

Civil Procedure - Suit by Wife on Community Cause of Action

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it was properly done to escape liability.⁵³ These duties imposed upon the *gestor* insure against improper intervention or management.

Of course, a hospital should seek to comply as closely as possible with the Mental Health Act. But, in a case of good faith lack of compliance, it should incur no liability where all the conditions for the application of the institution of *negotiorum gestio* are present.

Robert W. Collings

CIVIL PROCEDURE—SUIT BY WIFE ON COMMUNITY CAUSE OF ACTION

*Gebbia v. City of New Orleans*¹ raises important questions concerning the applicability of the exceptions of no right of action and want of procedural capacity to a suit by a wife to recover a community claim. The case held that a wife is merely under a procedural incapacity to sue on behalf of the community—an incapacity that must be timely challenged by dilatory exception, or be waived. Reasoning that the wife has a “present, vested interest” in the community, the court said the peremptory exception of no right of action cannot prevail against her claim on behalf of the community.

Legislative and Judicial Background

Before the Married Women’s Emancipation Act of 1916,² a married woman was unable to sue unless her husband authorized her to do so, and there was thus no problem of the wife attempting to independently prosecute claims for the community. Only after the Emancipation Acts, when a married woman, over eighteen, could appear in court as party plaintiff without her husband’s authorization, did the question of her ability to independently assert a so-called community cause of action arise.

53. The master’s right to damages do not arise *ex delicto* since the act of the *gestor* is not, under civilian theory, considered unlawful. His intention to aid another, even if ill conceived, takes his action out of a wrongful category. See LA. CIVIL CODE art. 2293 (1870), where it is stated that obligations arising under quasi contracts are “lawful and purely voluntary act of man.”

1. 249 La. 409, 187 So. 2d 423 (1966), reversing 181 So. 2d. 292 (La. App. 4th Cir. 1965), discussed in *The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Civil Procedure*, 27 LA. L.REV. 540, 544 (1967).

2. La. Acts 1916, No. 94, now LA. R.S. 9:102 (1950).

The Louisiana Supreme Court had, before 1916, expressly recognized the right of a wife to act as an agent of her husband with special power of attorney to sell community immovables.³ Citing Civil Code articles 3001⁴ and 1787,⁵ the court reasoned: "If they [married women] can act as agents for strangers, there is no reason why they should not be selected as such by their husbands."⁶ After the wife was given capacity to sue, it would have been consistent to conclude that a wife, if specially authorized, could *sue* as agent of her husband on a claim belonging either to his separate estate or to the community. However, with very limited exception,⁷ the jurisprudence, relying upon the rule of Civil Code article 2404⁸ that the husband was the head, master, and administrator of the community, allowed only the husband to assert a community claim judicially. The cases applied this rule whether the wife attempted to assert the community claim in her own name,⁹ or as agent specially authorized by her husband,¹⁰ thus denying her the right to sue for the community in either an individual or representative capacity.

In 1944, Civil Code article 1787, which with article 3001,

3. Succession of Brown, Mann. Unrep. Cas. 218 (La.).

4. "Women and emancipated minors may be appointed attorneys . . ."

5. "A married woman may act as a mandatary, and her acts will bind the mandatary and the person with whom she contracts, although she be not authorized by her husband; but the mandator has no action against her on the contract."

6. Succession of Brown, Mann. Unrep. Cas. 216, 217 (La.).

7. See *Lavoy v. Toye Bros. Auto & Taxicab Co.*, 159 La. 209, 105 So. 292 (1925); *Dickens v. Singer Sewing Machine Co.*, 19 La. App. 735, 140 So. 296 (2d Cir. 1932); *Sarrett v. Globe Indem. Co.*, 11 La. App. 190, 123 So. 191 (1st Cir. 1929); *Perfection Garment Co. v. Lanasa*, 7 La. App. 31 (Orl. Cir. 1927). In addition to these cases and a few later decisions, two lines of cases have developed which establish exceptions to the general prohibition against the wife's suit on behalf of the community. One exception arose under the Louisiana Teacher Tenure Law, when a wife sought reinstatement and back pay, on the theory that the tenure law was a special statute creating a personal right in favor of the wife. See *State ex rel. Fields v. School Board*, 227 La. 290, 79 So.2d 312 (1955); *State ex rel. Kennington v. School Board*, 193 So. 225 (La. App. 2d Cir. 1939). One case, however, refused to apply the exception where the wife sued for back pay only. *Riche v. School Board*, 200 So. 681 (La. App. 1st Cir. 1941).

Another exception arose under Negotiable Instruments Law. See *Grantz v. Levy*, 170 La. 712, 129 So. 139 (1930); *Van Horn v. Vining*, 133 So.2d 901 (La. App. 2d Cir. 1961).

8. "The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by onerous title, without the consent and permission of his wife . . . he may dispose of the movable effects by gratuitous and particular title, to the benefit of all persons. . . ."

9. See, *e.g.*, *Succession of Howell*, 177 La. 276, 148 So. 48 (1933); *Houghton v. Hall*, 177 La. 237, 148 So. 37 (1933); *Simon v. Harrison*, 200 So. 476 (La. App. 1st Cir. 1941); *Smith v. Brock*, 200 So. 342 (La. App. 2d Cir. 1940).

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

establishes the capacity of the wife to act as agent, was amended to specify that the wife could "also act as mandatary for her husband or for the community when authorized by her husband."¹¹ The amendment did not state that the wife could *sue* as agent for the community, but there was ample room for such interpretation.¹² The courts, however, generally continued to limit community actions to suit by the husband.¹³

In 1960, Code of Civil Procedure article 695,¹⁴ derived from Civil Code article 1787, employed "express language to accomplish what was sought to be accomplished in the source provision."¹⁵ Article 695 specifies that the wife "as the agent of her husband, may sue to enforce. . . a right of the marital community, when specially authorized to do so by her husband."

The first case to interpret article 695 was *Muse v. United States Cas. Co.*,¹⁶ a federal court decision in which it was said:

"It is plain from the reading of this statute that it does not purport to change ownership of the type of claim here in question. It merely authorizes a procedural step in that the wife may sue as agent for her husband who otherwise would be the only person entitled to sue on behalf of the community. . . .

"In view of the fact that the statute says that she may act as agent *for the husband*, it is clear that there has been no change in the traditional jurisprudence of the state that reposes in the husband the power to enforce claims on behalf of the community. We conclude therefore, that there has been no such change as would vest authority in the wife, *in*

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

12. See Oppenheim, *The Significance of Recent Louisiana Legislation Concerning the Marital Community—Louisiana Acts 49 and 286 of 1944*, 19 TUL. L. REV. 200 (1944). See also *Anderson v. Simmons*, 75 So. 2d 34 (La. App. Orl. Cir. 1954).

13. See, e.g., *Stevens v. Johnson*, 230 La. 101, 87 So. 2d 743 (1956); *Mitchell v. First Nat'l Life Ins. Co.*, 231 La. 546, 91 So. 2d 788 (1956); *Harris v. Travelers Indem. Co.*, 70 So. 2d 235 (La. App. 2d Cir. 1954); *Casente v. Lloyd*, 68 So. 2d 329 (La. App. Orl. Cir. 1953); *Delpido v. Colony*, 52 So. 2d 720 (La. App. Orl. Cir. 1951); *Kientz v. Charles Dennery, Inc.*, 17 So. 2d 506 (La. App. Orl. Cir. 1944).

14. LA. CODE OF CIVIL PROCEDURE art. 695 (1960): "A wife, as the agent of her husband, may sue to enforce a right of his separate estate, or a right of the marital community, when specially authorized to do so by her husband."

15. LA. CODE OF CIVIL PROCEDURE art. 695, reporter's comment (1960).

16. 306 F.2d 30 (5th Cir. 1962).

her own right, to bring an action. . . for recovery of her loss of wages."¹⁷

Gebbia, the first expression on the subject by the Louisiana Supreme Court since the adoption of article 695, reaches an opposite result.

THE GEBBIA DECISION

In *Gebbia*, the wife sued for damages for personal injury including loss of her wages, a claim previously classified by Louisiana jurisprudence as a community claim. The husband joined as plaintiff and prayed for reimbursement of medical expenses. The issue of the wife's ability to enforce the community claim for her lost wages arose on an exception of no right of action presented for the first time in the court of appeal. The court sustained the exception on the theory that the husband alone possesses the right of action on behalf of the community. In his dissent, Judge Yarrut argued that since the husband joined the wife in her suit, he could be considered to have given sufficient authorization for her to act as his agent for the community.¹⁸

The Supreme Court reversed, reasoning that the wife's inability to prosecute community claims stems from a mere procedural incapacity, rather than the absence of a right of action. That incapacity could be cured either by authorization of the husband or by defendant's failure to file, within the delays allowed, a dilatory exception of want of capacity. The court reached this conclusion by finding that the wife had a "present, vested interest" in the community and therefore possessed a right of action.¹⁹

It was undisputed that there was a cause of action classified by the jurisprudence as a community cause of action. It was also undisputed that the wife is, by law, burdened with some disability in relation to community causes of action. It was the nature of this disability which was at issue. If the disability was the lack of a right of action, the wife's attempt to assert the community claim could be defeated at any stage of the

17. *Id.* at 31.

18. *Gebbia v. City of New Orleans*, 181 So. 2d 292, 297 (La. App. 4th Cir. 1965).

19. *Gebbia v. City of New Orleans*, 249 La. 409, 187 So. 2d 423 (1966); *contra*, *Mitchell v. First Nat'l Life Ins. Co.*, 231 La. 546, 91 So. 2d 788 (1956); *Stevens v. Johnson*, 230 La. 101, 87 So. 2d 743 (1956).

proceedings, including the appellate stage. On the other hand, if the disability was merely procedural incapacity, the wife's capacity would be presumed unless challenged by dilatory exception before the filing of an answer to her suit.

In analyzing the decision of the instant case, it is useful to examine the concepts of *cause of action*, *right of action*, *procedural capacity*, and *interest*, and to relate these concepts to relevant community property law.

The Concepts Defined

Boyd Professor Henry George McMahon, Coordinator of the Louisiana State Law Institute Committee which produced the 1960 Code of Civil Procedure and Reporter for Book 1, Title 1, containing the articles on exceptions, was the only recent writer to explore extensively the subject of Louisiana procedural exceptions. For this reason, his writings are quoted extensively here.

In 1934 Professor McMahon distinguished the exceptions of no cause of action and no right of action.²⁰ The exception of *no cause of action* was said to question whether the law affords a remedy under the facts presented.²¹ It is concerned neither with the person of the plaintiff nor the capacity in which he appears, but refers to the *remedy sought* in relation to the *facts* alleged or presented.

The exception of *no right of action* was described as "employed (in cases where the law affords a remedy) to raise the question as to whether plaintiff belongs to the particular class in whose exclusive favor the law extends the remedy, or to raise the issue as to whether plaintiff has the right to invoke a remedy which the law extends only conditionally."²² This exception assumes that a cause of action exists; the question is whether the plaintiff has the right to assert the cause of action, or in Professor McMahon's language, does the law extend the remedy *to him*. It refers to the *person* in relation to the *remedy* he seeks.

In 1937 Professor McMahon stated that "while the exception of *want of capacity* serves the general purpose of putting at issue the procedural capacity of the plaintiff, more specifically it may

20. McMahon, *The Exception of No Cause of Action in Louisiana*, 9 TUL. L. REV. 17 (1934).

21. *Id.* at 28.

22. *Id.* at 30.

be said to possess two functions. The first is to challenge the authority of a plaintiff who appears in a representative capacity. The second is to raise the issue that the plaintiff who appears individually is without sufficient capacity to institute and prosecute the suit, and to stand in judgment therein."²³ (Emphasis added.) In 1934 he had stated more succinctly that the exception of want of capacity "raises the issue that the plaintiff (if suing in an individual capacity) is not *sui juris*, or (if suing in a representative capacity) has not been qualified properly."²⁴ If the plaintiff appears individually, it is assumed for purposes of this exception that there is a cause of action and that he has the right to assert it; the exception of want of capacity questions whether the plaintiff is under a legal incapacity to sue, without reference to the nature of the cause of action. If the plaintiff appears as a representative, it is assumed for purposes of this exception that there is a cause of action and that the party represented has the right to assert it; the exception of want of capacity questions the authority of the plaintiff to sue as a representative. It can thus be said that the exception of want of capacity refers to the *person* of the plaintiff and whether he has been *authorized* to sue: where the plaintiff appears individually, the exception questions whether the law authorizes him to sue; where the plaintiff appears as a representative, it questions whether the owner of the cause of action has authorized him to sue.

It should be noted that both the exception of want of capacity, when the plaintiff appears individually, and the exception of no right of action question whether the plaintiff has been authorized by law to sue. The distinction is that the exception of no right of action questions whether the law authorizes the plaintiff to sue *on a particular cause of action*, while the exception of want of capacity, when the plaintiff appears individually, questions whether the law authorizes the plaintiff to sue *at all*, without reference to any particular cause of action.

In discussing the concept of *interest*, Professor McMahan noted that the exception of want of interest predates the exception of no right of action, but that the two appear to be indistinguishable. In explaining this conclusion he wrote:

23. McMahan, *Parties Ligtgant in Louisiana—Part IV*, 11 TUL. L. REV. 538, 547 (1937).

24. McMahan, *The Exception of No Cause of Action in Louisiana*, 9 TUL. L. REV. 17, 28, n. 62 (1934).

"Any possibility of the plaintiff having a right of action when he has no interest in the litigation is foreclosed by the codal requirement that the plaintiff have a 'real and actual interest which he pursues.' Conversely, it would not seem that a plaintiff could have an interest in the litigation within the intendment of the codal provision, without similarly having a right of action."²⁵

It was perhaps a result of this proposition that the exceptions of no right of action and want of interest were apparently equated in article 927 of the Code of Civil Procedure.²⁶ And it was clearly because of the apparent equating of the two exceptions that the court in *Gebbia* held that the existence of an interest in the wife necessitated the conclusion that she possessed a right of action.

The Concepts in the Light of Community Property Law

Putting aside the debate over the type of interest the wife possesses in the community,²⁷ and assuming that she does possess a "present, vested interest" as the court, rightly or wrongly, held, it should not necessarily follow that she possesses a right of action.

When Professor McMahon stated that the absence of an interest in the plaintiff was equivalent to the absence of a right of action, there can be no doubt as to his meaning. Weighty authority is cited in support of this indisputable proposition.²⁸ But the converse proposition, that the presence of an interest is equivalent to the presence of a right of action, is not as apparent. It should be noted that Professor McMahon prefaced his state-

25. McMahon, *Parties Litigant in Louisiana—Part III*, 11 TUL. L. REV. 527, 532 (1937).

26. LA. CODE OF CIVIL PROCEDURE art. 927 (1960): "The objections which may be raised through the peremptory exception include, but are not limited to, the following: . . . (5) No right of action, or no interest in the plaintiff to institute the suit."

27. For a recent discussion of the character of the wife's interest in the community, see Comment, 25 LA. L. REV. 159 (1964). After demonstrating the near impossibility of applying any one theory to the nature of the interest as interpreted by the jurisprudence, the author concludes that the interest ought to be characterized as *sui generis*.

28. McMahon, *Parties Litigant in Louisiana—Part III*, 11 TUL. L. REV. 527, 532 n.283 (1937), citing LA. CODE OF PRACTICE art. 15 (1870); Leberman & Co. v. New Orleans, F. & H. S.S. Co., 23 La. Ann. 412 (1876); Cure v. Porte, 18 La. Ann. 456 (1866); Prevost v. Martel, 10 Rob. 512 (La. 1845); State v. Desfortes, 5 Rob. 253 (La. 1843). See also LA. CODE OF CIVIL PROCEDURE art. 681 (1960): "Except as otherwise provided by law, an action can be brought only by a person having a real and actual interest which he asserts."

ment of that proposition with the words, "It would not seem that" and qualified the statement by describing the interest as one "within the intendment of the codal provision" (article 15 of the 1870 Code of Practice²⁹ which speaks of a "real and actual interest") and cited no authority for it. This heavy qualification and absence of supporting authority leads to the speculation that the proposition is not necessarily valid.

Examples of interest for which the proposition would not hold can be found. A stockholder may have an interest in the assets of the corporation and yet possess no right to assert a corporate cause of action, because he is not "among the class of persons to whom the law extends the remedy" with respect to the corporate cause of action. As a duly authorized agent of the corporation, or in a stockholder's derivative action, he may assert the right of action, but in his individual capacity he cannot.

Another example, very much akin to the issue presented in *Gebbia*, arises under Civil Code article 2315,³⁰ the wrongful death article. The first class of persons "to whom the law extends the remedy" for wrongful death is the spouse of the deceased and/or the child or children. Assume that a parent dies at the hands of a tortfeasor, so that a cause of action exists for wrongful death. Assume further that his only living relative is a son who is married and living with his wife under the community of acquets and gains. Under article 2315 this son belongs "to the class of persons to whom the law extends the remedy" and he therefore has a right of action. Any recovery he merits probably will, under the legal regime of community property as interpreted by the jurisprudence, fall into the community of acquets and gains. If so, his wife will have as much of an interest in the cause of action as the wife had in *Gebbia*. But daughters-in-law are most certainly not "among the class of persons to whom the law (article 2315) extends the remedy" for the wrongful death of a parent, and therefore do not possess a right of action. In such a case, it is easily seen that the concepts of interest and right of action are not perfectly equivalent.

29. La. Code of Practice art. 15 (1870): "An action can only be brought by one having a real and actual interest which he pursues, but as soon as that interest arises, he may bring his action."

30. LA. CIVIL CODE art. 2315 (1870), as amended, provides, in part: "The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. . . ."

Further evidence of the non-equivalence of interest and right of action, relating specifically to community property law, can be found in Professor McMahon's writings. In defining and describing the exception of no right of action, he cited *Succession of Howell*³¹ as an "excellent illustration" of a no right of action decision.³² In that case, as in *Gebbia*, a wife sued in her individual capacity on a community cause of action for wages owed to her. Professor McMahon wrote:

"Thus, while the litigant's opposition may have disclosed a perfect *cause of action*, it also disclosed a total lack of any *right of action*, for the earnings in question, being community property, could only be recovered by the husband."³³

Howell arose during the period of jurisprudential and legislative history when the right of a wife to sue as agent of her husband for the community was generally denied on the basis of *Mitchell v. Dixie Ice Co.*³⁴ Any distinction between *Howell* and *Mitchell* can be found only in the fact that in *Howell* the wife sued in her individual capacity, while in *Mitchell* she sued as agent of her husband. That Professor McMahon strongly approved of *Howell* as a matter of law, and as strongly disapproved of *Mitchell*³⁵ indicates that he approved of this distinction, endorsing, on the one hand, the idea that the wife does not possess individually a right of action for the community, while asserting, on the other hand, that the wife should be entitled to represent her husband's right of action, as his agent, in a suit to enforce a community claim.

31. 177 La. 276, 148 So. 48 (1933).

32. McMahon, *The Exception of No Cause of Action in Louisiana*, 9 TUL. L. REV. 17, 28-29 (1934).

33. *Id.* at 29.

34. 157 La. 383, 102 So. 497 (1924).

35. 1 McMAHON, LOUISIANA PRACTICE (Supp. 1956, at 30, n.28.1): "The unsoundness and unworkability of our present procedural rules on this subject are brought out in bold relief in the leading cases of *Mitchell v. Dixie Ice Co.* . . . , and *Succession of Howell*." It is apparent from a reading of the McMahon footnote here cited, that he included *Succession of Howell* as reaching an "unfortunate result," not because the court in that case found that the wife did not possess a right of action in her own right (with which he agreed), but because the husband expressly consented to his wife's suit. Although he disagreed with *Mitchell* as a matter of law, his disapproval of *Howell* was in its result as a matter of principle. To remedy the result of *Howell*, Professor McMahon recognized the argument that a simple authorization by the husband might be sufficient under amended Civil Code art. 1787, as a matter of law, to sustain the wife's suit; but concluded that what was really needed was a "formulation of more workable rules" resting "on a broader foundation." Professor McMahon proposed as a more workable rule the alternative pleading by the husband and wife permitted now in LA. CODE OF CIVIL PROCEDURE art. 686 (1960). Furthermore, as he suggested the *Mitchell* decision was specifically overruled by LA. CODE OF CIVIL PROCEDURE art. 695 (1960), which permits the wife to sue as agent of her husband for the community.

This conclusion is supported by the wording of article 695 of the Code of Civil Procedure, and the redactor's comment to the article which states: "This article completely spells out the procedural capacity of the wife to sue *as agent* to enforce a community right, when authorized to do so by her husband." (Emphasis added.) It is also supported by the redactor's comment to article 686. That article³⁶ permits the husband and wife to sue in the alternative to enforce a right which may belong either to the community or to the wife's separate estate. The redactors state that it is intended to prevent a defendant from defeating "a wife's suit when the evidence technically showed that the right sought to be enforced by the wife, *with the husband's approval*, was a community right. . . ." (Emphasis added.)

Article 686 also provides explicitly: "The husband is the proper party plaintiff, during the existence of the marital community, to sue to enforce a right of the community." The Code of Civil Procedure, then, does not seem to be designed to allow a wife to appear alone in her individual capacity on behalf of the community. On the other hand, it seems to ameliorate this disability in two instances in which the husband obviously approves of the wife's suit: she may sue as her husband's agent under article 695, or she and her husband may sue in the alternative, under article 686, when there is doubt whether the cause of action belongs to the community or to the wife's separate estate.

The conclusion reached in *Gebbia*, that the wife's inability to prosecute a community cause of action does not stem from the lack of a right of action, is subject to further question when examined from the viewpoint of procedural capacity.

The court in *Gebbia* reasoned that the wife's disability with respect to community claims went to the question of procedural capacity and thus of *authorization*. The court further reasoned that the authorization required by the husband in article 695 of the Code of Civil Procedure was the authorization at issue.³⁷

The issue in the instant case clearly concerned the party plaintiff in relation to a particular cause of action. As has

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

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

37. *Gebbia v. City of New Orleans*, 187 So.2d 423, 425-26 (1966).

been noted, where the plaintiff appears in an individual capacity, the exception of lack of procedural capacity reaches only the question of whether plaintiff is *sui juris*. Whether plaintiff has been granted by law the *right to assert* that particular cause of action is determined by an exception of no right of action. It is only when the plaintiff appears in a representative capacity that the exception of want of procedural capacity reaches the question of the plaintiff's authorization to enforce another's particular cause of action—an authorization derived not from the law, but from the principal. It is within this framework that article 695 of the Code of Civil Procedure and the articles relating to it seem designed to function.

Article 695 provides that the wife may sue *as agent of her husband*. Just as in any other agency situation,³⁸ special authorization by the principal (the husband) is required before the agent (the wife) can sue on a particular claim owned by the principal (relating either to the husband's separate estate or the community). Without a finding in a given case that the wife is the husband's procedural representative, thus representing his right of action, article 695 has no application, for it speaks only of the wife's ability to sue *as agent* of her husband on a community claim. In *Gebbia* the wife did not technically sue in a representative capacity as agent of her husband, but sued in her individual capacity.

In her individual capacity a wife over eighteen years of age is now fully emancipated, *sui juris*, fully authorized by law to sue in the courts of Louisiana. Thus, had the defendant in *Gebbia* excepted to the wife's procedural capacity as the court concluded was the proper procedure, the exception should have been overruled according to the definition of procedural capacity provided by Professor McMahon, provided the wife were at least eighteen years old.

Incident to the court's misuse of article 695 is the resulting misuse of article 855.³⁹ *As an agent*, the wife, just as any other

38. See LA. CODE OF CIVIL PROCEDURE art. 694 (1960): "An agent has the procedural capacity to sue to enforce a right of his principal, when specially authorized to do so.

"For all procedural purposes, the principal is considered the plaintiff in such an action. The defendant may assert any defense available against the principal, and may enforce his rights against the principal in a reconventional demand." See also Comment, 25 LA. L. REV. 186, 195 (1964), wherein the author advocates strict adherence to the literal agency language of article 695.

39. LA. CODE OF CIVIL PROCEDURE art. 855 (1960): "It is not necessary to allege the capacity of a party to sue or be sued or the authority of a party to

competent major or emancipated minor, would be under a procedural incapacity if she were not specially authorized by the principal to sue. Article 855 provides that the authority of a party to sue in a representative capacity need not be pleaded, and is presumed if unchallenged timely by dilatory exception. The court in *Gebbia* relied heavily upon this article in support of its conclusion that the wife's disability had been cured by the defendant's failure to challenge timely by dilatory exception. But it failed to recognize that this article presupposes that the plaintiff is proceeding in a representative capacity. The true meaning and operation of article 855 is made manifest by article 700, which provides, in part: "*When a plaintiff sues as an agent to enforce a right of his principal, or as a legal representative, his authority or qualification is presumed, unless challenged by the defendant by the timely filing of the dilatory exception.*" (Emphasis added.) Article 855 complements article 700 and adds only that as a matter of pleading it is not necessary to allege the special authority required generally in article 694 and specifically in article 695.

The distinction between the individual or representative capacity in which a plaintiff may appear is not a mere technical matter, but relates directly to the question of the ownership of the right of action. This idea is carried through in article 694, which provides that when a party sues in a representative capacity, as an agent, "the principal is considered the plaintiff in such an action." The requirement of article 695 that the wife sue *as agent of the husband* is logically a preservation of the concept that the owner of the right of action must be the plaintiff, who brings the action through his representative. Obviously, if the redactors of the Code of Civil Procedure had intended that the wife could assert the right of action for the community in her individual capacity, article 695 would not have been drafted so as to preserve the requirement that the husband be plaintiff for the community.

It is evident, then, from a review of the Code of Civil Procedure articles in the light of Professor McMahon's writings, that the Code was in no way intended to change or in any way affect the principle that a right of action for the community is to be administered by the husband. The only change intended and

sue or be sued in a representative capacity or the legal existence of a legal entity or an organized association of persons made a party. Such procedural capacity shall be presumed, unless challenged by the dilatory exception."

affected is the recognition of the wife's ability to stand in her husband's stead, as his agent, to represent *his* right of action for the community.

Through an evolutionary jurisprudential development the wife's interest in the community has, rightly or wrongly, achieved a higher and higher status; and it is only because of this treatment of her interest that the Code lends a semblance of support to the conclusion that she can assert, in her individual capacity, a right of action for the community. But this semblance of support derives merely from an apparent equating of the concepts of right of action and of interest, an equivalence at best doubtful.⁴⁰ Even Professor McMahon, who qualifiedly asserted this equivalence of concepts, did not see flowing from this equivalence the result reached by the court in the instant case; on the contrary, he strongly approved of the holding in *Succession of Howell* that the wife does not own, in her own right, a right of action for the community.

It is significant, however, that Professor McMahon while approving of the *legal analysis*, disapproved of the *result* reached in *Howell*, because the husband had joined the wife's suit for the specific purpose of authorizing her to prosecute the suit.⁴¹ Had the wife's action been successful, the husband would have been barred from re-asserting the claim in a later action since he expressly consented to the wife's suit. The defendant was thus completely protected against double recovery.⁴² Professor McMahon therefore considered the law as it then stood to be inadequate for failing to provide a solution which would preserve the wife's suit in a case where the husband obviously approved. The 1960 Code of Civil Procedure provided that solution in articles 686 and 695.

In *Gebbia*, the fact that the husband joined the wife's suit to claim medical expenses should also be considered a sufficient

40. Further evidence of this fact is shown in *id.* art. 681 reporter's comment (a). That article established the negative proposition that the absence of an interest is equivalent to the absence of a right of action, "[e]xcept as otherwise provided by law." The redactors state that the exception was meant to avoid conflict with article 695 and others. Article 695 provides for suit by the wife as agent of her husband for the community.

41. 1 McMAHON, LOUISIANA PRACTICE (Supp. 1956 at 30, n.28.1), pertinent parts quoted in n. 35 *supra*.

42. *Ibid.* See also *Youngblood v. Daily & Weekly Signal Tribune*, 131 So. 604, 606 (La. App. 2d Cir. 1930), where the court said: "[W]e think a judgment rendered against defendant in these suits [wives suing for community *without* special authority from their husbands] would be *res adjudicata* and fully protect defendant."

expression of consent to the wife's suit to merit the conclusion that defendant would be protected against double recovery. Because of this, the case fits precisely into the category referred to in the comment to Civil Procedure article 686;⁴³ it is one of those cases in which the court had to decide whether to permit a defendant "completely protected against double recovery, to defeat a wife's suit when the evidence technically showed that the right sought to be enforced by the wife, *with the husband's approval*, was a community right." (Emphasis added.) A dilemma arose, however, because neither of the two procedural solutions provided by the Code of Civil Procedure were complied with: the husband and wife did not sue in the alternative as provided in article 686, nor did the wife technically appear as agent of her husband to claim the lost wages for the community, as provided in article 695, because she did not so allege in her petition.

Under the rule of *Gebbia*, a wife may sue in her own name without any authorization by her husband to enforce a community claim, which may consist, for an extreme example, of her husband's lost wages. Unless the defendant challenges her suit by timely filing the dilatory exception of want of capacity, she succeeds in her action. The wife has thus been granted, in her own right and without any requirement of any authorization from her husband, a significant part of the administration of the community—a power reserved specifically to the husband by Civil Code article 2404.

The court could have preserved the wife's judgment for her lost wages without finding that a wife owns, in her own right, a right of action for the community. The court could have inferred that the wife was suing in a representative capacity from the fact that her husband had joined with her in making the allega-

43. LA. CODE OF CIVIL PROCEDURE art. 686, reporter's comment (b) (1960), states in part: "The substantive rules of community property are legal rules of accounting between the community and separate estates which usually are of no concern to the defendant. The only justification for procedural rules on the subject are: (1) a recognition of the husband as head and master of the community to prevent any unauthorized assertion by the wife of a community right; (2) protection of the rights of forced heirs and creditors of the husband; and (3) protection of a defendant against double recovery. Time and time again the courts have permitted a defendant, completely protected against double recovery, to defeat a wife's suit when the evidence technically showed that the right sought to be enforced by the wife, with the husband's approval, was a community right; or when the evidence failed to rebut the presumption that it was a community right."

tions of her petition.⁴⁴ Such a conclusion would be well within the expressed policy of the Code of Civil Procedure in favor of liberal construction of pleadings⁴⁵ and of the principal that "pleading is not an end in itself but merely a means to an end."⁴⁶ By treating the wife as the husband's procedural representative, the court could have limited *Gebbia* to the situation where the husband obviously approves of his wife's suit, thus avoiding a judicial amendment of substantive community property law. Furthermore, the internal structure of the Code of Civil Procedure would be better preserved if the authority at issue in *Gebbia* had been recognized as that special authority required by the wife to sue *as agent* of the husband for the community. Although it is admitted that such a treatment may partake somewhat of the nature of undisclosed mandate, there should be no problem so long as the treatment of the husband as the wife's principal is limited to the case where he obviously approves of his wife's suit, and so long as this liberality is limited to the case of a married couple living under the community of acquets and gains.

There is no doubt that the facts of the instant case present a very hard case: the community claim was based on the wife's own wages; the husband joined her suit and thus obviously approved; and the issue of the wife's being without a right of action was not raised until the appellate stage. It is even a harder case when considered in the light of *McConnell v. Travelers Indem. Co.*,⁴⁷ which, if approved, would effectively cut off efforts of a husband to assert the claim for his wife's wages in a subsequent action, after he failed to include the claim in a suit involving the same cause of action. What Judge Wisdom said of *McConnell* is appropriate to the instant case: "This hard case involving, for the plaintiff, disastrous effects. . . , is an invitation to make bad law. We decline the invitation."⁴⁸ Perhaps the invitation could have been more effectively declined in the instant

44. See 1 McMAHON, LOUISIANA PRACTICE 150 n.30 (1939): "Under the modern trend of liberality, if the allegations fairly show that the plaintiff is appearing in a representative, rather than his individual, capacity, the courts will consider his status as such regardless of the absence of formal language unequivocally stating that he appears in his representative capacity." Citing among others: *Hanna v. Otis*, 151 La. 851, 92 So. 360 (1922); *Knox v. Allen*, 4 La. App. 223 (2d Cir. 1926).

45. See LA. CODE OF CIVIL PROCEDURE art. 865 (1960): "Every pleading shall be so construed as to do substantial justice."

46. *Id.* art. 865, reporter's comment (a).

47. 346 F.2d 219 (5th Cir. 1965).

48. *Id.* at 220.

case, had the court treated the wife as the husband's procedural representative, rather than recognizing that she had, in her own right, a right of action for community claims.

Billy J. Tarzvin

CONSTITUTIONAL LAW — FIFTH AMENDMENT PRIVILEGE
AGAINST SELF-INCRIMINATION — DISBARMENT PROCEEDINGS

Petitioner, a member of the New York bar, refused to produce certain financial records or to testify in a proceeding against him for professional misconduct, on the grounds that the records and testimony would tend to incriminate him. The Appellate Division of the New York Supreme Court ordered petitioner disbarred, the Court of Appeals affirmed. The United States Supreme Court held that since *Malloy v. Hogan*¹ proscribes the imposition of any penalty for the assertion of the privilege and since the threat of disbarment was a powerful form of compulsion which made the assertion costly, an attorney's invocation of the privilege against self-incrimination could not serve as a basis for his disbarment, *Spevack v. Klein*, 385 U.S. 511 (1967).

The Court explicitly overruled *Cohen v. Hurley*,² decided by a 5-4 majority six years ago. In that case, the Court held that the lawyer was under a duty to the Court and the public to cooperate in investigations concerning his qualifications as an attorney. Though he had the right to assert the privilege, as long as disbarment was not based on this assertion but on breach of his duty to cooperate with the investigating committee, it was a proper disciplinary measure. The state's interest in maintaining the standards of the legal profession was considered greater than the individual lawyer's unfettered right to exercise the fifth amendment privilege. Therefore a "dual status" was imposed upon the attorney, whereby his right to claim the privilege as any other citizen was subordinate to his special duty to the state to answer questions concerning his qualifications to continue the practice of law.³

1. 378 U.S. 1 (1964).

2. 366 U.S. 117 (1961).

3. See also *In re Anastaplo*, 366 U.S. 82 (1961); *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961).