided in R.S. 47:2410; and in case he shall so take or be in possession or shall so dispose of such things or property, or any part thereof, he shall no longer have the right of renouncing the inheritance or donation

ment of the community in the same proceedings as the succession. If the succession has relatively large debts, sale of property may be necessary.⁹ The deceased spouse's half interest in this community is subject to sale to satisfy the debts. Since that half interest is an undivided interest, it follows that the succession representative should be entitled to possession of the entire community pending complete settlement of the succession.

Secondly, judicial settlement is necessary when the community is terminated while both spouses are still alive and an amicable settlement cannot be agreed on. In this case only a suit to partition the community, but no administration similar to succession proceedings, is contemplated.¹⁰ The Louisiana Code of Civil Procedure provides that the suit to partition the community property may be brought either as an incident of the action which would result in a dissolution of the community, or as a separate action.¹¹ However, the suit must be brought to

mortis causa, and shall remain personally liable for the tax thereon; but he may, without waiting for authority, do any acts that may seem necessary to preserve the property from waste, damage or loss.

"B. Unless the tax due under this Part has been paid, or unless it is determined judicially in the manner prescribed herein that no tax is due: (1) no bank, banker, trust company, warehouseman, depository, or other person having on deposit, or having possession or control of, any money, credits, goods, or other things or rights of value which belonged to a deceased person, or in which the latter had an interest, shall deliver any such money or property to any heirs or legatees of the deceased person; and (2) no corporation shall transfer to any heirs or legatees of a deceased person any stock or registered bonds of such corporation which were owned by the deceased person. Except as provided hereinafter, any person or corporation so making delivery or transfer shall be liable for the tax.

"A person or corporation may deliver or transfer money or property which belonged to a deceased person, without incurring any liability for the tax due under this Part, to: (1) the succession representative of the deceased who submits a certified copy of the letters issued to him by a court of competent jurisdiction; or (2) the surviving spouse, heirs, or legatees of the deceased who submit a certified copy of the judgment of possession rendered by a court of competent jurisdiction which evidences their right to the possession of the money or property so delivered or transferred. A certified copy of such a judgment of possession constitutes full proof of the payment of all taxes due under this Part, or that no such tax is due"

9. LA. CODE OF CIVIL PROCEDURE art. 2951 (1960): "No judgment of possession shall be rendered, no inheritance or legacy shall be delivered, and no succession representative shall be discharged unless satisfactory proof has been submitted to the court that no inheritance taxes are due by the heirs or legatees, or that all such taxes have been paid, or that the maximum amount claimed by the inheritance tax collector has been deposited in the registry of the court pending judicial determination of the amount due."

10. LA. CODE OF CIVIL PROCEDURE art. 3261 (1960).

11. The probable reason for not requiring an administration when the community is terminated for a cause other than death is that the inheritance tax statute is not applicable; it is probably more economical to settle the community without an administration.

11. LA. CODE OF CIVIL PROCEDURE art. 82 (1960): "Except as otherwise pro-

liquidate the whole community; it cannot be partitioned in a piecemeal fashion.¹² Since there are no further procedural statutes applicable, once the suit is properly instituted, the court is relatively free to prescribe the particular method by which the settlement is to be effected. Generally, the court will order the taking of an inventory and then divide the property in accordance with the provisions for the partition of property in general.¹³ In case the judgment inadvertently omits some community property, a later suit pertaining to property not included in the first can still be maintained.¹⁴

It is uncertain by what method the court may divide a community composed of several pieces of property when it would be highly prejudicial to one spouse to divide his interest in a spe-

vided in the second paragraph of this article, an action to partition community property shall be brought either as an incident of the action which would result in a dissolution of the community, or as a separate action in the parish where the judgment dissolving the community was rendered.

"If the community owns immovable property, the action to partition the community property, movable and immovable, may be brought in the parish where any of the immovable property is situated."

White v. White, 153 La. 313, 95 So. 791 (1923) held that an action for partition could be included in a suit for separation from bed and board.

See also LA. CODE OF CIVIL PROCEDURE arts. 3001-3004, 3031, 3462 (1960), which allow the surviving spouse of an intestate to be recognized by the court on an ex parte petition as entitled to the possession of an undivided half of the community property, and of the other undivided half to the extent that she has the usufruct thereof, without an administration of the succession, when the community is accepted and the succession is relatively free of debt.

12. *Daigre v. Daigre*, 230 La. 472, 477, 89 So. 2d 41, 43 (1956): "If partial partition of communities or of partnerships is permitted it would foster multiplicity of actions and protract the liquidation of such communities and partnerships. In fact, the liquidation of a community could by such means be delayed over a period of years." The court further stated that "to permit piecemeal partition of this community would hamper and delay the liquidation of this community and the same rule would govern this community partnership that governs ordinary partnerships. These rules expedite the liquidation of the partnerships. Moreover, it would be impossible for this Court to give the plaintiff a money judgment against the defendant because after the debts are paid, if any, it may be that her interest in the community would be less than the amount prayed for." *Id.* at 482, 89 So. 2d at 45.

13. See *Rhodes v. Rhodes*, 190 La. 370, 182 So. 541 (1938).

14. *Adkins v. Cason*, 170 So. 366 (La. App. 2d Cir. 1936). In the second suit the court based its holding on the fact that prior court had not given any consideration to the property involved: "We are convinced that the court did not give consideration to the property herein involved in ordering a partition of the effects of the community. The fact that no inventory whatever is contained in the record of the separation suit and that all of the proceedings, including the judgment, are silent with reference to real estate, is the basis for this conviction. If the question of ownership of the property had been in contest therein, certainly an adjudication on its title would have been shown in the court's decree. Taking cognizance of the principle that the plea of *res judicata* is *stricti juris*, and being of the opinion that a partition of the litigated interest was not an object of the judgment in the separation suit, we must necessarily hold that Mrs. Cason did not lose the rights, by reason of such judgment, which she herein asserts." *Id.* at 371.

cific piece of property. For example, assume that the community has a 60 percent interest in a business established during marriage and managed by the husband; that the interest is presently worth \$50,000; and that there is \$50,000 worth of other community property remaining after the payment of debts on the date of dissolution. Is the wife entitled to demand half of the interest in the business and thus destroy the husband's majority control, or can she be required to take \$50,000 in other community property? There are some indications in the jurisprudence that the wife can demand a half interest in each specific piece of community property remaining on dissolution of the community.¹⁵ This position is consistent with judicial pronouncements that the spouses are considered owners in indivision of the community property after the community terminates.¹⁶ But in extreme cases in which one spouse would be unnecessarily prejudiced, it is submitted that the courts should have discretion to divide the community in an equitable manner. For example, in the circumstances just indicated the wife would gain nothing by forcing the husband to divide the business interest with her, while the husband would lose his control of the business. A court should be able to order the wife to take other community property of equivalent value and allow the husband to keep the business intact.

CONVENTIONAL SETTLEMENTS

Conventional settlement, in which the spouses contractually divide the community, is the other basic method of liquidation.¹⁷ The spouses can adopt any basis of settlement they choose after termination of the community.¹⁸ Although contracts between

15. The statement was made in *Miller v. Blackwell*, 142 La. 571, 573, 77 So. 285, 286 (1918) that "upon the death of the wife the property of the community devolved upon her heirs and surviving husband in indivision, which means that each owned her or his proportionate interest in the most remote atom of which that property was composed." In the recent case of *Succession of Heckert*, 160 So. 2d 375, 381 (La. App. 4th Cir. 1964), where the forced heirs were claiming the deceased wife's share of the community, the court upheld the forced heirs claim and stated that "petitioners did not merely own a certain number of shares in the stock of S. H. Kress and Co., but actually owned one-half of each of the certificates."

16. It has often been held that when there is a judgment dissolving the marriage, the parties become co-owners in indivision of the property which belonged to the matrimonial community and either spouse has the right to provoke a judicial partition of this property. See, e.g., *Daigre v. Daigre*, 230 La. 472, 89 So. 2d 41 (1956); *Giglio v. Giglio*, 159 La. 46, 105 So. 95 (1925).

17. In cases where the community is terminated by death, it is unlikely that a conventional settlement is possible. See note 3 *supra*.

18. See *Haddad v. Haddad*, 120 La. 218, 45 So. 109 (1907).

husband and wife are generally prohibited, transfers of property to settle the marital community after its termination are permitted contracts.¹⁹

Once the parties consummate a valid contract with full knowledge of the pertinent facts, they are prevented from making a claim against the other based on any matter included within the terms of the settlement.²⁰ The courts, however, have subjected conventional settlements to close scrutiny due to the advantages the husband as head and master of the community has over the wife during marriage.²¹ Since the property is under the husband's supervision and control, and he is able to deal with it without the wife's knowledge and consent, he is likely to be more familiar with the true value of the community

19. LA. CIVIL CODE art. 1790 (1870) provides: "Besides the general incapacity which persons of certain descriptions are under, there are others applicable only to certain contracts, either in relation to the parties, such as a husband and wife . . . whose contracts with each other are forbidden . . ."

Id. art. 2446 contains certain exceptions: "A contract of sale, between husband and wife, can take place only in the three following cases: (1) When one of the spouses makes a transfer of property to the other, who is judicially separated from him or her, in payment of his or her rights. (2) When the transfer made by the husband to his wife, even though not separated, has a legitimate cause, as the replacing of her dotal or other effects alienated. (3) When the wife makes a transfer of property to her husband, in payment of a sum promised to him as a dowry. Saving, in these three cases, to the heirs of the contracting parties, their rights, if there exist any indirect advantage." See *Guillot v. Guillot*, 141 La. 86, 74 So. 704 (1917).

20. *Mayer v. Hill*, 161 So. 208, 209 (La. App. Cir. 1935): "The record leaves no doubt that a full and complete settlement was intended by the parties and it necessarily results that, when that settlement was consummated, if each of the parties had full knowledge of all pertinent facts, that settlement fully estops either to make claim against the other on any matter which was intended to be included in and precluded by that settlement." Settlement contracts were also approved in *Saunier v. Saunier*, 217 La. 607, 47 So. 2d 19 (1950) and *Haddad v. Haddad*, 120 La. 218, 45 So. 109 (1907).

21. See *Lee v. Lee*, 214 La. 434, 441, 38 So. 2d 66, 68 (1948): "We must bear in mind that the parties to this contract or agreement were not strangers dealing with each other at arm's length, but had the relationship of husband and wife to each other. Mr. Lee, as head and master of the community, was in a position to sell and dispose of the community property without the knowledge and consent of his wife. The property was under his supervision and control, and, with the advantage which this position gave to him, he practically, if not positively, coerced his wife to accept the settlement, knowing full well at the time that he had withheld from her the true value of the property belonging to the community and also knowing that she had been forced into a position, without the benefit of counsel, of accepting a settlement subject to his own terms. In our opinion, under the circumstances in this case the husband did not discharge his duty to deal fairly and justly with his wife." Further in its opinion the court said that "since they are husband and wife, and since the husband by virtue of his superior position may compel his wife to settle the community for less than her share, this court will scrutinize such contracts with the utmost care in order to ascertain whether he has coerced his wife by any circumstances into signing an unfair settlement agreement." *Id.* at 442, 38 So. 2d at 69.

assets and the extent of the community liabilities.²² Accordingly, successful attacks on such contracts have been based on fraud,²³ error,²⁴ and lesion,²⁵ with the court applying these concepts in a somewhat lenient manner. Thus, one court placed the burden of proof on the husband to explain what had happened to all community property shown by his books to have been in his possession a few months prior to the dissolution of the community when the property was not mentioned in the contract.²⁶ In another case in which the wife transferred her interest in the community for the husband's promise to pay the community debts,²⁷ the court considered it immaterial whether there was fraud or mistake because the wife had received no consideration for the agreement.²⁸ Finally, the court in a recent case based a finding of error on the fact that the wife was an elderly lady, unable to read and write, and inexperienced in business or financial matters.²⁹

As would be expected, when a settlement contract is rescinded, the community is considered as if no settlement had been made and is again open for liquidation.³⁰ The parties are

22. *Ibid.*

23. *Lee v. Lee*, 214 La. 434, 38 So. 2d 66 (1948).

24. *Bruyninckx v. Woodward*, 217 La. 736, 47 So. 2d 478 (1950). In this case the defendant contended that the plaintiff could annul the contract she entered in settlement of her community rights only if the plaintiff could prove fraud or misrepresentation. The court rejected this contention stating, "The first proposition of defendants is not at all impressive as plaintiff's evidence is most convincing that, aside from any misrepresentations, she was acting under an error of fact and law when she executed the so-called contract in full settlement of her community interest." *Id.* at 744, 47 So. 2d at 481. *Accord*, *Berry v. Franklin State Bank & Trust Co.*, 186 La. 623, 173 So. 126 (1937).

25. *Beatty v. Vining*, 147 So. 2d 37 (La. App. 2d Cir. 1962). The court held that a wife who received approximately \$9,900 in movable and immovable property and cash at the time she entered into a voluntary partition of community assets, leaving the husband with property valued at approximately \$105,000, sustained such lesion as entitled her to a rescission of the partition contract.

26. See *Hill v. Hill*, 115 La. 489, 39 So. 503 (1905).

27. This type of bilateral contract should be distinguished from the wife's right to renounce the community by a unilateral act in order to relieve herself of liability for community debts. See LA. CIVIL CODE art. 2410 (1870).

28. *Berry v. Franklin State Bank & Trust Co.*, 186 La. 623, 633, 173 So. 126, 129 (1937): "[I]t manifestly appears that, whether Mr. Berry intended to practice fraud upon his divorced wife or whether he was mistaken as to the amount of debts which he owed and the value of the property, Mrs. Berry relinquished her interest in a valuable estate for no consideration whatever." Certainly, the husband's promise to pay the debts was a consideration, or more technically a valid cause, sufficient to support the contract.

29. *Bruyninckx v. Woodward*, 217 La. 736, 47 So. 2d 478 (1950).

30. See *Berry v. Franklin State Bank & Trust Co.*, 186 La. 623, 639, 173 So. 126, 132 (1937): "The purpose of the contract entered into by plaintiff and T. V. Berry after the divorce was granted was to settle the community affairs. That contract being null and void, it follows that there has been no settlement of the community and that it remains open for settlement."

required to restore all property received under the contract if they still own it.³¹ Good faith purchasers cannot be affected.³² However, according to one court, the aggrieved party is entitled to a personal judgment against the other for half the market value of the property as of the date of the contract.³³ Use of the date of the contract for valuation purposes can be questioned in cases in which the date of dissolution differs from the date of the contract. In such a case the value on the date of dissolution should control as the contract is considered null and of no effect.³⁴

DIVISION OF COMMUNITY

Article 2406 of the Civil Code provides the basic rule that "the effects which compose the partnership or community of gains or divided into two equal portions between the husband and the wife, or between their heirs, at the dissolution of the marriage."³⁵ Thus, for the purpose of settlement community property must be distinguished from separate property, as article 2406 applies only to community property.³⁶

The liquidation of the community depends upon the condition of the community at the date of dissolution.³⁷ In con-

31. See *Ruffino v. Hunt*, 234 La. 91, 103, 99 So.2d 34, 39 (1958): "Since this first settlement was void, the parties were required to restore to the community all property received under it."

32. See *Beatty v. Vining*, 147 So.2d 37, 50 (La. App. 2d Cir. 1962): "Where property acquired by one of the parties in an act of partition has been sold prior to the institution of an action for a rescission, the original vendee has a personal responsibility to the vendor. Where a husband sold a portion of property received in a partition of a community estate, an action by the former wife for a rescission of the partition is limited to the property the husband acquired in the partition and of which he remained the owner. An action to rescind, because of lesion, does not extend to good-faith purchasers. The aggrieved party is, however, entitled to a personal judgment against the other for one-half of the market value of the property so sold, evaluated as of the date of partition."

33. *Ibid.*

34. *Berry v. Franklin State Bank & Trust Co.*, 186 La. 623, 173 So. 126 (1937).

35. LA. CIVIL CODE art. 2406 (1870).

36. See Comment, 25 LA. L. REV. 95 (1964). One of the basic articles involved in the settlement of community rights is LA. CIVIL CODE art. 2408 (1870), which provides, "When the separate property of either the husband or the wife has been increased or improved during the marriage, the other spouse, or his or her heirs, shall be entitled to the reward of one half of the value of the increase or ameliorations, if it be proved that the increase is due only to the ordinary course of things, to the rise in the value of property, or to the chances of trade." This article has been omitted from direct consideration in this Comment, due to the fact two recent articles have thoroughly covered it. See Huie, *Separate Claims to Reimbursement from Community Property in Louisiana*, 27 TUL. L. REV. 143 (1953); Comment, 73 TUL. L. REV. 506 (1963).

37. *Bartoli v. Huguenard*, 39 La. Ann. 411, 418, 2 So. 196, 198 (1887): "The

formity with this principle, it was held prior to the amendment to article 155³⁸ that the value placed on community property in an inventory at the time of suit for separation must yield to the actual value of the property at the date of separation, as the dissolution did not occur until separation.³⁹ Article 155 now makes the judgment of separation retroactive to the date the petition was filed.⁴⁰ But the amendment should not affect an inventory taken voluntarily prior to suit for separation: it should yield to the value of the community property at the time the suit was filed. The date of dissolution is also important because the property that is included within the community at that time is subject to the payment of community debts and the residue is divided between the spouses.⁴¹

When community property has been alienated prior to the date of dissolution, the property itself should not be considered directly in the settlement, although the proceeds derived from the sale may be used in calculating the balance of community assets over liabilities.⁴² The effect given the proceeds derived from the sale depends on whether they have been disposed of prior to the date of dissolution. If they have been consumed by the community,⁴³ they would not be directly included in the settlement; but if the proceeds have not been disposed of, they would be a community asset to be divided equally between the

partition and settlement of the community must be predicated upon the condition of things at the date of dissolution. Whatever property there is remaining at that date is subject to the payment of community debts, and the residue may be divided between the spouses."

38. LA. CIVIL CODE art. 155 (1870), as amended by La. Acts 1962, No. 178, § 1, provides: "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 retroactive effect shall be without prejudice (a) to the liability of the community for the attorneys' fees and costs incurred by the wife in the action in which the judgment is rendered, or (b) to rights validly acquired in the interim between commencement of the action and recordation of the judgment. . . ."

39. *Klienpeter v. Klienpeter*, 198 So. 413 (La. App. 1st Cir. 1940).

40. See note 38 *supra*.

41. *E.g.*, *Bartoli v. Huguenard*, 39 La. Ann. 411, 2 So. 196 (1887); *Washington v. Palmer*, 213 La. 79, 34 So. 2d 382 (1948).

42. See *Succession of Webre*, 49 La. Ann. 1491, 1494, 22 So. 390, 392 (1897), where the court said: "Property disposed of at the date of dissolution of the community should not directly figure as an item of debit or credit, although it may enter into an account as an item, and be considered in fixing balances of profits or balances of losses of the community."

43. In case the proceeds were consumed by the separate estate of one of the spouses, the community may have a claim for reimbursement under LA. CIVIL CODE art. 2408 (1870). See *Huie, Separate Claims to Reimbursement from Community Property in Louisiana*, 27 TUL. L. REV. 143 (1953); Comment, 37 TUL. L. REV. 506 (1963).

former spouses. For example, if a community immovable is sold during marriage, the proceeds belong to the community to be divided by the spouses on dissolution; but if these proceeds are partly or wholly consumed by the community before dissolution, the consumed portion would not affect the settlement.

Article 2407 of the Civil Code provides for the equal division of separately owned cattle in gestation, and of "the fruits hanging by the roots" on the lands belonging separately to either the husband or the wife, at the time of the dissolution of the marriage.⁴⁴ The court has allowed the deduction of the necessary expenses of cultivating the crop by the person who incurred them before the division.⁴⁵

PAYMENT OF DEBTS

In the partition of the community, both husband and wife are equally liable for their share of the community debts contracted during marriage and not acquitted at the time of its dissolution.⁴⁶ The wife is able to relieve herself of liability for the community debts by renouncing the community,⁴⁷ or she may limit her liability by accepting under benefit of inventory.⁴⁸ These debts must be paid before the community property can be distributed.⁴⁹ Since the Civil Code does not elaborate on the obligation to discharge community debts after dissolution of the community, the courts have invented the concept of a fic-

44. LA. CIVIL CODE art. 2407 (1870): "The fruits hanging by the roots on the lands belonging separately to either the husband or the wife, at the time of the dissolution of the marriage, are equally divided between the husband and the wife or their heirs. It is the same with respect to the young of cattle yet in gestation." This article has been applied to crops growing at the time of dissolution. *Harrell v. Harrell*, 12 La. Ann. 549 (1857); *Wilcox v. Henderson*, 9 La. Ann. 347 (1854); *Rosata v. Cali*, 4 So. 2d 54 (La. App. 1st Cir. 1941).

45. *In re Jones*, 41 La. Ann. 620, 6 So. 180 (1889).

46. LA. CIVIL CODE art. 2409 (1870): "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." See *Washington v. Palmer*, 213 La. 79, 34 So. 2d 382 (1948) and LA. R.S. 9:2821 (1950).

47. LA. CIVIL CODE art. 2410 (1870).

48. LA. R.S. 9:2821 (1950); *Washington v. Palmer*, 213 La. 79, 34 So. 2d 382 (1948).

49. *E.g.*, *Tomme v. Tomme*, 174 La. 123, 139 So. 901 (1932); *Bartoli v. Huguenard*, 39 La. Ann. 411, 2 So. 196 (1887). This restriction on the distribution of property before the payment of debts is probably limited to judicial settlements. No cases were found which annulled a conventional settlement because the property was distributed before the debts were paid. In such a case the creditor's remedy would be against each of the former spouses individually. See Comment, 25 LA. L. REV. 201 (1964) for a discussion of the rights of community creditors.

titious community which exists after the termination of the actual community in order that the debts may be paid.⁵⁰ The concept of the fictitious community allows community debts to be satisfied out of the mass of assets owned by the community at the time of its termination and provides a reasonable mode of liquidating community liabilities.

Administration of the fictitious community is somewhat uncertain. It has been held that the death of the wife does not deprive the husband of the right to make bona fide settlements for the payment of community debts.⁵¹ This right may be available only to the husband who is personally liable for the community debts and not to the wife who has the privilege of accepting or renouncing the community and the debts which go with it.⁵² Consistent with this point of view is the holding that the husband can have community property sold at public sale after dissolution to pay community debts.⁵³ If in settling the community the husband pays community debts with his separate funds, he is entitled to reimbursement for half the amount paid.⁵⁴

In some cases it is difficult to determine whether certain borderline expenses were a debt of the community or a debt of

50. *E.g.*, *Washington v. Palmer*, 213 La. 79, 34 So. 2d 382 (1948); *Newman v. Cooper*, 46 La. Ann. 1485, 16 So. 481 (1894); *Succession of Dumestre*, 42 La. Ann. 411, 7 So. 624 (1890). See Comment, 25 LA. L. REV. 241 (1964).

51. *Rusk v. Warren*, 25 La. Ann. 314 (1873).

52. *Hawley v. Crescent City Bank*, 26 La. Ann. 230, 232 (1874): "Upon the dissolution of the community by the 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 the dissolution. It is but just that he should have those powers. The community property continues under his control until the debts are paid. Until their final settlement and discharge, the heirs have no absolute rights to the property of the community that can be legally recognized. Their interest in it continues contingent and uncertain, until by the result of the final discharge of all the obligations of the community, it is known whether or not there are assets remaining for partition between the survivor and the heirs of the deceased spouse."

Several cases have indicated that the wife may, after the husband's death, use community property to pay community debts. See *Saloy v. Chexnaidre*, 14 La. Ann. 567 (1859); *Succession of Pratte*, 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).

53. *Elizardi v. Kelly*, 115 La. 712, 39 So. 851 (1905).

54. *Phillips v. Phillips*, 176 La. 983, 147 So. 53 (1933).

the separate estate of one of the spouses. The costs of settling the community,⁵⁵ the attorney's fees in a suit for separation or divorce,⁵⁶ and the expenses of last illness⁵⁷ have all been held to be debts of the community. However, funeral expenses are not community obligations and thus must be paid out of the deceased's separate estate.⁵⁸

Article 150 of the Civil Code limits the rights of the husband in separation cases by providing: "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 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."⁵⁹ In two recent court of appeal decisions it was held that article 150 distinguished between the contracting of a debt, and an alienation.⁶⁰ According to these cases, any debts contracted after the suit for separation is filed are unlawful whether contracted with a fraudu-

55. *Ibid.*; *Vicknair v. Terracina*, 168 La. 417, 122 So. 276 (1929).

56. *Vicknair v. Terracina*, 168 La. 417, 122 So. 276 (1929); *Bryan v. Stirling*, 170 So. 500 (La. App. 1st Cir. 1936).

57. *Maggio v. Papa*, 206 La. 38, 18 So.2d 645 (1944).

58. *E.g.*, *Maggio v. Papa*, 206 La. 38, 18 So.2d 645 (1944); *Succession of Pizzati*, 141 La. 645, 75 So. 498 (1917); *Womack v. McCook Bros. Funeral Home*, 192 So. 756 (La. App. 2d Cir. 1939).

59. LA. CIVIL CODE art. 150 (1870). In the case of *Gastauer v. Gastauer*, 143 La. 749, 79 So. 326 (1918), a note and mortgage were executed by the husband after he had brought suit for divorce and discontinued it. The wife contended that the purpose of the discontinuance was to relieve the husband from the limitations imposed by article 150. The court held: "[N]o matter what may have been the motive of the discontinuance the suit was none the less discontinued, and that, a divorce suit being no longer pending, the disability incident to the pendency of such a suit no longer existed." *Id.* at 752, 79 So. at 327. In the case of *Sciambra v. Sciambra*, 153 So.2d 441, 443 (La. App. 4th Cir. 1963) the court held that "since the wife's suit was dismissed, the date of the filing of her suit is of no importance and considered as never filed. However, the date of filing the husband's reconventional demand, resulting in judgment in his favor, became the date of suit."

60. In *Ohanna v. Ohanna*, 129 So.2d 249, 252-53 (La. App. 4th Cir. 1961), the court, after quoting article 150, stated: "Defendant argues that the provisions of the above-quoted article have no application to any debts he might have incurred on account of the community because such debts were created in good faith and not with the fraudulent view of injuring his wife's rights. A reading of the article compels a conclusion that it does not establish as a standard that the debts must be fraudulent. LSA-C.C. art. 150 plainly distinguishes between contracting a debt on account of the community and the disposing of or alienating the community immovables and provides that a fraudulent alienation shall be null. No requirement is made that a contract of indebtedness to be unlawful must be made with the view of defrauding the wife. Our opinion is that under the clear terms of said codal article debts such as the ones due by the husband to Berger Bros., if contracted for the account of the community after the suit is filed, are unlawful." The Third Circuit Court of Appeal followed the distinction set forth in *Ohanna* in *Landreneau v. Ceasar*, 153 So.2d 145 (La. App. 3d Cir. 1963).

lent intent or not.⁶¹ However, in order to annul an alienation made by the husband after suit for a separation is filed, it must be proved that there was a fraudulent view of injuring the rights of the wife.⁶² A debt which is contracted in contravention of Article 150 is not chargeable to the community, but must be charged to the husband's separate estate.⁶³ Article 150 by its terms applies only to suits for separation, but there is no reason why it should not be applicable by analogy to suits for divorce and several courts have applied article 150 to divorce actions.⁶⁴ The same reasons exist for preventing the husband from contracting a debt, or alienating property, whether the action is for separation or divorce.

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THE EFFECT OF GASPARD V. LEMAIRE ON AWARDS FOR GENERAL DAMAGES

There are several general areas in which the amount of damages to be awarded a deserving tort claimant is not easily determined, but particularly difficult problems stand out in determining the amount of awards for pain and suffering. Such awards are of necessity arbitrary, since pain and suffering are not commodities which may be assessed in pecuniary terms.¹

61. See note 60 *supra*.

62. See note 60 *supra*.

63. Ohanna v. Ohanna, 129 So.2d 249 (La. App. 4th Cir. 1961). According to the court in Davis v. Davis, 23 So.2d 651, 654 (La. App. 2d Cir. 1945) the wife has the burden of proving that the husband violated article 150 of the Civil Code: "It will be observed from this Article that if the husband alienates immovable property of the community *after institution of suit for separation by the wife*, before the sale can be annulled on the ground of fraudulent intent to cheat her, she must prove that he acted with such intent and that the alienation was consummated subsequent to the date of filing of suit for separation or divorce. In the present case the alienation occurred four days prior to institution of the divorce suit; and it has not been proven that it was fraudulently consummated. Surely, no semblance of fraud or bad faith on the part of the Millers has been proven and, even though Davis had been motivated by a desire to circumvent his estranged wife's interest in the property, proof of this fact alone would not warrant annulment of the sale."

64. Gastauer v. Gastauer, 143 La. 749, 79 So. 326 (1918); Ohanna v. Ohanna, 129 So.2d 249 (La. App. 4th Cir. 1961).

1. See Leggio v. Broussard, 162 So.2d 23, 26 (La. App. 1st Cir. 1964) ("no adequate rule has yet been devised for the evaluation of pain and suffering"); Thomas v. Great Am. Indem. Co., 83 So.2d 485, 487 (La. App. 2d Cir. 1955) ("the establishment of such a rule [for determining the quantum of damages in personal injury cases] appears humanly impossible").