The Marital Fourth and the Widow's Homestead

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

Charles A. Snyder

THE MARITAL FOURTH AND THE WIDOW'S HOMESTEAD

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

¹ These benefits are: the inheritance of the surviving spouse, provided by La. Civil Code art. 915 (1870); the usufruct of the surviving spouse, provided by id. art. 916; the marital fourth, provided by id. art. 2382; the widow's homestead, provided by id. art. 3252.
homestead and the marital fourth. The widow's homestead, first introduced by Act 255 of 1852 and later incorporated into the Louisiana Civil Code as article 3252, provides that a widow or minor children in necessitous circumstances may claim by preferential right the sum of one thousand dollars from the succession of the deceased husband or father. On the other hand the marital fourth (article 2382) allows the surviving spouse to obtain, under certain conditions, one-fourth of the deceased spouse's succession.

Until recently the substance of the two articles was thought so similar that the courts construed them as being pari materia. Renunciation of this premise requires a clear delineation of the distinction between the two articles and necessitates the provision of some guidelines for future cases.

2. LA. CIVIL CODE art. 3252 (1870): "Whenever the widow or minor children of a deceased person shall be left in necessitous circumstances, and not possess in their own right property to the amount of One Thousand Dollars, the widow or the legal representatives of the children, shall be entitled to demand and receive from the succession of the deceased husband or father, a sum which added to the amount of property owned by them, or either of them, in their own right, will make up the sum of one thousand dollars and which amount shall be paid in preference to all other debts, except those secured by the vendor's privilege on both movables and immovables, conventional mortgages, and expenses incurred in selling the property. The surviving widow shall have and enjoy the usufruct of the amount so received from her deceased husband's succession, during her widowhood, which amount shall afterwards vest in and belong to the children or other descendants of the deceased husband."

3. Id. art. 2382 (1870): "When the wife has not brought any dowry, or when what she brought as a dowry is inconsiderable with respect to the condition of the husband, if either the husband or the wife die rich, leaving the survivor in necessitous circumstances, the latter has a right to take out of the succession of the deceased what is called the marital portion; that is, the fourth of the succession in full property, if there be no children, and the same portion, in usufruct only, when there are but three or a smaller number of children; and if there be more than three children, the surviving, whether husband or wife, shall receive only a child's share in usufruct, and he is bound to include in this portion what has been left to him as a legacy by the husband or wife, who died first.

"Whenever, during the administration of any succession it appears that the surviving spouse will be entitled to the marital portion above provided for, upon final liquidation of the estate of the deceased, the survivor in necessitous circumstances shall be entitled to demand and receive from the executor or administrator of such succession, a periodical allowance to be fixed by the court wherein the proceedings are pending. Such allowance shall be based upon the apparent amount of the marital portion invested at five per cent. per annum interest. And should the marital portion, as finally fixed, not yield the revenue equal to the allowance as fixed by the court, the surviving spouse shall be charged with, and there shall be deducted from the marital portion, the amount of such deficiency. The provisions of this article shall apply to successions pending and unsettled, as well as those hereafter opened."

5. See note 2 supra.
6. See note 3 supra.
THE MARITAL FOURTH AND THE WIDOW'S HOMESTEAD
ARE NOT LAWS IN PARI MATERIA

Until the decision in Malone v. Cannon the courts, in reading the two articles together, sometimes reached unfortunate conclusions. The Supreme Court, in a well-reasoned opinion, concluded that the articles were not in pari materia for the following reasons: First, the purposes of the two articles are dissimilar. The marital fourth was premised on the existence of a marriage, both in law and fact, and the discharge of the mutual marital duties defined in articles 119 and 120 of the Louisiana Civil Code; the widow's homestead was enacted as a welfare measure to prevent the surviving widow and minor children from becoming wards of the state. Second, the marital fourth is unlimited in amount except on the required fractional basis; the widow's homestead is limited to a maximum of one thousand dollars. Third, both the husband and wife may seek the marital portion; only the widow or minor children may claim the widow's homestead. Fourth, "necessitous circumstances" as used in connection with the marital fourth is a relative term; the widow's homestead can be claimed only when the widow's and minor children's assets do not exceed one thousand dollars. Fifth, the widow's homestead may be awarded from insolvent as well as solvent estates; the marital fourth is obtainable only from solvent estates. Sixth, the two articles were derived from different sources: the marital fourth has roots in Roman law; the widow's homestead had its inception in a legislative act of 1852.

In light of Malone, in which the court reached a sound conclusion, much confusion can be eliminated by careful analysis of the prior jurisprudence. To assist us, it should be determined

10. See, e.g., Wimprenne v. Jouty, 12 La. App. 326, 125 So. 154 (Orl. Cir. 1929), in which the bride, some two weeks after the marriage, abandoned her husband and did not reappear until she came into court seeking the marital fourth. The court of appeal, although sympathetic toward the husband's heirs, allowed the marital fourth under the literal interpretation rule discussed at note 61 infra, and accompanying text.
11. LA. CIVIL CODE art. 119 (1870) : "The husband and wife owe to each other mutually, fidelity, support and assistance."
12. Id. art. 120: "The wife is bound to live with her husband and to follow him wherever he chooses to reside; the husband is obliged to receive her and to furnish her with whatever is required for the convenience of life, in proportion to his means and condition."
whether the case was decided at a time when the two articles were considered in pari materia, and whether the decision was sound in light of the purpose of the article in question.

THE WIDOW'S HOMESTEAD

The widow's homestead statute provides that a widow or minor children in necessitous circumstances may claim by preferential right the sum of one thousand dollars from the succession of the deceased husband or father.\(^{14}\) This provision, although found in the section of the Code dealing with privileges, does not appear to be an ordinary privilege. As the succession is made the debtor,\(^{15}\) the privilege seems to be more in the nature of an inheritance right, and as such might have been placed more properly in the section on successions. This provision has the welfare motive of keeping the widow and children in necessitous circumstances from being forced to look to public funds for support.\(^{16}\) The legislature, so motivated, chose to adopt the mode of a privilege to insure that the widow and children would prime most succession creditors.\(^{17}\) Consideration of this purpose suggests that the courts are not compelled to adhere literally to the \textit{stricti juris} principle, which requires the courts to interpret a privilege narrowly,\(^{18}\) nor to the general principle that a privilege is an accessory of a valid debt.\(^{19}\)

An examination of the jurisprudence, however, discloses that the courts have subordinated the purpose of the widow's homestead to the \textit{stricti juris} principle. The courts, for example, in interpreting whose succession is meant by the words "succession of the deceased husband or father" have considered claims against the grandfather's succession,\(^{20}\) the grandmother's succession,\(^{21}\) and the mother's succession.\(^{22}\) Only in the last case,

\begin{itemize}
  \item 15. \textit{Id.} art. 3252: "[T]he widow or the legal representatives of the children, shall be entitled to demand and receive from the succession of the deceased husband or father . . . ."
  \item 17. Article 3252, by its terms, provides that this privilege shall be ranked by the vendor's privilege on movables and immovables, conventional mortgages, and expenses incurred in selling the property.
  \item 18. \textit{La. Civil Code} art. 3185 (1870): "Privilege can be claimed only for those debts to which it is expressly granted in this code."
  \item 20. Succession of Watzke, 139 La. 868, 72 So. 423 (1916).
\end{itemize}
now overruled, has the court refused to apply the *stricti juris* principle and thus allowed the claim.\(^\text{23}\) In the other cases, the courts, apparently adhering to the *stricti juris* principle, have rested their decisions on a literal construction of the article.

The "necessitous circumstances" requirement of the widow's homestead is different from the "necessitous circumstances" requirement of the marital fourth. Under the latter the surviving spouse must prove only that his or her wealth is "relatively small" when compared with that of the deceased spouse, and, unlike the former, there is no limitation of one-thousand dollars.\(^\text{24}\) The courts have refused to consider such factors as the widow's ability to work, or that she is working,\(^\text{25}\) in determining whether she is entitled to the homestead. These decisions appear correct, given the purpose of the widow's homestead. To do otherwise would make the award depend upon chance or circumstance and would not properly reflect the liberality sought to be afforded by the lawmaker.

Unfortunately, however, the courts have subordinated the purpose behind the privilege to the principle of *stricti juris* in determining what deductions should be made in computing the amount to be awarded to the widow and minor children. Deductions have been allowed for insurance proceeds that the wife receives as beneficiary;\(^\text{26}\) rent received by the widow after the death of her husband;\(^\text{27}\) money received by the widow and children from benevolent societies.\(^\text{28}\) Even the furniture and bedding belonging to the widow and children have been considered.\(^\text{29}\) It appears that deductions for insurance proceeds and money received from benevolent societies are proper; however, the other deductions appear to be examples of an unduly stringent use of the *stricti juris* principle. Although the tenor of the article is that the courts should award the widow and children only the difference between the amount of their property and


\(^{25}\) Succession of Kuntz, 179 So. 623 (La. App. Orl. Cir. 1938); Succession of Hawk, 9 La. App. 211, 120 So. 93 (2d Cir. 1932).

\(^{26}\) Succession of Farrell, 200 La. 29, 7 So. 2d 605 (1942); Succession of Roach, 155 La. 541, 59 So. 442 (1924); Succession of Futjo, 52 La. Ann. 1561, 28 So. 135 (1900); Succession of DeBoisblanc, 32 La. Ann. 17 (1880).


the sum of one thousand dollars, it is unlikely that the lawmaker intended the courts to be so stringent in determining the assets of the widow and minor children. The courts should adopt a more liberal approach, and thus fulfill the welfare purpose of the widow's homestead.

Several questions revolving around the term "children" have faced the courts: first, what children are entitled to demand the widow's homestead from the succession? Second, are the assets of minor children by a former marriage combined with those of the widow or minor children of a second marriage in determining whether widow's homestead benefits are available? Third, which persons are entitled to the proceeds of the homestead after the death of the widow-usufructuary?

In the first situation the courts quickly disposed of claims of major children for the homestead when the widow failed to demand it, stating that the law contemplates only the demands of the widow or minor children. Competing claims of minor children of two marriages present a more serious problem. This situation was apparently not contemplated by the legislature, as the law gives only one homestead. The only solution, perhaps, is to divide the proceeds equally among all the claimants.

The courts have answered the second question by construing article 3252 to mean that the assets of all the minor children and the widow must be added to determine whether the homestead may be given. It was reasoned that since the article provides for only one homestead, to exclude the assets of some minor children, such as those by a former marriage, would unduly penalize succession creditors. This reasoning, however, overlooks the purpose of the privilege. As the widow's homestead has not been awarded from this succession, and since there are persons who would properly benefit by its award, it seems

32. Possible argument against this solution could arise in the situation where the competition is between the wife's children by a first marriage and the children of the marriage between the wife and the deceased husband. Since the children of the first marriage are not blood relatives of the deceased spouse it seems at first glance that these children should be barred. The better view, it is submitted, is to realize that the purpose of the widow's homestead is one of welfare; therefore, it seems that these children should be entitled to one-half of the proceeds of the widow's homestead.
that its allowance in this situation would further the lawmakers' motive.

In considering the third question the courts appear to have extended the language of the statute and allowed minor grandchildren to claim the privilege from their grandfather's succession when the grandmother died without claiming it. This view seems to be based on a broad interpretation of the word "children" as used in that part of the statute providing that at the death of the widow-usufructuary the money belongs to the children or other descendants. Allowing minor grandchildren to take the fund seems unsound as it presupposes the widow's homestead is transmissible, and further it interferes with the devolution of succession property by preferring more remote descendants over those in a closer degree to the deceased. The courts have long held that the widow's homestead is only a personal right given the widow or minor children of the deceased and that such right is not transmissible. Moreover, the possibilities of uncertainty in land titles are magnified by the continued use of this interpretation, since the Louisiana Constitution specifically exempts the widow's homestead from the necessity of recordation; and while the prescriptive period is in doubt, it appears that the action could be brought within ten years from the death of the deceased. Therefore the property of the succession would remain subject to potential claims of minor grandchildren for ten years.

THE MARITAL FOURTH

Article 2382 provides that if either husband or wife die rich, leaving the survivor in necessitous circumstances, the latter is entitled to demand one-fourth of the deceased spouse's succession. The redactors seem to have contemplated that this portion be taken from the legitime of the children. The article provides

36. LA. CONST. art. XIX, § 19: "No mortgage or privilege on immovable property, or debt for which preference may be granted by law, shall affect third persons unless recorded or registered in the parish where the property is situated, in the manner and within the time prescribed by law, except . . . privileges arising upon the death of the owner of the property affected. . . ." (Emphasis added.)
37. LA. CIV. CODE art. 3544 (1870): "In general, all personal actions, except those before enumerated, are prescribed by ten years." A prescriptive period for the widow's homestead action is not enumerated elsewhere.
that if there be no children the fourth is awarded in full ownership; however, if there be children the survivor only takes the fourth in usufruct, with the further qualification that if there are more than three children the survivor’s fourth is reduced to a child’s portion in usufruct.\textsuperscript{38}

The tenor of article 2382 indicates that the basic purpose is to maintain the surviving spouse in the same style which had been enjoyed during the marriage.\textsuperscript{39} The purpose requires that the surviving spouse be allowed to take the marital fourth notwithstanding the adverse disposition of the testator’s property.\textsuperscript{40}

This concept originated in the twenty-second Novelle of Justinian which provided that a rich man who divorced a wife without dowry had to pay her a sum equal to one-fourth of his estate.\textsuperscript{41} The wife who was at fault in causing a separation was required to pay the same penalty. Later in the fifty-sixth Novelle the law was extended to encompass either spouse in necessitous circumstances upon the death of the rich spouse.\textsuperscript{42} In the one hundred and seventeenth Novelle restrictions were placed upon the giving of this bounty, including elimination of the husband’s right to the fourth if his wife divorced him.\textsuperscript{43} The French commentator, Merlin, concluded that this Novelle also meant that the husband could not obtain the portion from his wife’s estate even when the marriage was dissolved by the wife’s death.\textsuperscript{44} The early written law of France, however, refused to follow this interpretation.\textsuperscript{45}

When the fifty-sixth Novelle is read in conjunction with the one hundred and seventeenth Novelle the basic characteristics of article 2382 are discernible.\textsuperscript{46} That our article is little more

\textsuperscript{38} This article is not subject to the restrictions of Civil Code article 1710, that the legitime may not be burdened, since this burden is created by operation of law. See Succession of Moore, 40 La. Ann. 531, 4 So. 460 (1888). There is no jurisprudence, however, stating that the marital fourth must be taken from the legitime.


\textsuperscript{40} Cf. Malone v. Cannon, 215 La. 939, 41 So. 2d 837 (1949); Veillon v. Lafleur’s Estate, 162 La. 214, 110 So. 326 (1926).

\textsuperscript{41} Justinian, NoVELLES 22.6.

\textsuperscript{42} Id. 56.4.

\textsuperscript{43} Id. 117.5.

\textsuperscript{44} Merlin, REPertoire de jurisprudence 445 (1813).

\textsuperscript{45} Ibid.

\textsuperscript{46} Justinian, NoVELLE 53.6 (Scott’s transl. 1932) : “As every law enacted by Us is based upon clemency, and We see that when men married to women who have brought no dowry die, the children alone are legally called to the
than a revision of these two Novelles is a plausible conclusion in light of other facts: namely, that there is no corresponding article in either the Projet to the French Code or the Code Civil;

succession of their father's estates, while their widows, even though they may remain in the condition of lawful wives, for the reason that they have not brought any dowry, and no ante-nuptial donation has been given them, can obtain nothing from the estates of their deceased husbands, and are compelled to live in the greatest poverty, We wish to provide for their maintenance by enabling them to succeed to them, and be called to share their estate conjointly with the children. But as We have already enacted a law which provides that when a husband divorces his wife, whom he married without any dowry, she shall receive the fourth of his estate, just as in the present instance, whether there are few or many children, the wife shall be entitled to the fourth of the property of the deceased, if, however, a husband has left a legacy to his wife and this legacy amounts to less than a fourth of his estate, this amount shall be made up out of the same. Hence, as we come to the relief of women who have not been endowed or divorced by their husbands, so We assist them where they have constantly lived with them, and We grant them the same privilege.

"Again, everything that We have stated in the present law with reference to the fourth to which a poor woman is entitled shall equally apply to a husband, for like the former one, We make this law applicable to both.

"(1) But if the woman has property of her own in the house of her husband, or situated elsewhere, she will have the right to retain said property, and it shall not, under any circumstances, be subject to hypothecation for the benefit of the creditors of her husband; unless he is the heir of his wife to the amount established by the present law.

"(2) We enact these provisions as applicable in cases where either of the two married persons has not brought either a dowry or an ante-nuptial donation, and the survivor is poor, or the deceased was rich. For if the survivor has property elsewhere, it would be unjust when, having neither brought any dowry nor ante-nuptial donation, he or she should oppress the children by sharing the estate with them; and as another of Our laws provides that a wife who does not bring any dowry cannot, by means of an ante-nuptial donation, acquire any property from her husband, We desire that this rule shall continue to remain in force, establishing however, an exception to it where a husband has bequeathed a legacy, or some other share of his estate to his wife; for We by no means wish to prevent this, in order that the laws may, in every respect, be consistent with one another and that the poverty of one spouse may be compensated by the wealth of the other."

Id. 117.5: "We some time since enacted a law providing that where a man married a woman solely through nuptial affection, without any dowry, and he afterwards divorces her without any cause recognized by the law, she shall be entitled to the fourth part of the property of her husband; and after this law We promulgated another, by which it is provided that if any should marry a wife without a dowry, having been induced to do so by mere affection, and lives all his life with her, and dies before she does, she, also shall be entitled to the fourth of his estate, provided that the said fourth does not exceed the value of a hundred pounds of gold. We, however, at present displaying more sagacity, do hereby decree that children born of marriages due to mere affection shall, under these circumstances, be deemed legitimate, and be called to the succession of their father's estates; and that in each of these instances the wife shall receive the fourth of her husband's property where he only had three children by her, or by a preceding marriage; but if he had more than that, the wife shall then be entitled to the usufruct of the share of the property she receives, and the ownership of the same shall be reserved for the children whom she has had by this marriage; but where such a woman has not had any children by her husband, We decree that she shall acquire the ownership of the said property.

"We desire that a woman who was put away without good cause shall receive the portion established by this law at the very moment of repudiation; but, under similar circumstances, We absolutely forbid the husband to obtain the fourth part of the estate of his wife in accordance with Our former law."
that the corresponding Spanish law did not embody all the characteristics of our article; and that Roman authorities were available to the redactors of our Code. Therefore, it seems the Louisiana courts should look beyond the Spanish or early French law for the true meaning and purpose of our article.

Heritability of the Marital Fourth

The early Louisiana decisions, incorrectly relying on the Spanish law, classified the right to the marital fourth as heritable. In Succession of Justus, however, the court, relying on decisions involving the widow’s homestead, held that the right to the marital fourth was not heritable but a purely personal right which remained inchoate until accepted; if not accepted, it lapsed. The court distinguished the prior decision, Succession of Piffet, which had allowed inheritance of the right since there the surviving spouse had judicially demanded the marital portion prior to her death. The court reasoned that once the

47. 2 Moreau & Carleton, Partidas pt. 6, tit. 13, L. 7 (1820) : “Men are sometimes content to marry women who are poor and without a dowry; it is therefore but just and proper, that since they loved and honored them through life, they should not leave them destitute at their death. The ancient sages have therefore thought fit to ordain, that if the husband should not leave the such wife, the means of living independently (bien e honestamente), and she should not possess them herself, then she may inherit one fourth of the estate, notwithstanding he should leave children: but such fourth part, ought not to exceed one hundred pounds of gold, however great may be the estate of the deceased. (a) But if such wife should possess in her own right, the means of living decently (honestamente), then she will not have any claim to the estate of the deceased, on account of such fourth part.”

48. Franklin, Libraries of Edward Livingston and of Moreau Lislet, 15 Tul. L. Rev. 401 (1941). See also 2 Moreau & Carleton, Partidas 1696 (1820), which is further indication of the prominent role that Roman law has had in influencing the redactors.


50. 44 La. Ann. 721, 11 So. 95 (1892).


52. Succession of Justus, 44 La. Ann. 721, 724, 11 So. 95, 96 (1892) : “The right conferred by the article is in the nature of a charity or bounty in favor of the surviving consort left in penurious circumstances, which, to vest in him or her, must, at least, have been claimed, when it could have been done. It is a personal and optional right which remains inchoate until accepted, and which lapses and dies away, and does not pass to the heirs of the survivor at his death, when not previously accepted by him or her.” Accord, Succession of Bancker, 154 La. 77, 97 So. 321 (1923); Succession of Kunemann, 115 La. 604, 39 So. 702 (1905); Dupuy v. Dupuy, 52 La. Ann. 889, 27 So. 287 (1899); Lasseigne v. Lieche, Tessier’s Digest No. 7459 (La. App. Orl. Cir. 1919).

right had been judicially demanded it became vested and thus transmissible.

It appears that, although the Justus case’s reliance on the widow’s homestead decisions was unsound, its determination that the right to the marital fourth is not heritable is correct. If the purpose of the marital fourth is to maintain the surviving spouse, then it seems that the right allowed is solely for the gratification of the surviving spouse, that is, a personal right, and that it should produce no direct benefit to the survivor’s heirs. Therefore, the decision in Succession of Piffet is questionable, since the death of the surviving spouse should terminate the right to the marital fourth whether or not the right has been demanded prior to death.

Fault on the Part of the Surviving Spouse — A Bar to Recovery

A literal reading of article 2382 indicates that the surviving spouse could claim the marital fourth regardless of the length or stability of the relationship existing between the two spouses during their marriage. The early cases, however, considering that the purpose of the marital fourth was to maintain the surviving spouse in the same manner as that enjoyed during the marriage, read into the article the requirement that there must have been a sufficiently lengthy period of cohabitation during the marriage to allow a common enjoyment of wealth.

Later the court repudiated the common enjoyment theory and substituted the fault theory. Under this theory there was

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55. See LA. CIVIL CODE arts. 2000-2001 (1870); LA. CODE OF CIVIL PROCEDURE art. 422 (1960).
56. LA. CIVIL CODE art. 2382 (1870). See note 3 supra.
59. Pickens v. Gillam, 43 La. Ann. 350, 352, 8 So. 928, 929 (1891): “It is proper to consider the effect to be given to separation, and the evidence with reference to absence. Protracted absence may be considered with other facts. A husband’s desertion can be shown by a variety of circumstances; as for instance, his departure with the avowed intent never to return; his prolonged absence without business detention, or without providing, in the least, for his family, although not entirely without ability so to do. The abiding together of married persons implies that the husband shall select the place of dwelling, and that in case of difference in this respect his will shall prevail. Civil Code, art. 120. He left the place where they were married.”
In Gee v. Thompson, 11 La. Ann. 657 (1856), the court gave the marital
no requirement that the spouses must have lived together for a lengthy period but simply a proviso that if the spouses separated prior to the death of one of the partners then the surviving spouse must prove that the separation was not due to his fault. Though later cases rejected this theory and substituted a literal interpretation of the article the fault doctrine was revived and approved in *Malone v. Cannon* and is now the present law.

Two serious objections have been made to the reintroduction of the fault theory: first, determination of fault causes great administrative difficulties for the courts; second, the theory in effect forces the court to render a post mortem divorce decree. But these objections, on consideration, are not as serious as they might seem. The administrative problem will be greatly reduced if the courts adopt the well-recognized definition of fault used in divorce cases. The other objection, that the doctrine requires a post mortem divorce, is not so easily dismissed. It has been argued that the wronged spouse has the action of divorce available if the other is believed at fault; it is up to the wronged spouse to judge his own feelings and act accordingly. It is submitted that the better view is to realize that the law permits one to seek a divorce but does not require one to do so. Further, the wronged spouse may object to divorce in principle. The fourth to the wife even though the wife was judicially separated from the husband prior to his death. The evidence established that the deceased husband had driven his wife from the family domicile. The court felt that now to deny her the marital fourth would be to penalize her for her husband's misconduct.

60. See note 59 supra.
61. See Veillon v. Lafleur's Estate, 162 La. 214, 222, 110 So. 326, 329 (1926), where the court stated: "Our own conclusion is that the law invoked by the plaintiffs is clear and explicit. It attaches no qualifications and imposed no conditions upon the necessitous wife who seeks to avail herself of its beneficial provisions. It makes no distinction between the faithful wife and the unfaithful wife." *Accord*, Succession of Hagan, 150 La. 934, 91 So. 303 (1922); Succession of Guillon, 150 La. 587, 91 So. 53 (1922).
64. "Fault" as defined in Felger v. Doty, 217 La. 365, 369, 46 So. 2d 300, 301 (1950), "contemplates conduct or substantial acts of commission or omission on the part of the wife, violative of her marital duties and responsibilities, which constitute a contributing or a proximate cause of the separation and continuous living apart, the ground for the divorce." This definition has been accepted into the jurisprudence of our state. Rogers v. Rogers, 239 La. 877, 120 So. 2d 402 (1960); Vinot v. Vinot, 239 La. 587, 119 So. 2d 474 (1960); Davieson v. Trapp, 223 La. 776, 66 So. 2d 804 (1953); Richard v. Garth, 223 La. 117, 65 So. 2d 109 (1953); Chapman v. Chapman, 130 So. 2d 811 (La. App. 3d Cir. 1961).
65. See Veillon v. Lafleur's Estate, 162 La. 214, 222, 110 So. 326, 329 (1926): "The husband, who is the sole judge of his feelings and of his honor, is the one to do this by taking appropriate legal action to sever the matrimonial tie if he is dissatisfied therewith."
use, therefore, of the fault theory serves to respect the wishes of a spouse with regard to divorce and still denies the erring spouse the marital fourth.

**Necessitous Circumstances and Dying Rich**

Two conditions precedent to recovery of the marital portion are that the deceased spouse die "rich" and that the survivor be in "necessitous circumstances." These conditions are relative; their fulfillment requires a comparison of the assets of the deceased with those of the survivor. When this comparison has shown a ratio of five to one, the courts have generally awarded the marital fourth. However, where the ratio was four to one, the marital portion has been denied, seemingly on the theory that here the surviving spouse already has assets equal to those which would be awarded by the terms of the article, if the survivor were wholly destitute.

Only two cases are at variance with the general scheme outlined above. Both decisions are based on a comparison of the property of the children of the parties with that of the surviving spouse. As the same comparison of property is used to determine entitlement to the widow's homestead it seems that one case is based on the now repudiated notion that the two articles should be read in pari materia, and the other, an earlier case, is simply unsound. It is submitted that the two cases are not to be followed.

In determining the wealth of the respective spouses the courts have refused to consider the future earning capacity of

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68. See, e.g., Succession of Morris, 137 La. 719, 69 So. 151 (1915); Crockett v. Madison, 118 La. 728, 43 So. 388 (1907); Melancon's Widow v. His Executor, 6 La. 105 (1833).


70. Mason v. Mason's Widow & Heirs, 12 La. 589 (1838); Succession of Derouen, 10 La. Ann. 675 (1855).


72. Succession of Derouen, 10 La. Ann. 675 (1855) seems based on the theory that the marital fourth and the widow's homestead statutes are in pari materia. Mason v. Mason's Widow & Heirs, 12 La. 589 (1838), decided before adoption of the widow's homestead statute, is an aberration without other support in the jurisprudence.
the surviving spouse, 73 as well as the support grown children might give. 74 In Succession of Leppleman, 75 however, the court stated obiter that a wife who had a rich father could not claim the marital fourth. 76 This dictum is supported by early French and Spanish commentators, 77 and further authority may be found in articles 227 78 and 229 79 of the Louisiana Civil Code on the obligations of support between parent and child. 80 It seems, however, that a denial of the marital fourth on the grounds that the survivor has a rich parent would subject the future of the surviving spouse to chance, a situation presumably not intended by the redactors.

Time of Determining Necessitous Circumstances

In Connor's Widow v. Administrator & Heirs of Connor 81 the heirs contended that the widow should be denied the marital portion because she had become affluent since the suit was filed. The court reasoned that the language of the article, "if either the husband or wife die rich, leaving the survivor in necessitous circumstances," 82 and the general policy of the law which forbade leaving rights in abeyance or dependent upon

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73. Succession of Fortier, 3 La. Ann. 104, 105 (1848), in which the Louisiana Supreme Court reversed the decision of the trial court holding that a young man who only possessed two slaves was in necessitous circumstances when the deceased spouse's estate was in excess of $26,000. The court stated: "The object of the law is to provide a support out of the property of the deceased without reference to the ability of the survivor to support himself by his industry or personal exertions alone."

74. Dupuy v. Dupuy, 52 La. Ann. 869, 27 So. 287 (1899). This decision, it is submitted, accords with the purpose behind the marital fourth, since to consider earning capacity and support is to consider contingencies that might not be fulfilled. Accord, 1 Ferrero, Libreria de Escribano 201 (1789-90).

75. 30 La. Ann. 408 (1878).

76. Examination of this case shows that the true basis for denial was lack of necessitous circumstances, since the succession was worth $8,000, while the surviving wife had property in excess of $2400. Id. at 470.

77. See 1 Ferrero, Libreria de Escribano 202 (1789-90); Merlin, Repertoire de Jurisprudence 445 (1813).

78. LA. CIVIL CODE art. 227 (1870): "Fathers and mothers, by the very act of marrying, contract together the obligation of supporting, maintaining, and educating their children."

79. Id. art. 229: "Children are bound to maintain their father and mother and other ascendants, who are in need; and the relatives in the direct ascending line are likewise bound to maintain their needy descendants, this obligation being reciprocal.

"They are also bound to render reciprocally all the services which their situation can require, if they should become insane."

80. See also Tolley v. Karcher, 196 La. 685, 200 So. 4 (1941); Elchinger v. Elchinger, 135 So.2d 347 (La. App. 4th Cir. 1961); St. Vincent v. Sanford, Gunby's Dec. (La. App. 2d Cir. 1885). For a more extensive discussion of this area see Note, 22 LA. L. REV. 848 (1962).


82. LA. CIVIL CODE art. 2382 (1870). See note 3 supra.
future accident, contemplated that the time of the death should be the point at which to determine whether the survivor is in necessitous circumstances. The court, however, overlooked that the language upon which it relied was a mistranslation of the French text of article 55, page 335, of the Louisiana Code of 1808. The English translation should read: "if either the husband or wife die rich, and if the survivor be in necessitous circumstances." This translation suggests two possible determining points: the time of death and the time suit is filed. The question which time is the more desirable must be weighed by balancing the purpose of the marital fourth and the factor of court administration. The first impression that time of filing suit is the proper point is strengthened by the consideration that in circumstances such as those in Connor the court could deny the marital portion, and that if the circumstances were such that the widow had suffered heavy financial reverses prior to filing suit she could recover the marital portion. This view is in accord with that taken by the early French commentators and is consonant with the purpose behind the marital fourth.

On the other hand, the Connor rule may be necessary to obtain satisfactory judicial administration of the marital fourth. If necessitous circumstances are always determined with reference to conditions existing at the moment death dissolved the marriage, the court has a readily ascertainable measuring point. While the moment of filing suit would be an equally ascertainable measuring point, it seems debatable that the court should be required to ignore the financial condition of the claimant between death and the filing of suit. Further, if the moment of filing suit is used the surviving spouse has an opportunity to speculate with his present funds; if he loses then he may recoup his losses, at least in part, by claiming the

84. The French text of article 55, p. 335, of the Louisiana Code of 1808 is as follows: "[S]i le premier mourant des deux époux, et que le survivant soit dans la nécessité . . . ." 3 Louisiana Legal Archives, Compiled Edition of the Civil Codes of Louisiana 1308-09 (1942).
85. Merlin, Répertoire de Jurisprudence 445-46 (1913); 1 Lebrun, Traité des Successions 131 (1775).
86. If there has been an appreciable amount of time between death and the time of filing suit, it seems that the argument will surely be made that the court should consider this interval in determining whether the surviving spouse is truly in necessitous circumstances. The court would then be faced with administrative difficulties which are not necessary under the Connor rule.

It is submitted that, if it should become desirable to fix the time of filing suit as the proper measuring point, a consideration should be made of the desirability of placing a short prescriptive period on the right to bring the action.
marital fourth. The Connor rule, however, eliminates the manipulation of assets prior to claiming the marital fourth and frees the court from the necessity of scrutinizing the claimant's business transactions for fraud on the law.

**Deductions from the Marital Fourth**

The express language of article 2382 provides that the marital fourth is to be taken from the deceased's succession and that any legacies from the decedent to the surviving spouse must be deducted from the marital fourth. The term "legacy" connotes a donation made by last will and testament. The Louisiana jurisprudence, however, in an attempt to prevent the surviving spouse from receiving a greater portion of the decedent's succession than that received by the heirs has allowed deductions from the marital fourth that cannot fit within the normal definition of legacy. The most notable are those deducting the proceeds of an insurance policy payable to the wife as beneficiary, and the separate property of the surviving spouse, and the value of the survivor's share of the community.

87. LA. CIVIL CODE art. 2382 (1870). See note 3 supra.
89. See LA. CIVIL CODE arts. 1605, 1606, 1612, 1625 (1870).
91. Dupuy v. Dupuy, 52 La. Ann. 869, 875, 27 So. 287, 289 (1899). The court, in reference to the contention that insurance proceeds were not a true legacy, stated: "It is true that this amount was not a legacy in terms left by the husband, and for that reason is not expressly referred to by the word 'legacy' in the article of the Revised Civil Code (article 2382); nevertheless, it cannot be overlooked that the amount was secured by the husband, who chose to make his wife the beneficiary of a policy on his life. We think that the amount should be considered in fixing the amount of the wife's marital fourth, and shall so decree."
It is submitted that if the court feels some deduction is proper, since the husband paid the premiums, then the value of the premiums, if paid from the husband's separate estate or one-half the value of the premiums if paid with community funds, would be more in line with the intention of the redactors. This, however, is still not the proper solution.
92. See Succession of Morris, 137 La. 719, 69 So. 151 (1915), in which the decedent's succession was worth $5025 and the property of surviving spouse amounted to $900. Had there been no deduction for the separate property, the amount of the marital portion would have been $1256 instead of only $356.
While it seems that these items are properly considered in determining whether a spouse is in necessitous circumstances, they should not be deducted from the marital portion itself. The deduction of a true legacy is proper since it comes from the deceased's succession, as does the marital portion. Not to allow the deduction of true legacies would indeed penalize the heirs. No penalty, however, results from the above-mentioned deductions, since those items never formed part of the succession of the deceased spouse.

A possible reason for the allowance of these deductions by the courts may have been the mistaken view that the marital fourth and widow's homestead are in pari materia and should be interpreted alike as far as possible. The above deductions would be proper under the widow's homestead, since its purpose is only to keep the necessitous widow and minor children of deceased from becoming wards of the state.94

The court has, however, refused to permit a deduction when the deceased released the surviving spouse of a debt owing to him95 and refused to consider deduction of the value of the property the wife would receive as dower in common law jurisdictions.96 These decisions, it is submitted, are proper, since neither sum formed part of the deceased's succession, nor could they be considered a true legacy.

CONCLUSION

It may be questioned whether the marital fourth and the widow's homestead have any utility in the law of today. This question is emphasized by considering the benefits afforded the

94. See note 13 supra, and accompanying text.
96. Foster v. Ferguson, 1 La. Ann. 262 (1846). The reason evidently is that the bounty accorded by one state should not be annulled by the laws of this state. Accord, Comment, 18 Tul. L. Rev. 290, 304 (1944). "Dower," at common law, is an estate to which a widow is entitled for the period of her life, in one-third of the land of which her husband was seized in fee simple or fee tail, and which the issue of the marriage, if any, might inherit. 2 Tiffany, Real Property 339 (3d ed. 1939). As dower is impressed upon immovable property which the husband may have sold during the marriage, the court wisely chose not to allow this as a deduction from the marital fourth, since this property would not form part of the succession. Had the court chosen the opposite view, this would have, in effect, deprived the widow of some of the benefits properly due her.
surviving spouse by articles 915\textsuperscript{97} and 916\textsuperscript{98} of the Louisiana Civil Code. By article 915 the surviving spouse inherits the decedent's share of the community when the surviving spouse leaves no ascendants or descendants. Article 916 provides that the surviving spouse is entitled to usufruct of the deceased's share of the community if the deceased has not disposed of it adversely to the surviving spouse's interest and if there are no children of the marriage. Consideration of these two articles shows that the need for the marital fourth is slight. On the other hand, the widow's homestead has some utility, since it reaches the situation where the community is either very small or insolvent. Its utility, however, is limited by the fact that it only provides benefits up to one thousand dollars. It is submitted that this sum is not sufficient to maintain the widow and minor children for any appreciable length of time, and this limit should be raised to an amount which would provide security for these persons until the machinery of the modern welfare and social security programs could be set in motion.

Charles G. Gladney

\textsuperscript{97} LA. CIVIL CODE art. 915 (1870): "When either husband or wife shall die, leaving neither a father nor mother nor descendants, and without having disposed by last will and testament of his or her share of the community property, such undisposed of share shall be inherited by the surviving spouse in full ownership. In the event the deceased leave descendants, his or her share in the community estate shall be inherited by such descendants in the manner provided by law. Should the deceased leave no descendants, but a father and mother, or either, then the share of the deceased in the community estate shall be divided into two equal portions one of which shall go to the surviving spouse, who, together with father or mother inheriting in the absence of descendants, as provided above, shall inherit as a legal heir by operation of law, and without the necessity of compliance with the forms of law provided in this chapter for the placing of irregular heirs in possession of the succession to which they are called."

\textsuperscript{98} Id. art. 916: "In all cases, when the predeceased husband or wife shall have left issue of the marriage with the survivor, and shall not have disposed by last will and testament, of his or her share in the community property, the survivor shall hold a usufruct, during his or her natural life, so much of the share of the deceased in such community property as may be inherited by such issue. This usufruct shall cease, however, whenever the survivor shall enter into a second marriage."