Control and Management of the Community

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Confusion has frequently resulted from attempted application of Civil Code provisions in some situations and from abstention, express or implied, in others. Particularly in the area of donations, the courts have taken the position that the contract is sui generis, and thus the court is free to search for the best solution. It is submitted that all contracts of insurance should be so treated, and that the principles of community property law should have little or no application outside the preliminary characterizations which do not conflict with settled principles of insurance law.

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CONTROL AND MANAGEMENT OF THE COMMUNITY

"The husband is the head and master of the partnership or community of gains."1 This traditional language has been used in each Louisiana Civil Code to give the husband control and management of the community.2 However, the extent of the husband's power over the community has changed greatly since 1808. More and more restrictions on the husband's power to deal freely with community property have been added to protect the interests of the wife. This Comment examines the scope of the husband's authority over the community under present law and the remedies by which the wife may protect her interest.

HISTORICAL INTRODUCTION

There were two aspects of the husband's powers in the system of control and management established by the 1808 Code. First, he dealt with community property as owner;3 second, the wife could not interfere with the husband's management as she lacked capacity to perform most juridical acts without the husband's authorization.4 Unauthorized acts of the wife were relative nullities which the husband could set aside.5 The articles

1. LA. CIVIL CODE art. 2404 (1870).
4. See La. Civil Code p. 28, art. 22 (1808), dealing with the wife's incapacity to contract, now appearing as LA. CIVIL CODE art. 122 (1870); La. Civil Code p. 28, art. 21 (1808), dealing with the wife's inability to appear in court, now LA. CIVIL CODE art. 121 (1870).
5. See La. Civil Code p. 28, art. 28 (1808); LA. CIVIL CODE art. 134 (1870).
on the wife's incapacities are substantially the same as the corresponding articles of the French Civil Code, but the immediate source of the provision enabling the husband to deal with community property as its owner is uncertain.

The 1808 Code expressly recognized the husband's power to deal with community property as its owner:

"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 be dead."  

Spanish origin of the provision has been claimed, although both Pothier and Toullier conclude that the wife has no ownership of community property during the marriage. The final clause of the provision was not taken from the French Civil Code. The language that the wife has no right in the community property until her husband's death seems unusual, as the 1808 Code provides for termination of the community for reasons other than the death of one spouse. Both separation from bed and board and a judicial separation of property terminated the community while both spouses were alive. No commentator was found who supported the requirement that the husband be dead before the wife's right attaches, although French and Spanish writers did teach that the wife had no ownership of community property during the existence of the community. The language used in the 1808 Code may have been selected to emphasize the husband's power as head and master of the community. Whatever its origin, the language...

9. See Pothier, TRAITÉ DE LA COMMUNAUTÉ n° 3 (Bugnet ed. 1861).
10. 7 TOULLIER, LE DROIT CIVIL FRANÇAIS n° 76-77 (1833).
11. FRENCH CIVIL CODE art. 1421 merely provides that the husband is sole administrator of the community and may alienate or hypothecate it without the wife's concurrence.
13. Id. p. 340, arts. 86-97. Presumably, if a putative marriage were annulled this too would terminate the community during the life of both spouses. Cf. LA. CIVIL CODE p. 28, art. 30 (1808).
was dropped in the 1825 Code and has present significance only insofar as it illuminates the final paragraph of the article which was carried forward into the 1870 Code:

"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 her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud."

Read together, the provisions of the 1808 Code are consistent, for if the wife has no interest in the community property until the death of her husband, her only recourse is against his heirs. The pattern is less consistent in the present Code, which retains the old limitation that the wife's remedy for fraud is an action against the husband's heirs but omits the statutory premise that the wife is not owner of the community property during the husband's life.16

The trend toward limiting the husband's power over the community commenced with the 1825 Code.17 The limitations it contains were borrowed from the French Civil Code18 and were carried forward in article 2404 of the 1870 Code.19 Later legislation has added further restrictions on the husband's power.

**POWER OF THE HUSBAND**

Under the present law, the husband has extensive power to

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15. LA. CIVIL CODE art. 2404 (1870).
17. LA. CIVIL CODE art. 2373 (1825).
18. FRENCH CIVIL CODE art. 1422.
19. LA. CIVIL CODE art. 2404 (1870), as amended: "The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

"He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.

"Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

"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 her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud."
manage and control the community. Generally, the husband may alienate community property by onerous title. He may purchase, pledge, and mortgage community property. He may place community assets in a corporation, or place them in a partnership, thus making the community liable for the partnership debts. He is the proper person to assert community claims and to defend claims against the community, or to compromise them in his discretion. Further, the husband may make inter vivos donations of community movables by particular title and he may donate community immovables “for the establishment of the children of the marriage.” Thus, in the absence of fraud, the husband has power of control sufficient to authorize him to enter into almost any onerous transaction he deems proper. However, the power of the husband, broad as it is, is not unlimited. Since the wife has a vital interest in the community property, some restrictions are necessary to protect her interest against a husband who proves an unfaithful administrator of the community.

RESTRICTIONS ON THE HUSBAND’S POWER

Fraudulent Dispositions

The husband’s power to enter into onerous transactions is subject to one important restriction: he can make no disposition of community property in fraud of his wife’s rights. The husband makes a fraudulent disposition if he, in bad faith, so transfers a community asset that the quantum which the wife will receive on termination and liquidation of the community is materially reduced. In the past the courts have been reluctant to find an onerous disposition fraudulent, perhaps because of the prevailing concept of the husband’s broad power to manage the community. Intent to injure the wife and actual injury to

20. Ibid.
28. LA. CIVIL CODE art. 2404 (1870).
29. Ibid. See last paragraph quoted in note 19 supra.
30. Succession of Boyer, 36 La. Ann. 506, 512 (1884): “Had he [husband] chosen to squander the community property on unworthy objects or in the gratification of extravagant tastes or luxurious indulgences, neither his estate nor his
her are essential components of a fraudulent disposition. In considering a challenged disposition the courts examine all factors surrounding it and no single factor is decisive. Relevant factors include the value of the property disposed of in relation to the value of the total community, the time of the disposition in relation to the time of termination of the community, the domestic climate at the time of the disposition, whether the transaction was a simulation, and the amount of consideration received in relation to the value of the asset transferred.

Property in Name of Wife or Both Spouses

Two amendments to article 2334 impose specific restrictions on the husband's power. The 1920 amendment provides that "when title to community property stands in the name of the wife, it cannot be mortgaged, or sold by the husband" without the written consent of the wife. Prior to the amendment, as all property acquired during the marriage was presumptively community property, the husband could alienate property acquired in the wife's name, thus forcing the wife to prove it was heirs could have been called to an account for it by the community or its representatives."

3 Planiol, Civil Law Treatise (An English Translation by the Louisiana State Law Institute) no. 1018 (1959) quotes Pothier as saying that the husband may "abuse his power and let the whole common estate deteriorate or become a total loss, without any obligation to indemnify his wife. He can let prescriptive rights of others mature, abandon inherited property, break up personal effects, kill animals as a display of personal brutality, etc."

31. See Thigpen v. Thigpen, 231 La. 206, 91 So. 2d 12 (1956); Succession of Packwood, 12 Rob. 334 (La. 1845).
32. See note 31 supra; Succession of Geagan, 212 La. 574, 33 So. 2d 118 (1947).
33. In Succession of Geagan, 212 La. 574, 33 So. 2d 118 (1947), the court points out this factor is not decisive, and is important only when considered with the other particular facts.
34. See Thigpen v. Thigpen, 231 La. 206, 91 So. 2d 12 (1956) (disposition when suit for separation or divorce was imminent); Van Asselberg v. Van Asselberg, 164 La. 553, 114 So. 155 (1927) (disposition a few days prior to institution of suit for separation); Lockhart v. Dickey, 161 La. 282, 108 So. 483 (1928) (simulated donation after suit for separation was filed by husband); Belden v. Hanlon, 32 La. Ann. 85 (1880). But cf. Oliphint v. Oliphint, 219 La. 781, 54 So. 2d 18 (1951) (seven years prior to suit for separation held to be a time "unsuspicious"); Exposito v. Lapeyrouse, 195 So. 814 (La. App. 1st Cir. 1940) (two weeks after wife left husband, two months prior to suit for separation filed by wife); Rundle v. Williams, 184 So. 590 (La. App. 2d Cir. 1948) (mortgage given father in February, divorce suit rendered in March).
her paraphernal property in order to have it returned to her. Presumably the purpose of the amendment was to prevent the husband from thus involving the wife in litigation over her separate property. The 1962 amendment prevents the husband from selling, mortgaging, or leasing community immovables acquired in the name of both husband and wife without the consent of the wife, when she has filed in the conveyance and mortgage records an authentic act declaring that her authority and consent are required for such transactions. The amendment changes prior jurisprudence allowing the husband to alienate community property standing in the name of both spouses. The wisdom of the amendment seems doubtful. To require the wife's consent to alienation of property recorded in her name protects her separate property; the requirement that the wife join in alienation of community immovables recorded in the name of both spouses simply serves to restrict the husband's managerial power and it could lead to serious friction in marital relations.

Homestead Exemption

The Louisiana Constitution allows heads of families an exemption from seizure and sale of the homestead owned and occupied by them to the extent of $4,000. This exemption may be waived, but if the debtor is married the waiver is ineffective unless signed by the other spouse. The provision limits the husband's power to deal with community property. He may sell the property or make a valid dation en paiement, but he may not defeat the wife's homestead rights by a security transaction disguised as a sale. Thus he cannot execute a mortgage in the form of a sale and resale, or sale with right of redemption.

40. Ibid.
42. See Otwell v. Vaughan, 186 La. 911, 173 So. 527 (1937) (retrocession by husband); Young v. Arkansas-Louisiana Gas Co., 184 La. 460, 166 So. 139 (1936).
43. La. Const. art. XI, § 1.
44. Id. § 3.
45. See Pugh v. Hunter, 150 La. 275, 90 So. 646 (1922); Nona Milk Co. v. Swain, 125 La. 233, 51 So. 128 (1910).
46. See Pugh v. Hunter, 150 La. 275, 90 So. 646 (1922).
47. See Underwood v. Flosheim Bros. Dry Goods Co., 129 La. 450, 56 So. 364 (1911); Carroll v. Magee, 120 La. 626, 45 So. 528 (1908).
49. See Becker v. Hampton, 137 La. 323, 68 So. 626 (1915); Maxwell v. Roach, 106 La. 123, 30 So. 251 (1901).
or by a simulated sale in which the notes of the "vendee" are negotiated to the creditor and the vendor "repurchases" the property by assuming the notes and mortgage.\(^5\) The wife's consent to all such transactions is necessary.

**Declaration of Homestead**

The statutory "declaration of family home"\(^5\) restricts the husband's power to manage the community in a manner similar to the constitutional homestead exemption. The statute permits the husband to record an authentic declaration that he is married and that he desires to, and does, designate adequately described property as a family home. If for six months after the acquisition of a home, the husband fails to file such declaration, the wife who is living with her husband\(^5\) may record the declaration.\(^5\) Once property is designated as "family home," it does not lose this status by change of actual residence or by any other cause except the dissolution of the marriage by death or divorce, or by an authentic declaration of abandonment or waiver of status signed by both husband and wife.\(^5\) Property designated as "family home" may not be validly sold or mortgaged by the husband without the written consent of the wife.\(^5\)

**Restrictions During Pendency of Separation and Divorce Suits**

Civil Code article 150\(^6\) provides that from the date on which

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50. See Jefferson v. Herold, 144 La. 1064, 81 So. 714 (1919).
52. The wife is "living with" her husband if she is not separated from bed and board from her husband or has not abandoned him or the family home. See Reymond v. Louisiana Trust & Savings Bank, 177 La. 409, 148 So. 663 (1933) (husband abandoned wife); Mallouf v. Fontenot, 170 La. 612, 128 So. 652 (1930) (same). See also Hodges v. Hodges, 150 So. 2d 884 (La. App. 1st Cir. 1963) (judgment of divorce conclusive against wife that she had abandoned husband so that she was not "living" with him when she filed a declaration of homestead).
53. LA. R.S. 9:2802 (1950). The statute provides that the wife's declaration is limited to property of the community. The declaration has been held effective when filed by the wife after acceptance of an offer to sell but prior to execution of the deed, Baumann v. Michel, 190 La. 1, 181 So. 549 (1938), but not effective against a prior recorded option, Watson v. Bethany, 209 La. 989, 26 So. 2d 12 (1946).
54. See LA. R.S. 9:2804 (1950); Smith v. Marino, 28 So. 2d 780 (La. App. 1st Cir. 1947); Smith v. Marino, 12 So. 2d 71 (La. App. 1st Cir. 1943).
56. LA. CIVIL 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, nor to dispose of the immovables belonging to the same, and any alienation by him made after that time, shall be null, if it
an action for separation is brought the husband may neither contract any debt on account of the community nor alienate community immovables. As pendency of a suit for separation or divorce is essential for the operation of article 150, the restrictions on the husband’s power cease when the suit is abandoned or dismissed. However, the filing of a suit for divorce during pendency of a suit for separation is not an abandonment of the latter suit so as to remove the restrictions on the husband’s power.

Article 150 distinguishes between debts incurred by the husband and dispositions of community immovables. The disposition of the immovables is null if “made with a fraudulent view of injuring the rights of the wife.” Apparently, the courts require fraud on the part of both the husband and the person acquiring the property from him to nullify the disposition. Recently it was held that the sale of community immovables by the husband during pendency of a separation suit was valid for a bona fide purchaser when the wife failed to record a notice of lis pendens. On the other hand, fraud is immaterial in the case of debts—it is simply unlawful for the husband to contract debts on account of the community. Such debts, however, are not null; they are valid as the separate debt of the husband, and the wife’s failure to record notice of lis pendens in no way alters the result.

Restrictions on Donations

Although not expressly stated by the Code, it is settled that the husband cannot dispose mortis causa of a greater interest in the community than his half interest. The courts have reasoned that at the moment of death of the husband title to half
the community vests in the surviving wife; and, as a disposition mortis causa can have effect only at the death of the testator, there is only half the community to be disposed of by testament. The result seems self evident: the testator cannot dispose of property which he does not own.

The husband has limited power to make donations inter vivos of community property. With one exception, the husband cannot make a valid inter vivos donation of a community immovable. Exceptionally, he may make such a donation for the establishment of the children of the marriage. Apparently, the restriction applies only to purely gratuitous donations and not to remunerative and onerous donations. Formerly it was held that the husband could make an onerous donation of a community immovable by which the charges imposed were in favor of persons other than the donor, but the decision was legislatively overruled. It seems that a valid onerous donation of community immovables is possible now only if the charges imposed inure to the advantage of the donor.

While the husband may make inter vivos donations of movables by particular title, the Code forbids him to make universal donations or donations under universal title of community movables except for the establishment of the children of the marriage. The husband's power to donate community movables by particular title is further restricted by the general principle that he can make no disposition of community property in fraud of his wife. In examining donations challenged as fraudulent, the courts consider relevant the same factors considered in examining challenged onerous transactions and two additional factors: whether the husband has concealed the donation from the wife and whether the wife knew of the donation at the

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67. Ibid. This reasoning may not accurately reflect the nature of the wife's interest in property of the community. See Comment, 26 La. L. Rev. 159 (1964).
68. La. Civil Code art. 2404 (1870).
69. Ibid.
71. Thompson v. Société Catholique d'Education Religieuse et Littéraire, 157 La. 875, 103 So. 247 (1925), overruled legislatively by La. Acts 1926, No. 96, amending La. Civil Code art. 2404 (1870) to include the sentence: "A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor."
72. La. Civil Code art. 2404 (1870).
73. See text at notes 33-37 supra.
74. See Thigpen v. Thigpen, 231 La. 206, 91 So. 2d 12 (1956); Succession of Geagan, 212 La. 574, 33 So. 2d 118 (1947).
time it was made. That the husband concealed the donation seems to indicate fraudulent intent, but to say that the wife's mere knowledge of the donation negatives fraud seems unsound. Of course, the wife may concur in a donation and this would preclude her from attacking it at a later date, but even if the wife knew of and disapproved a large donation made by her husband, she could do nothing about it at that time as she has no remedy until dissolution of the community.

French writers have expressed concern that the husband might use his powers to alienate community property to favor his presumptive heirs over the wife and her presumptive heirs. Louisiana courts may not have given sufficient consideration to this possibility. In Succession of Ratcliff the court found no fraud in the husband's donations of $29,640 to his relatives as compared to donations of $6,930 to the wife's relatives. That the community assets exceeded $500,000 undoubtedly influenced the decision. The court also decided that donations made to the husband's relatives, in absence of an expressed intent that they be borne by his separate estate, are chargeable to the community. The court reasoned that since the income from the husband's separate estate inured to the community, he would be unlikely to reduce the capital of his separate estate. It seems that the presumption should be otherwise, for generally donations to the husband's relatives in no way benefit the wife but rather enrich such relatives at her expense. Further, imputing such donations made without the wife's concurrence to the husband's separate estate does not require a diminution of the husband's capital during marriage but rather an adjustment in the amounts distributed on partition of the community.

The power of the husband to make inter vivos donations of movables by particular title has been criticized. The criticisms seem just. The rule prohibiting donations of immovables by the husband may have provided sufficient protection to the

76. See Bouny v. Anheuser-Busch Brewing Ass'n, 155 La. 437, 99 So. 395 (1924); Snowden v. Cruse, 152 La. 144, 92 So. 764 (1922).
78. See Pothier, Traité de la communauté n° 467 (Bugnet ed. 1861); 7 Toullier, Le droit civil français n° 310 (1833).
79. But see Succession of Geagan, 212 La. 574, 33 So.2d 118 (1947).
80. 208 La. 224, 24 So.2d 456 (1945).
81. Ibid.
82. 212 La. 574, 33 So.2d 118 (1947).
wife when most of the wealth of the estate consisted of land, but it is of less benefit today in the present society in which wealth consists primarily of movables. Though in *Succession of Geagan* the court expressed the opinion that the wife should not be required to prove fraud to avoid gratuitous dispositions of movables and directed the attention of the legislature to the problem, the legislature has not yet seen fit to act. It is submitted that the problem would be best solved by jurisprudential adoption of the French view by which excessive donations are presumed fraudulent. The French view gives a more flexible approach than a strict rule requiring the wife's consent to donations of movables or movables above a certain value, or a percentage of community assets. A rigid rule is likely to be too great a restriction on the husband's managerial powers since it might be beneficial to the community for the husband to make donations of movables to further his business interest. Under the suggested approach the court should consider all circumstances surrounding a donation of movables to determine its propriety. The time of the donation relative to the termination of the community, the person who receives the donation, the value of the donation in relation to the value of the community would be relevant factors to consider in determining whether the donation is fraudulent.

**Remedies of the Wife**

The restrictions on the husband's power as head and master of the community are no more effective than the remedies available to the wife in case the husband exceeds the power granted him by law. In general, the wife's remedies in such cases are adequate to protect her. Where the wife is permitted to set aside an unlawful transaction of her husband, the remedy is satisfactory. The remedy is less satisfactory where the wife has only an action for damages.

If the husband has made a fraudulent disposition of community property, article 2404 gives the wife an action against her husband's heirs. The jurisprudence allows the wife to pro-
ceed against a third person to whom community property has been transferred in some situations.\textsuperscript{86} \textit{Thigpen v. Thigpen}\textsuperscript{87} concluded that the wife may proceed against her husband, instead of his heirs, if the community is terminated while both spouses are alive. The wife's remedy for fraudulent dispositions can be exercised only after termination of the community or in conjunction with an action to terminate it.\textsuperscript{88} Usually the wife's remedy for a fraudulent disposition of community property is an action for damages.\textsuperscript{89} If, however, the husband makes a simulated alienation\textsuperscript{90} of community property, the wife may proceed against the pretended transferee and set the transaction aside when her remedy is exigible.\textsuperscript{91}

The wife has an effective remedy if the husband makes a prohibited donation of community immovables. On termination of the community she may proceed against the donee in possession to have the donation set aside to the extent of her half interest in the property.\textsuperscript{92} The remedy is personal to the wife as the donation of community immovables is a relative nullity which she may ratify.\textsuperscript{93} Of course, if the wife concurs in the donation, it is a valid donation.\textsuperscript{94} Likewise, it is obvious that a donation of a community immovable by the husband to the

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\item 86. See Van Asselberg v. Van Asselberg, 164 La. 553, 114 So. 155 (1927); Lockhart v. Dickey, 161 La. 282, 108 So. 483 (1925) (simulated donation of movables); Radovich v. Jenkins, 123 La. 355, 48 So. 988 (1909); Belden v. Hanlon, 32 La. Ann. 85 (1890) (simulated mortgage).\textsuperscript{87} See La. R.S. 9:291 (Supp. 1964) : "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."

See also Azar v. Azar, 239 La. 941, 120 So. 2d 485 (1960).\textsuperscript{88}

\item 89. See Thigpen v. Thigpen, 231 La. 206, 91 So. 2d 12 (1956). The amount of damages due the wife is usually recovered in settlement of the community.

\item 90. A "simulated alienation" is a transaction, usually in the form of a sale, in which the "vendor" does not intend to transfer ownership, and the "vendee" does not intend to take ownership. See generally Lemann, \textit{Some Aspects of Simulation in France and Louisiana}, 29 Tul. L. Rev. 22 (1954).

\item 91. See Van Asselberg v. Van Asselberg, 164 La. 553, 114 So. 155 (1927).


\item 93. Wisner v. City of New Orleans, 169 La. 1127, 126 So. 681 (1930). It is unlikely that the court meant to say that the wife's action is not inheritable. If the community is terminated by her death, it seems probable that her heirs may bring the action.

\item 94. Bouny v. Anheuser-Busch Brewing Ass'n, 155 La. 437, 99 So. 395 (1924) (donation by husband and wife to children of the marriage); Snowden v. Cruse, 152 La. 144, 92 So. 764 (1922) (donation to wife).
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wife is valid, providing it does not impair the legitime of forced heirs.95

_Bister v. Menge_96 concluded that if the husband made an unlawful donation of a community immovable, the wife has no action against his heirs under article 2404, but must proceed against the donee. The court indicated that the action against the husband’s heirs is available only if the husband’s fraudulent alienation is by onerous title. The language of article 2404 lends some support to the decision.97 The _Bister_ decision should be reconsidered in light of _Thompson v. Thompson_,98 in which the court indicates that the public records doctrine protects a purchaser relying on a recorded act of sale which is in fact a disguised donation of a community immovable. The combination of the two cases could leave the wife with no remedy at all. _Bister_ excludes a remedy against the husband’s heirs. _Thompson_ excludes a remedy against the donee’s transferee if the original donation was disguised as a sale. It is submitted that the language “or otherwise disposed of” in article 2404 is sufficiently broad to include disguised donations99 and thus afford the wife a remedy against the husband or his heirs when none is available against the donee.

In French law the wife has a cause of action to set aside donations of immovables only after partition of the community. If property donated by the husband falls to her lot, she may then set aside the donation.100 The rule seems practical as the wife whose claims are otherwise satisfied would have no interest in setting aside donations previously made. The rule, however, is contrary to Louisiana jurisprudence which indicates that the wife has an interest in every specific asset of the community.101

95. See Succession of Williams, 171 La. 151, 129 So. 801 (1930); Cavanaugh v. Youngblood, 162 La. 22, 110 So. 75 (1926); Snowden v. Cruse, 152 La. 144, 92 So. 764 (1922).
96. 21 La. Ann. 216 (1869).
97. _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 her action against the heirs of her husband.”
100. 3 _Planiol, Civil Law Treatise (An English Translation by the Louisiana State Law Institute)_ no. 1029 (1959).
101. See Succession of Heckert, 190 So.2d 375 (La. App. 4th Cir. 1964).
If, in violation of article 2334, the husband sells community property recorded in the name of the wife without her consent, the effect of the transaction is unclear. *Carter v. Brown*\(^{102}\) held that the sale was valid as to the husband’s half interest but null as to the wife’s half interest in the property. The result seems correct on the facts of the case. As the community had been terminated by divorce, the former spouses were owners in indivision.\(^{103}\) If the wife had been permitted to set aside the entire sale, the warranties of sale would preclude the husband from claiming against his vendee.\(^{104}\) The result achieved in *Carter* is plainly inapplicable if the wife asserts against the transferee the nullity of the sale during the existence of the community.\(^{105}\) Application of the *Carter* case would result in a partial partition of the community under circumstances in which a partition of the community is not authorized by law.\(^{106}\) Dictum in *Succession of Franek*\(^{107}\) indicates, however, that the husband’s sale of community property recorded in the name of the wife is absolutely null. This solution seems appropriate if the wife is permitted to assert against the vendee the nullity of the sale during the existence of the community. The restriction on the husband’s managerial power was designed to protect the wife’s interest and to preclude his involving her in litigation over her separate property.\(^{108}\) To achieve this purpose it seems she should have an immediate remedy against the vendee.

The same remedy should be available to the wife if, in violation of article 2334, the husband conveys immovable community property recorded in the name of both spouses without the consent of the wife after she had filed the requisite declaration that her consent was necessary.

The right of the wife to assert during the existence of the community the nullity of a sale or mortgage by the husband

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103. 55 So. 2d 301 (La. App. 2d Cir. 1951).


106. It has never been decided that she can assert the nullity during the existence of the community. *La. Civil Code* art. 2406 (1870).


108. See note 40 *supra.*
subsequent to the wife's filing a declaration of "family home" seems to have been upheld in Reymond v. Louisiana Trust & Savings Bank.109 There is some confusion in the case between the constitutional "homestead exemption"110 and the statutory "declaration of family home,"111 and the case may hold that the wife can claim the "homestead exemption" in the event the husband refuses to do so.112 The husband had given a second mortgage on property occupied by the wife as a residence after the wife filed a declaration of family home. The wife did not sign the mortgage. The property was sold upon execution by the first mortgagee. The second mortgagee purchased the property for approximately $3000 in excess of the sum due the first mortgagee. The wife sued the second mortgagee for $2000, the then amount of the homestead exemption. In upholding her claim the court concluded that the constitutional and statutory provisions should be construed together, the statutes supplementing the Constitution. Perhaps the confusion resulted from the wife's assertion of rights under both and her claim of only $2,000 rather than the full amount of the excess over that due the first mortgagee.

The decision seems to weaken the wife's protection under the "homestead exemption" by requiring her to file a declaration of family home in order to assert the exemption. The two provisions seem totally unrelated, for as the court said in Smith v. Marino:113 "Section 1 of Article XI of the Constitution deals with certain rights and exemptions of certain debtors with respect to their creditors, while Act 35 of 1921, Ex.Sess., simply accords certain rights between husband and wife."114 It is submitted that after the wife has filed a declaration of family home, a vendee or mortgagee of the husband can acquire no rights affecting the home without the consent of the wife, and the wife has a right to assert the nullity of the transaction. The purpose of the declaration of "family home" seems clearly to prevent the husband from depriving his wife and children of a

109. 177 La. 409, 148 So. 663 (1933). See also Smith v. Marino, 28 So.2d 780 (La. App. 1st Cir. 1947) (concerning cause of action by wife after dissolution of the community).
110. LA. CONST. art. XI, § 1.
113. 28 So.2d 780 (La. App. 1st Cir. 1947).
114. Id. at 783.
residence through exercise of his broad powers of management and control of the community.\textsuperscript{115} That such is the purpose of the “family home” is indicated by the fact that the statute is not limited to community property but provides that even the separate property of the husband may be designated “family home,”\textsuperscript{116} and the fact that the restriction on sale or mortgage is not removed upon separation from bed and board, but only upon dissolution of the marriage or the joint declaration of husband and wife.\textsuperscript{117} It seems the purpose of the statute can be achieved only if the wife is permitted to assert the nullity of the illegal transactions performed by her husband.

**POWER OF THE WIFE TO ALIENATE COMMUNITY PROPERTY\textsuperscript{118}**

\textit{In General}

It is well settled in Louisiana that the wife cannot, acting in her own name, alienate or encumber community immovables.\textsuperscript{119} The rule is so strong that one dealing with a woman may not rely on public records, but must go outside the record to determine her marital status.\textsuperscript{120} The rule seems appropriate in a community property system giving the husband broad powers to manage the community. Further, since the husband is personally liable for community debts,\textsuperscript{121} he should have adequate control over what debts the community incurs and upon what terms the community assets are alienated.

Exceptionally, the husband has been held estopped to assert

\textsuperscript{115} Cf. LA. CIVIL CODE art. 2334 (1870), as amended regarding sale of community property recorded in the joint names of husband and wife.

\textsuperscript{116} See LA. R.S. 9:2601 (1950).

\textsuperscript{117} See id. 9:2804.

\textsuperscript{118} This Comment considers only the power of the wife to alienate or encumber community property. The general powers of the wife to obligate the community, contractually or otherwise, are fully discussed in Comment, 25 LA. L. REV. 201 (1964).

\textsuperscript{119} See Murphy v. Burns, 63 F. Supp. 648 (W.D. La. 1945) (mineral lease); Ducasse v. Morica, 224 La. 318, 69 So. 2d 338 (1953) (mortgage); Roccaforte v. Barbien, 212 La. 69, 31 So. 2d 521 (1947) (sale); Bywater v. Enderle, 175 La. 1098, 145 So. 118 (1932) (husband can prevent wife from answering interrogatories when result could be judgment granting property to another); Succession of James, 147 La. 944, 86 So. 403 (1920) (mortgage); Thomas v. Winsey, 76 So. 2d 33 (La. App. 1st Cir. 1954) (sale); Vanzant v. Morgan, 181 So. 600 (La. App. 2d Cir. 1938) (sale).

\textsuperscript{120} See Succession of James, 147 La. 944, 951, 86 So. 403, 405 (1920): “[T]he only question remaining is whether it devolves upon a person who deals with a purchaser of immovable property to find out whether he or she was married or single at the date of the purchase, and we must hold in the affirmative on that question.”

\textsuperscript{121} See Comment, 25 LA. L. REV. 201 (1964).
title to community immovables alienated by the wife. The estoppel has been sustained where the husband acknowledged that the property alienated was the wife’s separate property,122 where he received the benefit of the proceeds of the transaction,123 and where he joined in the act of sale or mortgage.124 These cases are not inconsistent with the general principle that the husband controls the community, as in each instance he could have prevented the transaction.

_Monsanto Chemical Co. v. Jones_125 presents a rare instance in which a wife effectively alienated community property when the husband perhaps could not have prevented the transaction. The court held that a deed from a married woman conveying community property was a “just title” sufficient to support a plea of ten years acquisitive prescription.126

Generally the wife has no more authority to alienate community movables than she has to alienate community immovables.127 There is at least one exception. Article 1786 provides that the husband’s authorization of the wife’s contracts for necessities for herself and her family is presumed.128 Very early the court held that “contracts” was broad enough to include sales of community movables by the wife if the evidence shows that the wife and children were in necessitous circumstances, that a movable was sold for a valuable consideration, that the sale was for the purpose of providing support for the wife and children, and that the proceeds of the sale were so applied.129

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128. _La. Civ. Code_ art. 1786 (1870): “... The authorization of the husband to the commercial contracts of the wife is presumed by law, if he permits her to trade in her own name; to her contracts for necessities for herself and family, where he does not himself provide them; and to all her other contracts, when he is himself a party to them.”

These cases do not indicate that the circumstances enlarge the powers of the wife; rather the cases rely on an implied authorization of the husband. Since an authorization to sell immovables must be in writing, it seems unlikely that the wife in necessitous circumstances could alienate immovables without the written consent of the husband.

The wife's lack of power to alienate community property extends to transactions other than a sale. It extends to confessions of judgment, suffering a default judgment, and in some circumstances to admissions made in answer to interrogatories. The broad conception of an alienation is probably necessary to preserve the husband's power to manage the community.

**Absence or Incapacity of the Husband**

Louisiana law makes no general provision for the administration of the community by the wife during the absence or incapacity of the husband. If the husband is an absentee or an interdict, the wife is preferred in appointment of a curator. Her administration would, of course, be subject to the duties and liabilities of any curatorship. The curatorship of the estate of a married man seems to include management of the community as the Code makes no provision for its separate administration. Although not directly decided by the Louisiana courts, it seems the wife of the absentee or interdict who is not appointed curatrix would have to apply to the curator for funds necessary for support of herself and her children.

Special provision permits the spouse of an absentee to prevent the presumptive heirs from being placed in provisional possession of the absentee's estate. By doing so the present

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60 So. 2d 240 (La. App. 1st Cir. 1952) for a more recent expression of the same principle.


131. See Bywater v. Enderle, 175 La. 1098, 1011, 145 So. 118, 119 (1932): "But it is clear that a husband or wife who, by confessing judgment, by suffering a judgment by default, or by admissions made in answer to interrogatories, enables another to take away the community property, does in fact alienate such property as effectively as if he or she had sold it. And it would be too narrow a construction to place on the statute, in view of its manifest purpose, to hold that the prohibition against any alienation by the husband (and by the same token, by the wife) applies only to conveyances by deed of sale, for a judgment awarding property to another conveys it as effectively as the most formal deed."

132. See La. Civil Code arts. 47-55 (1870), concerning the curatorship of absentees, and id. arts. 389-426, concerning the curatorship of interdicts.

spouse continues the community and administers it. Presumably the wife of an absentee could take over administration of the community without formality. Such procedure seems inadvisable, however, as the wife might lose the right to renounce the community at its termination.

If the husband is incapacitated, but not to such extent that interdiction is possible, the law does not authorize the wife to take over administration of the community. Perhaps the wife could obtain a separation of property in these circumstances. If not, her ability to obligate the community for necessaries offers some protection. Several community property states have provided for court appointment of the wife as head of the family with power to act in the name of the community in the same manner as the husband when he is incapacitated. Properly limited, such legislation seems desirable in Louisiana, provided it eliminates the personal liability of the husband for the community debts the wife incurred.

CONCLUSION

A community property system in which the husband is to administer the community must accommodate two conflicting interests. To administer the community effectively, the husband must have broad power to control the use of community property, the terms upon which it will be alienated, and the conditions upon which it will become obligated. At the same time these powers must be sufficiently limited to protect the wife's interest.

The Code gives adequate consideration to both interests. The husband is given broad powers. The wife is protected against injury by the husband in his management of community immovables. Indeed, the law may be too restrictive in requiring the wife's consent to dispose of or encumber community immovables recorded in the name of both spouses.

134. La. Civil Code art. 64 (1870); Pedlahore v. Pedlahore, 151 La. 288, 91 So. 738 (1922). The temporary administration continues until the heirs of the absent spouse become entitled to absolute possession of the absentee's estate. La. Civil Code art. 70 (1870).
135. Id. art. 2412. But cf. art. 64.
The power of the husband to donate movables by particular title is the primary source of potential injury to the wife. This power has been too liberally interpreted to provide an effective balance between the rights of the wife and the discretion necessary for the husband to administer the community, particularly in modern times when the greatest wealth consists of movable property.

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

**Autley B. Newton**

### SETTLEMENT OF COMMUNITY RIGHTS

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

#### SETTLEMENTS—JUDICIAL OR CONVENTIONAL

Although the law contemplates that there shall be a liquida-

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

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

See also id. arts. 2334, 2404: Comments, 25 L.A. L. Rev. 95 (1964).