Nature of the Wife's Interst During the Existence of the Community

Gordon E. Rountree
Even under the current law, it would seem that deposits in a joint account of a married couple would be presumed to be community property.\textsuperscript{267} Thus separate creditors of the wife cannot rely on the fact that funds have been deposited in such a joint account, and their claims may be defeated by a showing that the funds represent community property, which cannot be seized for her debts.\textsuperscript{268}

It is settled that joint deposits with survivorship provisions do not affect the requirements for a valid donation, either inter vivos or mortis causa.\textsuperscript{269}

\textit{Kenneth D. McCoy, Jr.}

\section*{NATURE OF THE WIFE'S INTEREST DURING THE EXISTENCE OF THE COMMUNITY}

\textbf{INTRODUCTION}

Characterization of the exact nature of the wife's interest during the existence of the community has proved to be an arduous task. In \textit{Arnett v. Reade}, Justice Holmes stated: "It is not necessary to go very deeply into the precise nature of the wife's interest during the marriage. The discussion has fed the flame of juridical controversy for many years."\textsuperscript{21} In numerous attempts to settle the matter, jurists have described the wife's interest as residuary, inchoate, dormant, as a hope or expectancy, and as absolute ownership of one-half of the com-

\textsuperscript{without the authorization of her husband}. The bank, under the terms of the deposit, was obligated to account for the fund to plaintiff's wife as well as to plaintiff." \textit{Id.} at 975-76, 126 So. at 443. \textit{Accord}, Clingman v. Devonian Oil Co., 188 La. 310, 177 So. 59 (1937).

\textit{LeRosen} has subsequently been overruled on another point, Jones v. Southern Natural Gas Co., 213 La. 1051, 36 So. 2d 34 (1948), but would appear to stand on the question of payment to joint accounts. It is significant, however, that the provisions discussed in the text at notes 261-263 \textit{supra} were enacted subsequent to \textit{LeRosen} and seem to negate the assumption in \textit{LeRosen} that the depositary is obligated to account to all of the joint depositors. See Note, 12 Tul. L. Rev. 465, 466 (1938).


269. Vercher v. Roy, 171 La. 524, 131 So. 658 (1930); \textit{cf.} Succession of Mulqueeny, 156 So. 2d 317 (La. App. 4th Cir. 1963), \textit{cert. denied}, 157 So. 2d 234.
1. 220 U.S. 311, 319 (1911).
munity during its existence. Among other things, analogies have been made to ownership in indivision, partnership, usufruct, and trust. It appears that in the Louisiana community property system, the choice has been narrowed to a consideration of two possibilities. Is the wife to be considered an owner in indivision of one-half of the community during its existence, or does she have merely a hope or expectancy which materializes into absolute ownership only after the community has been dissolved? Rather than attempt to classify the nature of the wife's interest under any single label or theory, the purpose of this Comment is to determine the present state of law in Louisiana. The major portion examines the pertinent code provisions and jurisprudence, while the latter portion surveys the practical effects of both viewpoints.

**HISTORY**

Since the Louisiana community property system is largely based on French and Spanish law, a short historical review seems in order.²

_French_

It is generally accepted that the community property system originated with the Germans.³ Later, the Germanic customary law became the customary law of Northern France.⁴ Although the French customs were by no means uniform prior to the French Civil Code of 1804, the French writers generally agreed that the wife's interest during the community was a mere expectancy or benefit of survivorship.⁵ Dumoulin explained that

---
³ Cole's Widow v. His Executors, 7 Mart. (N.S.) 41, 48 (La. 1828); 3 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 891 (1959); MCKAY, COMMUNITY PROPERTY § 9 (2d ed. 1925); Daggett, A Comparison of the German Community System With That of Louisiana, 4 TUL. L. REV. 27 (1929); Daggett, The Modern Problem of the Nature of the Wife's Interest in Community Property—A Comparative Study, 19 CALIF. L. REV. 567, 569 (1931).
⁵ See references to and translations of early commentators in Garrozi v. Dastas, 204 U.S. 64, 79 (1907). In Dixon v. Dixon's Executors, 4 La. 188, 191 (1832) the court stated: "We are aware the principles here recognised do not correspond with the doctrines taught by the highest authorities in the French law, by Dumoulin, Pothier. . . . They hold that the wife has no right whatever, until the marriage is dissolved, or the community otherwise terminates. That she has nothing but a mere hope or expectancy." See also 3 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW
the wife was not a co-owner during her husband's life, but she only hoped to become one. In accord, Pothier stated the husband could "abuse his power and let the whole common estate deteriorate or become a total loss, without any obligation to indemnify his wife."

With the adoption of the French Civil Code came a diversity of opinions. Toullier, adhering to the earlier view, concluded that the wife had no tangible interest in the community until its dissolution. Troplong spoke of the rights of the wife as being "dormant" during the marriage. He said "the wife is like a silent partner, whose rights arise and reveal themselves when the partnership ceases." On the other hand, the majority of the later commentators seem to support the ownership approach. For example, Planiol asserted that the wife was a "joint owner by halves." Continuing, he declared that "the spouses have always been considered co-owners, with the husband being the head and master of the common property."

Manifestly, the French commentators are not in accord regarding the nature of the wife's interest prior to dissolution of the community.

Spanish

The Spanish authorities appear as unhelpful as the French. Manresa viewed the "proprietorship" of the wife as "not nominal or theoretical, but real and effective." In accord is Matienzo, who declared that "ownership and possession of a moiety of the property acquired during marriage passes automatically to the wife without delivery and the wife is owner.

8. 12 TOULLIER, LE DROIT CIVIL FRANÇAIS no 75 (1846).
9. 2 TROPLONG, LE DROIT CIVIL EXPLIQUÉ, DU CONTRAT DE MARIAGE no 855 (1850).
10. See 3 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) nos. 905, 1037 (1959); 8 AUBRY ET RAU, DROIT CIVIL FRANÇAIS no 506 (5th ed. 1916); 1 BAUDRY-LACANTINIERE, TRAITÉ DE DROIT CIVIL, DU CONTRAT DE MARIAGE no 247 (2d ed. 1901).
11. 3 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 1037 (1959).
12. Id. no. 905.
even during the marriage of the share which belongs to her."\textsuperscript{14} On the other hand, both Azevedo and Gutierrez characterized the wife's interest as "constructive" ownership.\textsuperscript{15} Azevedo added that the wife's interest was "revocable" during the community,\textsuperscript{16} while both agreed that her "constructive" ownership does not become absolute or "actual" ownership until dissolution of the community.\textsuperscript{17} Similarly, Febrero wrote:

"To the married woman is imparted and transferred by usage and legal authority the dominion and possession, \textit{revocable and fictitious}, of the one-half of the property which during the marriage she gains and acquires with her husband; but after he dies, the same passes to her irrevocably and effectively, so that, after his death, she becomes the absolute owner in possession and property of the one-half which he leaves in the manner prescribed by law between conventional partners."\textsuperscript{18} (Emphasis added.)

However, like the French, it appears that the ownership approach has emerged as the dominant position in Spanish law.\textsuperscript{19}

The above survey indicates that a solution to the problem by way of historical investigation is unlikely. It is conceivable that one could find historical support for almost any theory imaginable concerning the nature of the wife's interest. Daggett states that "in this maze of ancient statutes and learned annotations, anything and nothing may be proved about as elusive a thing as the wife's interest in the community."\textsuperscript{20} Nevertheless, it would be incorrect to dismiss the search into the past as being inconclusive. It seems the wife's interest in the community has not remained constant but has varied from

\textsuperscript{14} MATIENZO, \textit{COMMENTARIA} (1507), transl. in ROBBINS, \textit{COMMUNITY PROPERTY LAWS} 66 (1940) [hereinafter cited as MATIENZO with page reference to ROBBINS transl.].

\textsuperscript{15} AZEVEDO, \textit{COMENTARIOV IURIS CIVILIS IN HISPANIAE REGIAS} (1597), transl. in ROBBINS, \textit{COMMUNITY PROPERTY LAWS} 148 (1940) [hereinafter cited as AZEVEDO with page reference to ROBBINS transl.]; GUTIERREZ, \textit{PRACTICARUM QUESTIONUM CIRCA LEGES REGIAS HISPANIAE} (1606), transl. in ROBBINS, \textit{COMMUNITY PROPERTY LAWS} 223 (1940) [hereinafter cited as GUTIERREZ with page reference to ROBBINS transl.].

\textsuperscript{16} AZEVEDO 148.

\textsuperscript{17} AZEVEDO 149; GUTIERREZ 223.


\textsuperscript{19} See I DE FUNIACK, \textit{PRINCIPLES OF COMMUNITY PROPERTY} § 97 (1943).

time to time and place to place. Historical survey reveals that the early theories generally depict the wife’s interest as being no greater than a benefit of survivorship or a hope. On the other hand, it appears that the trend in later times has moved away from the expectancy theory and more toward some type of ownership theory.

**Statutory Provisions**

Title VI of Book III of the Louisiana Civil Code is devoted to the subject of community property. The Louisiana Code of Civil Procedure and other later legislation include provisions pertaining to community property law. While no code article or other statutory provision specifically defines the nature of the wife’s interest, the Civil Code, supplemented by later statutes, includes provisions concerning the nature of the wife’s interest during the existence of the community.

*Expectancy Theory*

Statutory support of the expectancy theory can be divided into three main groups. First, article 2404 of the Civil Code gives the husband unquestioned control over the community: “The husband is 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 an onerous title, without the consent and permission of his wife.”21 The corresponding article in the 1808 Code provided that “the husband is the head and master of the partnership or community of gains; he administers said effects; disposes of the revenues which they produce, and may sell and even give away the same without the consent and permission of his wife, because she has no sort of right in them until her husband is dead.”22 (Emphasis added.) The legislative omission of the last portion of the article from its 182523 and 187024 counterparts affords an opportunity for speculation. It is conceivable that the omission indicates legislative intent to give the wife something more than a hope or expectancy during the community. On the other hand, one might say the omission merely reopened the question for further consideration. Article 686 of the Louisiana Code

---

of Civil Procedure fully supports the spirit of article 2404 by designating the husband as the proper party to represent community interests in court. Article 2404 of the same Code allows the wife to act as agent of the community, but only "when specially authorized to do so by her husband." R.S. 9:291 indirectly supports article 2404 by not providing the wife with a cause of action against her husband for an accounting of community funds during the community.

The courts have upheld the validity of article 2404 by consistently holding that the wife's sale or mortgage of community immovables without the husband's consent is an absolute nullity. Similarly, in support of article 2404, the courts have frequently placed the wife in the category of a third person with respect to her husband's actions concerning community property. Cases involving the husband's lease agreements are notable examples: when the husband leases property, the wife is considered a third party to the agreement. This rule becomes particularly significant when the lessee's wife suffers personal injury by some vice or defect in the premises. She has no

25. LA. CODE OF CIVIL PROCEDURE art. 686 (1960): "The husband is the proper plaintiff, during the existence of the marital community, to sue to enforce a right of the community." Article 686 is a codification of prior jurisprudence with one statutory exception, LA. R.S. 7:51 (1950): "The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument." This exception to the rule that the husband is the proper plaintiff was applied in Van Horn v. Vining, 133 So. 2d 901 (La. App. 2d Cir. 1961), where the court allowed a married woman named as payee of a check given for her personal services to sue on the dishonored check. Since the services were performed during the community, her earnings were community property. See LA. CIVIL CODE art. 2334 (1870).

26. Id. art. 695.

27. LA. R.S. 9:291 (Supp. 1963): "As long as the marriage continues and the spouses are not separated judicially a married woman may not sue her husband except for: (1) A separation of property; (2) The restitution and enjoyment of her paraphernal property; (3) A separation from bed and board; or (4) A divorce."

28. Angichido v. Cerami, 217 F.2d 848 (5th Cir. 1942); Roccaforte v. Barbin, 212 La. 60, 31 So.2d 521 (1947); Robinson v. Marks, 211 La. 452, 30 So. 2d 200 (1947); Bywater v. Enderle, 175 La. 1098, 145 So. 118 (1932); Preston v. Humphreys, 5 Rob. 299 (La. 1843); Liberal Finance Corp. v. Washington, 62 So.2d 545 (La. App. Orl. Cir. 1953); Vanzant v. Morgan, 181 So. 660 (La. App. 2d Cir. 1938); Gulf Refining Co. v. Evans, 181 So. 660 (La. App. 2d Cir. 1938).


30. Schoppel v. Daly, 112 La. 201, 36 So. 322 (1904); Hill v. Traveler's Ins. Co., 128 So. 2d 277 (La. App. 1st Cir. 1961); Green v. Southern Furniture Co., 94 So. 2d 508 (La. App. 1st Cir. 1957); Frudhomme v. Berry, 60 So. 2d 620 (La. App. 2d Cir. 1953); Duplain v. Wiltz, 194 So. 60 (La. App. Orl. Cir. 1940). This rule may be inapplicable to mineral leases; however, this question is beyond the scope of this Comment.
cause of action against the lessor under article 2695 of the Code, as her husband does, but can only recover from the owner of the premises\textsuperscript{31} by proving that the owner neglected to repair the premises and that she was injured by “ruin”\textsuperscript{32} or “falling down”\textsuperscript{33} of the building.

When considering the prenuptial debts of the husband, the courts have said that article 2403 must be read with article 2404.\textsuperscript{34} In effect, the husband may pay his separate creditors with community funds, while the wife does not have the same privilege.\textsuperscript{35} However, on dissolution of the community, his estate is indebted to the wife’s estate for one-half of the community funds used to liquidate his debts.\textsuperscript{36} The husband’s creditors may still be able to seize community property in satisfaction of his separate debts,\textsuperscript{37} although a recent decision casts doubt on this procedure.\textsuperscript{38}

Obviously the wife has little or no control over the community during its existence. Administration and control, however,

\begin{itemize}
\item \textsuperscript{31} LA. CIVIL CODE art. 2695 (1870): “The lessor guarantees the lessee against all the vices and defects of the thing . . . and if any loss should result to the lessee from the vices and defects, the lessor shall be bound to indemnify him for the same.” This article has been restricted to a lessee’s action against the lessor, thus excluding third persons who were injured on the premises. In Green v. Southern Furniture Co., 94 So. 2d 508, 511 (La. App. 1st Cir. 1957) the court asserted: “The lessor’s liability under the former codal articles [2693 and 2695] has been held to be only to the tenant and not to third persons (not even to the tenant’s wife).” Additionally, the lessor is strictly liable for the lessee’s personal injuries sustained on the premises. See Comment, 20 LA. L. REV. 76, 77 (1959). Consequently, since the wife is a third person and cannot use article 2695 against the lessor, her only recourse is against the owner of the property. Of course, the lessor and owner are frequently the same person, yet the wife must still base her cause of action on provisions other than 2695. See Comment, 20 LA. L. REV. 76, 79 (1959).
\item \textsuperscript{32} LA. CIVIL CODE art. 2322 (1870).
\item \textsuperscript{34} Id. art. 670.
\item \textsuperscript{35} See, e.g., Davis v. Compton, 13 La. Ann. 396 (1858).
\item \textsuperscript{36} Succession of Ratcliff, 209 La. 224, 24 So. 2d 456 (1946); Hawley v. Crescent City Bank, 26 La. Ann. 230 (1874); Davis v. Compton, 13 La. Ann. 396 (1858); Glenn v. Elam, 3 La. Ann. 611 (1848); Harris v. Harris, 190 So. 2d 359 (La. App. 4th Cir. 1964); Stafford v. Sumrall, 21 So. 2d 83 (La. App. 1st Cir. 1945); Comment, 22 TUL. L. REV. 486, 488 (1948). But see Notes, 21 TUL. L. REV. 125 (1946), 20 TUL. L. REV. 136 (1945). It should be noted that “separate” debts, in the text, include the husband’s prenuptial debts as well as his separate debts incurred during the community.
\item \textsuperscript{37} Glenn v. Elam, 3 La. Ann. 611 (1848); Comment, 22 TUL. L. REV. 486, 488 (1948).
\item \textsuperscript{38} See note 35 supra.
\item \textsuperscript{39} Fazzio v. Krieger, 226 La. 511, 526, 76 So. 2d 713, 717 (1954). The court indicates that only the husband’s one-half of the community may be seized to satisfy his anterior debts. Speaking of the husband’s prenuptial debt, the court states: “[T]hat obligation is nonetheless enforceable from the husband’s share of the community.” (Emphasis added.)
\end{itemize}
are not the sole factors for consideration in the search for a satisfactory determination of her interest in the community.

Second, one of the strongest arguments against the ownership theory appears to be article 2410 of the Civil Code, which allows the wife to absolve herself from liability for community debts by renouncing the community. Although renunciation prevents the wife from receiving her share of community assets, it also has the effect of exonerating her from any personal liability for community debts. Article 2410 is particularly advantageous to the wife who recognizes that the community debts exceed the assets. The husband never has the privilege of renunciation; he is always personally liable for community debts. Apparently the husband is denied the power to renounce the community because of his control over community property. Allied with article 2410 is R.S. 9:2821 which allows the wife to accept the community with benefit of inventory. This privilege entitles the wife to receive one-half of any community assets remaining after all community debts have been paid. At this point, an opportunity for speculation arises. Is the wife's privilege of renunciation after dissolution of the community consistent with the theory that she owns one-half of the community during its existence? An affirmative answer to this

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

40. Succession of Baum, 11 Rob. 314 (La. 1845).


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

43. Ibid. See also LA. CIVIL CODE art. 1032 (1870): "The benefit of inventory is the privilege, which the heir obtains, of being liable for the charges and debts of the succession only to the value of the effects of the succession, by causing an inventory of these effects to be made within the time and in the manner hereinafter prescribed."
question seems doubtful, since an owner's entire patrimony is burdensed by the debts he incurs.

Third, article 2406 of the Civil Code states that "the effects which compose the partnership or community of gains, are divided into two equal portions between the husband and wife, or between their heirs, at the dissolution of the marriage."44 (Emphasis added.) Although it seems that article 2406 merely provides for division of community property into halves after the community has been dissolved, the article has frequently been used to support the proposition that the wife's interest does not vest, or begin, until dissolution of the community.45 Similarly, article 2407 provides: "The fruits . . . at the time of the dissolution of the marriage, are equally divided between the husband and the wife or their heirs."46 (Emphasis added.)

Ownership Theory

The courts have experienced difficulty in finding affirmative statutory language to support the proposition that the wife owns one-half of the community during its existence. Jurists have occasionally relied upon article 2399 of the Civil Code which provides that "every marriage contracted in this state, superinduces of right partnership or community of acquets or gains."47 The term "community" and "partnership" are used synonymously throughout the Code.48 In addition, several articles describe the community property as "common" effects or

44. LA. CIVIL CODE art. 2406 (1870).
45. In Monk v. Monk, 243 La. 429, 440, 144 So. 2d 384, 388 (1962) the court stated: "[A]nd . . . when the community was dissolved by the judgment of separation in 1939, the plaintiff, on that day, became an owner of an undivided half interest in and to this property. Article 2406 of the Revised Civil Code." See, e.g., Humphreys v. Royal, 215 La. 567, 41 So. 2d 220 (1949); Tugwell v. Tugwell, 32 La. Ann. 848 (1880). In Commissioners of Exchange & Banking Co. v. Bein, 12 Rob. 578, 582 (La. 1840), the court declared: "Her interest in the community is only eventual and contingent, and is to be ascertained upon its dissolution; it is only then that she becomes entitled to one-half of the property . . . (Civ. Code, arts. 2375, 2378)." Article 2375 of the 1825 Code is article 2406 of the 1870 Code. 3 LOUISIANA LEGAL ARCHIVES, COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA 1323 (1942). See also Speights v. Nance, 142 So. 2d 418 (La. App. 2d Cir. 1962).
46. LA. CIVIL CODE art. 2407 (1870).
47. id. art. 2399. See Messersmith v. Messersmith, 229 La. 495, 86 So. 2d 169 (1956); Dixon v. Dixon's Executors, 4 La. 188 (1832). In Beatty v. Vining, 147 So. 2d 37, 43 (La. App. 2d Cir. 1962), the court cited article 2399 and declared: "The law's investiture of the husband as head and master of the community by no means negatives or limits the wife's interest as a co-owner, or affects her title to an undivided one-half interest in all community property from the very moment of its acquisition. LSA-C.C. Arts. 2399, 2402."
48. LA. CIVIL CODE art. 2332 (1870) states: "[T]he partnership, or community of acquets or gains. . . ." See, e.g., id. arts. 2399, 2402, 2403, 2404.
property.\textsuperscript{49} However, article 2807 unequivocally states that "the community of property created by marriage is not a partnership."\textsuperscript{50} Similarly, to say the community is analogous to a partnership is somewhat confusing.\textsuperscript{51} To analogize the community to a common law partnership would be consistent since the partners are generally considered co-owners of the partnership property.\textsuperscript{52} On the other hand, Louisiana has embraced the civil law concept of partnership, which, regarded as a separate legal entity, owns the property while the partners have merely a "residuary" interest.\textsuperscript{53} Accordingly, it seems inappropriate for the advocates of the ownership approach to analogize the community to a Louisiana partnership.

Other than the above-mentioned language, the search for affirmative statements indicating the wife is an owner during the community has been unproductive. Rather than rely on such paucity of language, the limitations placed by the Code upon the husband's control and management of the community have frequently been used to rebut the expectancy theory.\textsuperscript{54} The reasoning seems to be that since the husband's control of the community is restricted for the purpose of protecting the wife's

\textsuperscript{49} See, e.g., id. arts. 2334, 2404, 2405.

\textsuperscript{50} Id. art. 2807. It should be noted that article 2807 is found in the section of the Civil Code which deals specifically with partnership.

\textsuperscript{51} However, such an analogy has been made on several occasions. See Messersmith v. Messersmith, 229 La. 495, 86 So. 2d 169 (1956). In Succession of Wiener, 203 La. 649, 657, 14 So. 2d 475, 477 (1943), the court stated: "That this community is a partnership in which the husband and wife own equal shares, their title thereto vesting at the very instant such property is acquired, is well settled in this state."


\textsuperscript{53} Ibid.

\textsuperscript{54} The Code limitations on the husband's control of the community were responsible for the birth of the ownership doctrine. Dixon v. Dixon's Executors, 4 La. 188, 192 (1832). The court, recognizing that the expectancy theory was the majority position in France, distinguished the French Code from the Louisiana Civil Code. "The Napoleon Code does not contain the provision found in the Code of Louisiana, that if the husband alienates, during coverture, the acquets and gains, with the intention of injuring the wife, she may, at his decease, bring an action to set aside the alienation. The laws of Spain seem to have furnished such a right, how can she maintain an action to set aside the alienation?" The court was referring to La. CIVIL CODE p. 336, art. 66 (1808) and La. CIVIL CODE art. 2373 (1825), which now appears as La. CIVIL CODE art. 2404 (1870). 3 LOUISIANA LEGAL ARCHIVES, COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA 1321 (1942). Louisiana courts have relied on the Dixon holding as authority for the ownership theory. See, e.g., Azar v. Azar, 239 La. 941, 120 So. 2d 485 (1960); Messersmith v. Messersmith, 229 La. 495, 86 So. 2d 169 (1956); Succession of Helis, 226 La. 133, 75 So. 2d 221 (1954); Phillips v. Phillips, 160 La. 813, 107 So. 584 (1926).
interest, the conclusion is inescapable that the wife's interest manifests itself as ownership rather than a mere benefit of survivorship. Article 2404 is one of the most significant statutory limitations on the husband's control: it gives the wife a cause of action against the heirs of the husband if he has disposed of community property "by fraud, to injure his wife." The same article prohibits the husband from donating community immovables. The courts have extended the wife's cause of action for fraudulent alienation to make it effective against her husband when the community is dissolved by means other than his death. Article 2425 allows the wife an action for separation of property during the marriage. Article 2334 adds that where title to community property is in the wife's name, "it cannot be mortgaged or sold by the husband without her written authority or consent." A recent amendment to article 2334 prohibits the husband from alienating community immovables without the wife's consent where the husband and wife are named jointly as owners and the wife has filed a declaration stating that her consent is necessary before the husband can lease, sell, or mortgage the property. R.S. 9:2801-2804 forbids the husband to sell or mortgage the family home if a declaration of homestead has been filed, either by husband or wife. In order to enforce R.S. 9:2801, the courts have given the wife the right to enjoin or annul, during the community, the sale or

55. LA. CIVIL CODE art. 2404 (1870).
57. LA. CIVIL CODE art. 2425 (1870): "The wife may, during the marriage, petition against the husband for a separation of property, whenever her dowry is in danger, owing to the mismanagement of her husband, or otherwise, or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims."

Article 2425 does not seem to cover the situation in which the wife has brought nothing into the marriage but is earning wages which fall into the community and are being mismanaged by the husband. However, Davock v. Darcy, 6 Rob. 342 (La. 1844) extended article 2425 to cover such a situation.
58. LA. CIVIL CODE art. 2334 (1870). At the same time, the wife cannot encumber community property where title stands in her name without the authority of her husband. Bywater v. Enderle, 175 La. 1098, 145 So. 118 (1932).
59. In 1962, LA. CIVIL CODE art. 2334 (1870) was amended to read in part: "Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written authority or consent where she has made a declaration by authenticated act that her authority and consent are required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated."

If she does not file the declaration, the husband may alienate the property without her consent. See Young v. Arkansas-Louisiana Gas Co., 184 La. 460, 166 So. 139 (1939).
mortgage of the family home by the husband if a declaration has been filed. Finally, article 150 prohibits the husband from contracting community debts after an action for separation from bed and board has been filed.

Irrespective of the statutory provisions limiting the husband’s control of the community, there appear to be more convincing reasons for holding that the wife’s interest is greater than a mere hope. The Code, in certain cases, requires the wife to contribute to the community. Her “earnings,” when living with her husband, fall into the community fund. Similarly, unless she files a declaration of paraphernality, “the fruits” of her paraphernal property are deemed community property. Article 2402 creates the all-important presumption that everything the spouses “acquire” during the community becomes community property. Additionally, article 2402 provides that “the produce of the reciprocal industry and labor of both husband and wife” inures to the community. Since the wife is required to contribute to the community fund, it seems inequitable to say her interest during the marriage amounts to only a hope of ownership after the community has been dissolved. It should also be noted that articles 915 and 916 allow the wife to provide for the disposal of her one-half of the community by will, prior to the dissolution of the community. However, it is questionable whether 915 and 916 should be used as authority for the proposition that the wife owns one-half of the community during its existence.

61. See, e.g., Reymond v. Louisiana Trust & Savings Bank, 177 La. 409, 148 So. 663 (1933).
62. La. Civ. Code art. 150 (1870): “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 . . . .”
63. Id. art. 2334.
64. Id. art. 2386.
65. Id. art. 2402.
66. Id. arts. 915, 916. Although the wife is allowed to dispose of her one-half of the community property by will, the will is not effective until dissolution of the community and the death of the wife. Her share of the community property on dissolution of the community will fall into her succession. If there is no community property at dissolution of the community, the disposition of her share by will, which was made during the existence of the community, will have no effect. Articles 915 and 916 merely provide the wife with a means to dispose of her share of the community property after the community has been dissolved. Additionally, the nature of the spouses’ (or former spouses’) interest after dissolution of the community is considered to be co-ownership. See, e.g., Rhodes v. Rhodes, 190 La. 370, 182 So. 541 (1938); Tomme v. Tomme, 174 La. 123, 139 So. 901 (1932); Succession of Heckert, 160 So. 2d 375 (La. App., 4th Cir. 1964). For this reason, it is doubtful whether articles 915 and 916 should be used as authority for the proposition that the wife owns one-half of the community during the existence of the community.
After examining the statutory provisions pertinent to the study of the wife's interest, it appears doubtful that they provide a conclusive solution to the problem. It seems improper to say the wife has merely a hope of becoming an owner simply because the husband is the "head and master." Similarly, it seems equally unsound to use the limitations placed on the husband's control of the community as the basis for declaring the wife an owner during its existence. More conclusive results are to be found by an examination of the jurisprudential use and interpretations of the statutory provisions as well as the jurists' considerations on policy matters.

**JURISPRUDENCE**

**Origin**

_Dixon v. Dixon's Executors_ seems to be the source of the ownership theory in Louisiana jurisprudence. The court held that the wife's interest did not vest, or begin, at dissolution of the community, but that "she has rights in the acquets before the husband dies." The court reasoned that since the marriage had "superinduced of right" the community, and since the wife had an action for fraudulent alienation of community property by the husband, her rights must vest prior to dissolution.

Before the _Dixon_ ruling had an opportunity to become firmly established in Louisiana jurisprudence, the Supreme Court reversed its position in the landmark case of _Guice v. Lawrence._ The husband, deeply indebted to his separate creditors

---

67. 4 La. 188 (1832). Husband and wife were married in Pennsylvania, but the husband later moved to Louisiana. The husband died in Louisiana and the widow was claiming her one-half of the community. Prior to the husband's death, Spanish laws regarding the community were repealed. Heretofore, Spanish law had been relied upon heavily by the courts. The court was faced with the question of whether to give retroactive effect to the repeal of the Spanish laws which would abrogate the community and defeat the contentions of the widow. The widow asserted that the law in force at the time the community was created should govern and not the law in existence at the time of dissolution.

68. _Id._ at 194.

69. _Id._ at 191: "The rights of husband and wife, in the partnership of gains, grow out of the marriage contract, and do not originate in its dissolution. . . . If, therefore, by the law of the country where the marriage took place, a community of acquets and gains was declared to be created by the marriage, or, in the language of our code, superinduced of right by the contract, we should think that a subsequent law, declaring there should be no further community between the persons who had entered into this engagement, would be retrospective, and as much a violation of rights vested under the contract, as a statute would be, which would alter the obligations imposed, or impair the rights acquired, under a contract of sale or of lease."

70. See quotation from _Dixon_ in note 54 _supra._

71. 2 La. Ann. 226 (1847).
for debts contracted prior to the marriage, voluntarily surrendered community immovables to satisfy his anterior debts. After the husband died, the widow sued to be recognized as owner of one-half of the proceeds remaining from the sale of the surrendered property after payment of community debts. In ruling against the wife, the court reasoned that the voluntary surrender of community property was merely an alienation by the husband which he had the power to make as "head and master" of the community. In rejecting the ownership doctrine, the court asserted that "the laws of Louisiana have never recognized a title in the wife during marriage to one-half the acquets and gains." The court supported its position by quoting a passage from the Spanish commentator, Febrero, which has since been the subject of considerable controversy. In conclusion, the court maintained that the wife's cause of action for her husband's fraudulent alienation of community property "cannot be construed as giving or recognizing a title to or in the wife." Therefore, since the husband controls the community and since the wife has no title therein until dissolution, the court allowed the husband to surrender community property during the existence of the community to satisfy his personal debts. The Guice v. Lawrence ruling that the wife's ownership does not vest, or begin, until dissolution of the community was adhered

72. Id. at 228.
73. Ibid. The Louisiana Supreme Court, in Phillips v. Phillips, 160 La. 813, 107 So. 584 (1926), asserted that Febrero was mistranslated in Guice v. Lawrence. In Guice v. Lawrence, 2 La. Ann. 226, 228 (1847) the court stated: "The rule of the Spanish law on that subject, is laid down by Febrero with his usual precision. The ownership of the wife, says that author, is revocable and fictitious during marriage. As long as the husband lives and marriage is not dissolved, the wife must not say that she has ganancias, nor is she to prevent the husband from using them, under the pretext that the law gives her one-half. But soluto matrimonio, she becomes irrevocably the owner of one undivided half, in the manner provided by law for ordinary joint ownership. The husband is, during marriage, real y verdadero dueño de todos, y tiene en el efecto de su dominio irrevocable." Concerning the above quotation, Phillips stated: "The statement to the contrary in Guice v. Lawrence was an error, resulting from a wrong translation of the Spanish word dominio, used by the commentator, Febrero. He used the word dominio as meaning dominion or control, but not ownership, in describing the authority of the husband over the community estate." Id. at 826, 107 So. at 588.
74. Guice v. Lawrence, 2 La. Ann. 226, 228 (1847). At the time of the instant case, the proviso giving the wife an action against the heirs of her husband for his fraudulent alienation of community property was part of article 2373 of the 1825 Code. The proviso is now part of article 2404 of the 1870 Code. 3 Louisiana Legal Archives, Compiled Edition of the Civil Codes of Louisiana 1321 (1942).
75. Irrespective of later developments concerning the wife's interest, the husband may still pay his separate debts with community funds. See note 35 supra.
to, with few exceptions, for more than three-quarters of a century.

**CAUSE FOR A CHANGE — TAX PROBLEMS**

In 1913, the United States Constitution was amended in order to give Congress power to levy a federal income tax without requiring apportionment among the states in proportion to population. Subsequent thereto, federal income tax laws were enacted which based the tax on the "individual's" income. The wife's earnings were to be reported separately from her husband's. It became apparent that this type of tax law could prove extremely beneficial to taxpayers in community property states. If the wife owned one-half of the community during its existence, she would be able to declare one-half of its annual income in her separate return while her husband could declare the remaining one-half. On the other hand, if she had only an expectancy, the husband would have to report the entire community income in his return, thus causing a larger tax burden. In response to a request by the Secretary of the Treasury, the United States Attorney General issued an opinion on the matter.

In Louisiana, Attorney General Palmer concluded that the wife could be considered an owner of one-half of the community, therefore, she could report one-half of the community

---

76. In Phillips v. Phillips, 160 La. 813, 107 So. 584 (1926), the court asserted that Beck v. Natalie Oil Co., 143 La. 153, 78 So. 430 (1918); Succession of May, 120 La. 692, 45 So. 551 (1908); and Succession of Marsal, 118 La. 212, 42 So. (1907), had overruled the Guice decision. After an examination of these cases, it appears doubtful whether the above cited cases did, in effect, overrule Guice v. Lawrence.


78. U.S. CONST. amend. XVI: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

79. Numerous federal income tax laws were passed from 1913 to 1928; but all included language basing the tax on the individual's income. Typical is the 1919 Revenue Act, 40 Stat. 1065 (1919), which provided that the individual's taxable gross income would include "gains, profits, and income derived from salaries, wages, or compensation for personal service . . . or growing out of the ownership or use of or interest in such property." (Emphasis added.)

80. 32 Ops. ATT'Y GEN. OF U.S. 435 (1921).
income. His conclusion was based on the code provisions limiting the husband's control of community property as well as articles 915 and 916 of the Code, which allow the wife to dispose of one-half of the community property by will. The provisions supporting the expectancy theory were, on the other hand, regarded lightly, and the Attorney General merely alluded to the fact that the preponderance of jurisprudence favored the expectancy approach. In any event, the opinion enabled the people of Louisiana and other community property states to benefit from the early federal income tax laws.

On January 4, 1926, the United States Supreme Court decided the landmark case of United States v. Robbins. Although the decision was limited to California law, the result caused much consternation among taxpayers of all community property states. The Court held that the wife's interest was a mere expectancy and, therefore, she could not report one-half of the community income in her separate return. More significantly, Justice Holmes indicated, in dictum, that ownership was not the proper test for determining whether the wife was entitled to report one-half of the community income. He asserted that the husband's control of the community was sufficient to require him to report the entire annual community income.

The impact of the Robbins case necessitated expeditious decisions on the matter. It was apparent that the nature of the wife's interest was once again an unsettled question. Was she an owner or did she have a mere expectancy? More significantly, was ownership by the wife sufficient or would the husband's control of the community require him to report the entire community income? Three weeks after Robbins, the Attorney General announced that he was considering the problem of the wife's interest and the effect of the Holmes dictum. He invited the filing of briefs and granted a hearing for the states to present their arguments. The situation looked bleak for the peo-

81. Id. at 460.
82. Id. at 444. 460. But see note 66 supra.
83. Id. at 445.
84. 269 U.S. 315 (1926).
ple of Louisiana since our jurisprudence was heavily weighted in favor of *Guice v. Lawrence*, or the expectancy ruling. The urgent need for persuasive jurisprudence holding that the wife owned one-half of the community during its existence became apparent. Shortly thereafter, the Louisiana Supreme Court in *Phillips v. Phillips,* by way of dicta, expressed disapproval of *Guice* and announced that the wife held title to one-half of the community prior to dissolution. The court’s principal concern was whether act 4 of 1882 (now R.S. 9:2821) repealed article 2420. Article 2420 stipulated, in effect, that when the community was dissolved by a separation from bed and board, the wife was presumed to renounce the community unless she formally accepted within thirty days. R.S. 9:2821 allows the wife to accept the community under benefit of inventory with the “same benefits and advantages as are allowed heirs to accept a succession under the benefit of inventory.” Therefore, the wife separated from her husband by divorce, separation from bed and board, or death had the same rights regarding the community as did an heir to a succession. She could either accept unconditionally, renounce, or accept with benefit of inventory. However, while the wife was presumed to renounce the community under article 2420, an heir was not presumed to renounce the succession nor was a widow presumed to renounce the community. After a thirty-day deliberation period, they could merely be compelled to choose whether to accept or renounce. The court reasoned that the obligations article 2420 imposed upon the separated or divorced wife were incongruous with the

88. See note 77 supra.
89. 160 La. 813, 107 So. 584 (1926).
90. Ibid. The wife had obtained a separation from bed and board but did not formally accept the community within 30 days from dissolution as was required by article 2420. Eight months later, she sued for partition and settlement of the community. If Act 4 of 1882 repealed article 2420, she could validly sue for partition of the community after 30 days had expired. If article 2420 was still in effect, she would be considered as having tacitly renounced the community since she did not formally accept within 30 days after the community had been dissolved.
91. LA. CIVIL CODE art. 2420 (1870): “The wife, separated from bed and board, who has not within the delays above fixed, to begin from the separation finally pronounced, accepted the community, is supposed to have renounced the same . . . . (Repealed by La. Acts 1926, No. 49.).”
93. LA. CIVIL CODE art. 2409 (1870).
94. Id. art. 2410.
97. LA. CIVIL CODE art. 1050 (1870).
98. Id. arts. 1055, 2414.
advantages given her by R.S. 9:2821. However, after concluding that R.S. 9:2821 had, in effect, repealed article 2420, the court continued by examining the nature of the wife’s interest: "The wife’s half interest in the community property is not a mere expectancy during the marriage; it is not transmitted to her by or in consequence of a dissolution of the community. The title for half of the community property is vested in the wife the moment it is acquired." It would be inconsistent for the wife to tacitly renounce the community after thirty days have passed, reasoned Justice O’Neill, since she owns one-half of the community during its existence. The reasoning of the court raises several questions. Unquestionably, an heir’s right to his ancestor’s patrimony does not arise until death of the ancestor. Thus, prior to that time, his interest is not considered as ownership in any form. He has no control over his ancestor’s patrimony and does not consent to the obligations of his ancestor. Apparently, for this reason, the heir is given the privilege of exonerating himself from liability if the debts of the succession exceed the assets. He may deliberate on whether to renounce, accept unconditionally, or accept the succession with benefit of inventory. The heir is certainly not given the opportunity to renounce something which he previously owned. In the same manner as an heir, the wife may deliberate on whether to renounce, accept unconditionally, or accept the community with benefit of inventory. Similarly, the wife has almost as little control over the community during its existence as does the heir over his ancestor’s patrimony prior to death. Despite this lack of control, the wife is still said to own one-half of the community during its existence. If so, why is she given a deliberation period? More significantly, why may she choose to renounce what she previously owned? Irrespective of the court’s reasoning, the Phillips decision provided the ammuni-

100. Ibid.
101. LA. CIVIL CODE arts. 940-942 (1870).
102. Id. arts. 1033, 1050.
103. Id. art. 1014.
104. Id. art. 977.
105. Id. art. 1032.
107. LA. CIVIL CODE art. 2410 (1870).
108. Id. art. 2409.
110. LA. CIVIL CODE art. 2404 (1870).
Aside from the consternation among taxpayers in the community property states, the Robbins decision precipitated two other significant events. First, Congress enacted section 1212 of the Revenue Act of 1926 which temporarily disposed of the possibility of tax liability as a result of the husband's control of the community. Section 1212 provided that if the wife had a "vested" interest, as opposed to an expectancy, separate returns filed prior to January 1, 1925, would be considered as correctly returned. The section made no provisions for the future but merely protected the taxpayer against an action for back taxes prior to 1925. For the future, the 1926 act embodied the provisions of the former acts which based the tax on the "individual's" income. Second, the Robbins decision eventually led to the institution of test suits in all community property states, except California, in order that a final decision could be made regarding the rights of the husband and wife to file separate returns. In 1927, the Secretary of the Treasury requested an opinion from the Attorney General as to the status of the law in the community property states regarding the wife's interest. After much deliberation, the Attorney General decided against an administrative decision on the matter, suggesting that the question of the wife's interest should be decided by the courts. In view of the differences in the various community property systems, he recommended that the federal courts accept the decisions of the state courts on the matter of the wife's interest. His proposal led the way to the Louisiana test case of Bender v. Pfaff. The United States Supreme Court adopt-

113. Revenue Act of 1926, 44 Stat. 9, 130 (1927). Section 1212 provided: "Income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the state law applicable to such marital community for such period." (Emphasis added.)
118. Id. at 266: "The nature and extent of a wife's interest in community income . . . is to be determined from the statutes and decisions of the State. In determining the nature of an interest in community income created by State law, it is necessary for the Federal courts to accept the decisions of the State courts."
ed, almost verbatim, the language of the Phillips case in holding that the wife was owner of one-half of the community during its existence. Accordingly, the people of Louisiana continued to benefit from the existing tax laws.

Inheritance taxes caused a similar controversy in 1942. Section 402(b)(2) of the Revenue Act of 1942, amending the Internal Revenue Code of 1939, provided for taxation of community property to "the extent of the interest therein held as community property by the decedent and surviving spouse." In other words, the deceased's heirs were to be taxed on the worth of the total community and not simply the ancestor's one-half interest. Prior to 1942, only the deceased's one-half of the community was included in the gross estate. Almost immediately after passage, the constitutionality of the amendment was tested. In Succession of Wiener, the state tax collector alleged that all community property should be included in the gross estate of the deceased. The collector, because of section 402(b)(2), was attempting to place a similar construction on an earlier Louisiana law. In other words, if the collector was successful, the wife's one-half of the community would be included within the gross estate of the deceased husband. The heirs contended that enforcement of the state and federal laws would be a denial of due process of law and the Louisiana Supreme Court agreed. The court, citing Phillips and Pfaff, held that since the wife owned one-half of the community during existence, the inclusion of her one-half in the gross estate of the deceased was a violation of the fifth and fourteenth amendments. In denying jurisdiction, the United States Supreme Court circumvented the challenge by ruling that the decision was based on Louisiana law and not on section 402(b)(2).

Undoubtedly, the Phillips and Wiener rulings were beneficial to the people of Louisiana. At the time, there was a de-

120. See generally Jackson, Taxation of Community Property: The Wiener Case, 18 TUL. L. REV. 525 (1944).
122. See Int. Rev. Code of 1939, § 811(a) which is the same as Int. Rev. Code of 1954, § 2033: "The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death."
123. 203 La. 649, 14 So. 2d 475 (1943).
nite need for these decisions. However, the need for treating the wife as an owner, for taxation purposes, has passed. The offending provision of the 1942 Revenue Act was repealed in 1948. The gross estate, for inheritance tax purposes, now includes only the deceased's share of the community.127 Similarly, the basis for federal income taxation has been changed. Section 301 of the Revenue Act of 1948 was designed to equalize the tax burden of married couples in community property and non-community property states, consequently, the ownership test was discarded.128 In all states, each of the spouses is now taxed on only one-half of the combined annual income, if a joint return is filed.129 However, spouses in community property states may still file separate returns for one-half of the annual community income.

RECENT JURISPRUDENCE

As stated previously, prior to 1926 the preponderance of jurisprudence favored the hope or expectancy theory,130 but since Phillips the courts seem to adhere to the ownership approach.131 However, recent authority supporting Guice v. Lawrence is available. For example, in First National Bank of Ville

127. 1 CCH, FEDERAL ESTATE & GIFT TAX, 1954 Code Regulations, para. 1310.05 (1960) : "The Revenue Act of 1948 repealed all of the above provisions relating to inclusions in the gross estate on account of interests in community property. Its effect . . . is to restore to the residents of community property states the same status they had before enactment of the 1942 Act as to estate tax liability — that is, their property interests are governed by the law of the state, and only one-half of the community property belongs to each spouse. The one-half which belonged to the deceased spouse is includible in his (or her) gross estate under 1954 Code sec. 2033."

128. 1 MERTENS, THE LAW OF FEDERAL INCOME TAXATION §2.05 (1962): "The provisions for the splitting of income between husband and wife, which were first introduced by the Revenue Act of 1948, were designed to equalize the tax burden of married couples in common law and in community property states."

129. See INT. REV. CODE of 1954, §2(a) : "In the case of a joint return of a husband and wife under section 6013, the tax imposed by section 1 shall be twice the tax which would be imposed if the taxable income were cut in half."

130. See note 77 supra.

Platte v. Coreil, the court declared that “property being community, the wife had no title therein and could become half-owner only after the dissolution of the marriage.” In 1962, the Supreme Court indicated the wife’s interest was not absolute until dissolution by stating: “[W]hen the community was dissolved by judgment of separation in 1939, the plaintiff, on that day, became an owner of an undivided half interest in and to this property.” After numerous attempts to discredit the Guice ruling, the expectancy theory, although a minority position, still seems very much a part of our jurisprudence.

**SUMMARY OF AUTHORITY**

**Ownership Theory**

There is little affirmative statutory language to support the ownership approach. In treating the wife as an owner prior to dissolution of the community, the courts have found it necessary to resort to statutory limitations on the husband’s control of the community to support their conclusions. The fact that the wife is required to contribute monetarily to the community also tends to support the ownership doctrine. However, the bulk of authority supporting the ownership approach is to be found in the jurisprudence. Passage of federal tax laws caused an immediate about-face in the courts regarding the nature of the wife’s interest. Although the offensive sections of these laws have long since been repealed, the trend of jurisprudence initiated by their passage, remains with us.

**Expectancy Theory**

Statutory and jurisprudential authority for the expectancy theory can be found in three groups. First, article 2404 of the Civil Code gives control and administration of the community to the husband. The Code of Civil Procedure and other later legislation fully support article 2404. Similarly, the jurisprudence affirms the proposition that the husband is “head and master” by treating the wife as a third person with respect to

---

132. 145 So. 395, 398 (La. App. 1st Cir. 1933).
134. Others have taken a contrary position. See Morrow, *Matrimonial Property Law in Louisiana*, 34 Tul. L. Rev. 3, 17 (1959): “When property is deemed to fall into the community, there can be no doubt whatever in Louisiana of the nature of the interest of each spouse in it. The wife in Louisiana has, just as the husband has, an immediate, present one-half interest, as owner, in all community property from the time of its acquisition.”
the acts of her husband as well as allowing the husband to pay his separate creditors with community funds. Second, article 2410 of the Code allows the wife to renounce the community, thus absolving herself from liability for community debts. Third, article 2406 may indicate that ownership of the spouses does not vest, or begin, until the community has been dissolved.

Although the great weight of statutory and jurisprudential authority has favored the Guice v. Lawrence ruling, the expectancy theory has been the minority position since 1926. Subsequent to Justice O'Niell's emphatic denunciation of Guice, the courts have clung tenaciously to the theory that the wife is an owner during the community. Given the preponderance of recent decisions following Phillips and Pfaff, it seems that the ownership approach remains the majority view today.

PRACTICAL EFFECTS OF THE OWNERSHIP DOCTRINE

Parol Evidence

It has often been said that the discussion of the nature of the wife's interest is merely academic and without practical significance. The inaccuracy of this statement has become apparent in light of recent jurisprudence. There are in fact distinct practical consequences in treating the wife as an owner, especially when rules of parol evidence are at issue.

Parol evidence is generally inadmissible between parties and their privies to vary the terms of a written contract. Third parties, on the other hand, are generally not bound by the parol evidence rule. For the most part, the wife has been treated as an owner.

135. 3 Planiol, Civil Law Treatise (An English Translation by the Louisiana State Law Institute) no. 905 (1959); McKay, Community Property § 1179 (2d ed. 1925).

136. See La. Civil Code art. 2276 (1870); Templet v. Babbit, 198 La. 810, 5 So.2d 13 (1942); Smith v. Chappell, 177 La. 311, 148 So. 242 (1933); Commercial Germania Trust & Savings Bank v. White, 145 La. 54, 81 So. 753 (1919); Beatty v. Vining, 147 So.2d 37 (La. App. 2d Cir. 1962); Cahow v. Hughes, 169 So. 801 (La. App. 1st Cir. 1936); Ewell v. Giamanco, 139 So. 515 (La. App. 2d Cir. 1932); Comment, 3 La. L. Rev. 427 (1941).

137. See, e.g., Henderson Iron Works & Supply v. Jeffries, 159 La. 620, 105 So. 792 (1925); Blake v. Hall, 19 La. Ann. 49 (1867); Morgan v. Livingston, 6 Mart.(O.S.) 19 (La. 1819). In other words, a third party may introduce parol to vary the recital in a written contract. At the same time, a third person, adversely affected, may exclude parol by a party or privy to the contract. Amite Auto Co. v. Appel, 134 So. 332 (La. App. 1st Cir. 1931); Hooper v. Miller, 125 So. 77 (La. App. 1st Cir. 1929); Central Mfg. & Lumber Co. v. Darcantel, 2 Orl. App. 444 (La. App. Orl. Cir. 1905).
as a third person to the acts of the husband. Although the wife is bound by the acts of her husband as "head and master," she has been considered a third person until she has accepted the community unconditionally. If she renounces, she remains in the position of a third person, and rightly so. It would thus appear inconsistent to treat the wife as a privy or party to the acts of her husband when she can exonerate herself from liability for his actions. However, recent decisions have viewed the matter differently. In *Beatty v. Vining*, the court protected the wife by allowing her to invoke the parol evidence rule against her husband, who had attempted to introduce parol to prove that certain property was acquired by a commercial partnership and not by the community. The wife objected to his use of parol to vary the articles of partnership. In sustaining her objection, the court reasoned that because the wife had an interest in the property on acquisition, "she is, therefore, directly concerned, interested in, and a privy to all acquisitions of property for the community estate." The objection to the use of parol was sustained on other grounds which would seem to make it unnecessary for the court to declare that the wife is a privy to all contracts of her husband concerning community property. Holding the wife is no longer a third party to the acts

---

138. See notes 29, 30 supra.
139. See Jacob v. Falgoust, 150 La. 21, 90 So. 426 (1922); Spencer v. Scott, 46 La. Ann. 1209 (1894); Snoddy v. Brashear, 13 La. Ann. 469 (1858); Brassec v. Ducros, 4 Rob. 335 (La. 1843); McDonough v. Tregre, 7 Mart. (N.S.) 68 (La. 1828).
140. 147 So. 2d 37 (La. App. 2d Cir. 1962).
141. Id. at 44.
142. The court employed the well-known rule that parol evidence is inadmissible to establish title in real estate in some person other than those named in the conveyance. The court concluded: "Therefore, upon the authority of the provisions of the Civil Code and under the well-established jurisprudence of this state, plaintiff's objection to the admissibility of parol testimony, coming from Wall and Vining and offered for the purpose of showing that Wall had acquired, under the articles of partnership, an undivided one-half interest in and to all the properties acquired by Vining in East Carroll Parish subsequent to the creation of the partnership, was meritorious and well-founded and should have been, and is now, sustained." Id. at 45.

Similarly, the court also sustained the wife's objection to use of parol by employment of the equally well-known rule that all property acquired during the existence of the community is presumed to be community property. *La. Civil Code* art. 2402 (1870). To overcome this presumption, the husband must make a double recital in the deed to the effect that he is purchasing the property with his separate funds and intends for the property to become his separate property. See, e.g., *Succession of Goll*, 156 La. 910, 101 So. 263 (1924). If the husband fails to make a double recital in the deed, the property becomes community and the husband is not allowed to introduce evidence to show otherwise. In this regard the court declared: "The deeds contain no recitals to the effect that the properties were not acquired as assets of the community of acquets and gains existing between plaintiff and defendant. Therefore, these properties are not
of her husband would appear to overturn considerable jurisprudence, the "lease" cases being one example. Similarly, since privies are bound by the acts of the parties to the contract, it seems that such a conclusion conflicts with the statutory provisions granting the wife the privilege to renounce her share of the community.

**Wife's Suit Against Husband During the Community**

Another fairly recent decision, *Thigpen v. Thigpen*, sheds further light on the practicality of treating the wife as an owner during the community. Article 2404 gives the wife an action against the heirs of the husband for his fraudulent alienation of community property. This provision assumes that the wife will have this action only when the community is dissolved by the death of the husband. But should she not be able to sue the husband for his fraudulent alienation of community property when the community is dissolved by other means? The *Thigpen* decision attempted to meet this problem, but the court's reasoning raised several unanswered questions. The court used the ownership rule as the basis for allowing a defrauded wife to sue her husband after the community had been dissolved by judicial separation. The court held that since the wife was an owner during the community, she should have a cause of action against her husband after dissolution of the community by means other than death. It would seem to follow that if she can sue her husband after dissolution because she is an owner during the community, she should be able to sue him during the community for the same reason. However, R.S. 9:291 allows the wife to sue her husband during marriage in only four situations, and fraudulent alienation of community property is not included.

---

143. See notes 30-33 supra, and accompanying text.
144. 231 La. 206, 91 So. 2d 12 (1956).
145. *LA. CIVIL CODE* art. 2404 (1870), in part: "But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have an action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving fraud."
146. 231 La. 206, 226, 91 So. 2d 12, 19 (1956) : "However, it has long since been established that the wife has a vested interest in community property at the time it is acquired. Consequently, the only logical view to be accorded Article 2404 is that it gives to the defrauded wife an action against her husband in the event the community is dissolved by divorce or judicial separation."
147. *LA. R.S.* 9:291 (Supp. 1963) : "As long as the marriage continues and the spouses are not separated judicially a married woman may not sue her hus-
In *Azar v. Azar*,\(^{148}\) the Supreme Court later rejected any possibility of the wife suing her husband during the community for fraud, pointing out that the wife could protect her community interests during the marriage by a suit for separation of property.

The use of the ownership doctrine as the basis for the court’s conclusion in the *Thigpen* case seems unnecessary. Prior jurisprudence had previously filled the gap in our law. As early as 1842, the Supreme Court stated that “although this law seems to contemplate only the case of a dissolution of the community by the death of the husband, yet the wife would not, perhaps, be without relief, in case of a separation from bed and board, were it proved that the husband had alienated property of the community in fraud of her rights.”\(^{149}\) Prior to the *Thigpen* decision, the Supreme Court had frequently permitted a defrauded wife to sue her husband after judicial separation or divorce.\(^{150}\) It seems the same conclusion could have been reached by simply adhering to the jurisprudence rather than casting doubt upon the validity of the well-established rule which limits the wife’s power to sue her husband during marriage to the four proceedings permitted by R.S. 9:291.

**CONCLUSION**

Although the ownership approach remains the majority position, the question still remains: which theory best describes the wife’s interest in the community? It is submitted that neither view accurately characterizes the nature of the wife’s interest in the community. Irrespective of which theory prevails, neither approach will adequately cover all situations that may arise. The wife’s contributions to the community and the statutory limitations on the husband’s control of the community seem to indicate that the wife’s interest is greater than a mere hope. On the other hand, the ownership theory is difficult to reconcile with the wife’s inability to bind the community without her

\(^{148}\) 239 La. 941, 120 So. 2d 485 (1960).

\(^{149}\) Smallwood v. Pratt, 3 Rob. 132, 133 (La. 1842).

\(^{150}\) Oliphint v. Oliphint, 219 La. 781, 54 So. 2d 18 (1951); Van Asselberg v. Van Asselberg, 164 La. 553, 114 So. 155 (1927). In Frierson v. Frierson, 164 La. 687, 114 So. 594 (1927), the wife’s claim against her husband was defeated simply because she did not allege that his actions were fraudulent. The court implied that she would have been successful if she had alleged fraud.
husband's consent\textsuperscript{151} and with the "head and master" provision of article 2404. In an action involving property owned in indivision, all those whose interests are affected by the judgment must be a party to the action.\textsuperscript{152} Similarly, in alienation of property, all those persons whose interests are affected must appear in the deed. If the wife is a true co-owner, it would follow that she would be required to be a party to all actions involving community property as well as appear in all transactions concerning community property. It is apparent that such a conclusion conflicts with article 2404 of the Civil Code and article 686 of the Code of Civil Procedure. In view of the wife's inferior powers and rights regarding control of community property, it appears doubtful whether she could be correctly called a co-owner.

Would it be more appropriate to label the wife a partner? Article 2807 of the Code expressly states she is not a partner. On dissolution of a partnership, the partners cannot choose whether to accept or repudiate the partnership as a wife may choose to renounce the community.\textsuperscript{153}

Will any single theory adequately describe the wife's interest without numerous exceptions? More significantly, should we attempt to categorize or classify the wife's interest under any single theory? It is suggested that we should abstain from any further attempts of this nature. What will be gained by analogizing the wife's interest to co-ownership, partnership, or the expectancy of an heir? Will categorizing the wife's interest facilitate comprehension of the problem or application of principles of law by the courts? As has been demonstrated, the adoption of any theory will require consideration of numerous exceptions to the chosen doctrine. On the subject of community property, it has been stated that any "attempt to compress the law into agreement with any theory is practically certain to do violence to the law."\textsuperscript{154} The validity of this viewpoint seems to have been unquestionably proved in light of the Beatty and Thigpen cases. After an examination of the problem, it appears that more harm than good has resulted from attempts to categorize the wife's interest. If the lawmakers had intended the wife to be a co-owner or partner, would they

\textsuperscript{151} There are exceptions to this rule. For example, in Thibodaux v. Richard, 60 So. 2d 240 (La. App. 1st Cir. 1952), a wife was allowed to sell a cow belonging to the community when the husband failed to provide for necessaries.


\textsuperscript{153} La. Civil Code arts. 2872-2875 (1870).

\textsuperscript{154} McKay, Community Property § 1186 (2d ed. 1925).
not have expressly stipulated to that effect? It is possible that the question was left open because none of the classifications of ownership would adequately describe the nature of the wife's interest in the community. It is submitted that fewer undesirable results will be produced if the wife's interest is characterized as the lawmakers intended it to be — *sui generis*.

Gordon E. Rountree

ENFORCEMENT OF RIGHTS BY SPOUSES

During the existence of the marital community, two broad classes of actions may arise with accompanying problems peculiar to each: actions against third parties and those between the spouses themselves. The former may be further divided into actions which may be brought by the wife in her individual capacity and actions properly instituted by the husband individually, or as head and master of the community. In the past difficulty has arisen due to uncertainty whether certain actions are separate or community, since choice of an improper plaintiff could result in dismissal for no right of action. In the area of the wife's separate actions there has been a significant broadening of the wife's capacity to sue as well as an increase in the number of claims classified as her separate property. In the area of interspousal suits, most problems are concerned with the scope of the underlying policy prohibiting certain types of suits, especially tort suits, and the breadth of the prohibition itself. This Comment examines these problem areas.

ACTIONS AGAINST THIRD PARTIES

Wife's Separate Rights and Actions

Generally, the classification of the right sought to be enforced as one belonging to the community or to the separate estate of one spouse determines the choice of a proper plaintiff. Actions to enforce common rights usually must be instituted by the husband as head and master of the community, whereas each spouse may institute actions relative to his own separate property. The husband's separate rights and actions apparently do not present any problems, since he may personally institute