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Private Law: Marital Regimes

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about to be taken from her foot, and might well have balked had she been warned that such was to be the treatment. It appears that defendant did not indicate to the patient that the treatment would be any way different from that earlier received and that preparations for the treatment would not have indicated such difference. The court's finding of implied consent seems to be based primarily upon the presumption that by submitting to treatment plaintiff had consented to "minor" operations. It is noteworthy that the court cited no authority for the existence of such a presumption, and it is submitted that to originate one would be undesirable. Protection of the medical profession against frivolous battery suits is of course desirable. On the other hand, the law is equally concerned with protecting parties from unconsented-to invasions of personality at the hands of anyone, and in the instant case it seems that just such an invasion had taken place. In striking a workable balance between these aims, courts are assisted by the flexibility of the usual approach to the question of the existence of consent to medical treatment. A presumption of consent to minor operations "where the probability of ill consequences is rather remote"[96] would, if literally applied, rob this approach of much of its flexibility.

MARITAL REGIMES[1]

*Robert A. Pascal**

SUITS TO ENFORCE COMMUNITY RIGHTS

Ordinarily only the husband may sue to enforce a community right. The general rule was applied in *Warren v. Yellow Cab Co.*,[2] a suit to recover for losses borne by the community of

96. *Ibid.*

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1. Decisions on this subject matter applying well understood principles and rules, and which therefore need not be discussed, are: Sylvester v. Sylvester, 137 So. 2d 716 (La. App. 3d Cir. 1952) on marital property following a reconciliation; Simon v. Simon, 138 So. 2d 260 (La. App. 2d Cir. 1962); Succession of Cazendeck, 138 So. 2d 613 (La. App. 4th Cir. 1962); and Monk v. Costin, 134 So. 2d 598 (La. App. 2d Cir. 1961), on the presumption things acquired during marriage are community property; Johnson v. Shreveport Transit Co., 137 So. 2d 463 (La. App. 2d Cir. 1962) and Gallie v. Ingraham, 140 So. 2d 741 (La. App. 4th Cir. 1962) on torts of the wife; and Egstrom's of Alexandria, Inc. v. Vaughn, 138 So. 2d 672 (La. App. 3d Cir. 1962) on eligibility for homestead rights.

2. 136 So. 2d 319 (La. App. 2d Cir. 1961).

acquets and gains as a result of wage losses by the wife and medical expenses attributable to her wrongful injury. Because of a provision of the Negotiable Instruments Law as enacted in Louisiana, however, particularly R.S. 7:51, a wife may sue to enforce payment of a check of which she is holder in due course. The application of this exceptional rule was illustrated in *Van Horn v. Vining*.[3]

IMPROVEMENTS TO SEPARATE AND COMMUNITY PROPERTY

In *Succession of Rusciana*[4] a wife's heirs sued to recover that spouse's interest in the increased value of the husband's separate property attributable to community expenditures and efforts during the marriage. This case required no more than an application of Article 2408[5] of the Civil Code according to well understood interpretations of it. Recovery was based on the value of the separate property at the termination of the community less the value the property would have had if the improvements made at community expense had not been made. In *Jenkins v. Prevost*[6] a divorced wife claimed reimbursement for (1) "money and effort" expended in helping her husband build a home on his land prior to their marriage and (2) one-half of the community funds expended during marriage on (a) mortgage payments on and (b) plumbing installations in the same house. The court estimated the value of her contribution to the house before marriage and allowed her that amount from the defendant husband individually. Whether the court based this portion of its decision on contract or unjust enrichment rules was not stated in the opinion. The court also allowed her one-half the cost of plumbing, installed after marriage, reasoning that the value of the improvement to the house by such installation had not been shown to exceed that. The question the court does not appear to have asked is whether the improvement to the house equalled the cost thereof, and this should be considered in applying Ar-

3. 133 So. 2d 901 (La. App. 2d Cir. 1961).
4. 136 So. 2d 509 (La. App. 1st Cir. 1961).
5. LA. CIVIL CODE art. 2408 (1870): "When the separate property of either the husband or the wife has been increased or improved during the marriage, the other spouse, or his or her heirs, shall be entitled to the reward of one half of the value of the increase or ameliorations, if it be proved that the increase or ameliorations be the result of the common labor, expenses or industry; but there shall be no reward due, if it be proved that the increase is due only to the ordinary course of things, to the rise in the value of property, or to the chances of trade."
6. 140 So. 2d 238 (La. App. 4th Cir. 1962).

ticle 2408 of the Civil Code. Finally, the court allowed the wife one-half the amount expended from community funds for payment of mortgage notes on the house. Here again this may have been excessive under the formula of Article 2408, for such payments undoubtedly contained much by way of interest which could not have been reflected in improvements to the house.

A third case, *Smith v. Garrison*,[7] involved a widow's claim for $2,000 *lent* to her husband from her separate funds for making improvements to his separate immovable. This, it will be noted, is not a case for the application of Article 2408 of the Civil Code, for that article refers only to improvements to separate property with community funds or labor. The court allowed the claim, using language which, intentionally or not, avoided the question whether husband and wife might enter into the contract of loan with each other.[8] It seemed satisfied to state that the money had been made available to the husband and that he had used it "for his individual interest." Accordingly, the basis of decisions must have been unjust enrichment, a basis which the writer considers valid.

CONTRACTS OF THE WIFE

Tricketts, Inc. v. Viser[9] applied the rule that a wife may obligate her husband for necessaries which she purchases because of his failure or refusal to supply them. The husband had argued that he could not be held liable unless the person contracting with the wife had reason to believe that the purchases were for necessaries and that the husband had failed or refused to supply them. To support his contention the husband cited *Keller-Zander, Inc. v. Copeland*[10] and other cases. The court distinguished the *Keller-Zander* case and considered the others inapplicable. Whatever the state of the jurisprudence, it may be observed that the ignorance or knowledge of the circumstances under which the wife is acting should not be relevant. First, it should not be relevant in any case in which the creditor can be deemed, as a matter of law, to have *contracted* with the husband. This the creditor must be deemed to have done in any instance in which the wife has contracted *in his name*, whether with

7. 137 So. 2d 505 (La. App. 3d Cir. 1962).
8. LA. CIVIL CODE art. 1790 (1870) forbids contracts between husband and wife.
9. 137 So. 2d 424 (La. App. 2d Cir. 1962).
10. 196 So. 527 (La. App. Orl. Cir. 1940).

authority as mandatary (express or tacit mandate), authority by presumption of law under Article 1786 of the Civil Code, or without authority as *gestor* under Article 2299.[11] Secondly, since Louisiana's judiciary has extended the effect of representative mandate to mandate without representation (*i.e.*, "undisclosed agency")[12] it would seem reasonable to conclude that the creditor should be deemed to have contracted with the husband even where the wife has acted without using the husband's name but with either conventional or legal authority. On the other hand, because of the strong language of Article 2299, the creditor probably would not be deemed to have contracted with the husband in the event the wife acted as his *gestor* without using his name. Thirdly, it should not be necessary for the creditor to prove knowledge of the circumstances if he sues on the basis of unjust enrichment, for here the right is founded simply on the fact of the enrichment of the husband and the corresponding loss of the creditor without legal cause. On the other hand the creditor would have to prove knowledge of the circumstances if he sued as *gestor* of the husband under Article 2299. In summary, therefore, the creditor's knowledge of the circumstances should be relevant only where the creditor himself alleges he has acted as gestor of the husband.

Goldring's Inc. v. Seeling[13] also involved a purchase by a wife in the name of her husband. Here, however, the wife purchased clothing and charged them to her husband's account. This she had been authorized to do at one time, but since then the parties had been separated from bed and board. The court reasoned that the authorization had not been revoked and therefore the husband was liable. More specifically, the court found as fact that the husband had not expressly revoked the authorization of his wife by notice to the creditor and specifically stated that the separation would not of itself terminate her authorization. This conclusion is favorable to a policy of protecting persons dealing with those once authorized to act as mandataries, but it may be asked whether the separation from bed and board was a "change of condition of the principal," which according to Article 3027 of the Civil Code terminates authorization.

11. LA. CIVIL CODE art. 2299 (1870): "Equity obliges the owner, whose business has been well managed, to comply with the engagements contracted by the manager, in his name; to indemnify the manager in all the personal engagements he has contracted; and to reimburse him all useful and necessary expenses."

12. Sentell v. Richardson, 211 La. 288, 29 So. 2d 852 (1947).

13. 139 So. 2d 538 (La. App. 4th Cir. 1962).

JOINT BANK ACCOUNTS

In *George L. Ducros Tile Co. v. Ruth*[14] a judgment creditor of the wife attached a joint account of the husband and wife. The court found as fact that the joint account had been opened by the husband to permit the wife to pay household and other community expenses and contained only funds deposited by him. Thus, none of the funds in the account were deemed to be funds of the wife and accordingly the attachment was dissolved. The decision is certainly correct. In Louisiana a joint account is no more than authority to each person to draw out the funds deposited to it, and of itself is not an indication of ownership between or among the parties.

ATTORNEYS' FEES IN SEPARATION AND DIVORCE SUITS

Act 178 of 1962, amending Article 155 of the Civil Code, expressly recognizes the "liability of the community for the attorneys' fees and costs incurred by the wife in the action in which the judgment [of separation or divorce] is rendered." The prior jurisprudence was to the same effect and among those decisions are three rendered within the period covered by this symposium but before the passage of Act 178 of 1962.[15] These decisions, therefore, are of no special lasting significance on this point. Nevertheless, it may be well to point out how very strange the rule of the jurisprudence and the new legislation is. The attorneys' fees of the wife are payable *only out of the community assets*,[16] and, if there are none, the wife alone must bear them. This may happen either because the community is itself negligible or insolvent, or because the parties lived under a regime of separate property. If this rule is to be given juridical basis, it must be that the attorneys' fees are a *debt of the wife* for which the community is liable. Actually, this was not the theory of Judge Tate's opinion in *Romero v. Leger*.[17] It was Judge Tate's opinion that the *husband* in his capacity as husband should be liable for an advance of the wife's attorneys' fees as part of the alimony which he owes the wife *pendente lite*. The theory that attorneys' fees are part of that due as ali-

14. 137 So. 2d 484 (La. App. 4th Cir. 1962).

15. Romero v. Leger, 133 So. 2d 897 (La. App. 3d Cir. 1961); Meyer v. Howard, 136 So. 2d 805 (La. App. 4th Cir. 1962); and Shockley v. Shockley, 141 So. 2d 64 (La. App. 2d Cir. 1962).

16. Shockley v. Shockley, 141 So. 2d 64 (La. App. 2d Cir. 1962) reflects this idea.

17. 133 So. 2d 897 (La. App. 3d Cir. 1961).

mony *pendente lite* would, of course, impose the liability of attorneys' fees on all husbands, whether or not living under the community regime. The rule sanctioned by the amendment to Article 155 is very different.

SECURITY DEVICES

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In large measure, the fertile soil of this area of our substantive law was permitted to lie fallow during the past year. Only three cases of interest, and only one of importance, were decided by the appellate courts in this field during the past term.

State v. Thoman[1] actually hinged on issues of fact; but, nevertheless, the case is of more than passing interest because of the importance of the legal principles called into play. There, by a mandamus proceeding, the plaintiff sought to cancel the inscription of a mortgage on urban property on the ground that the mortgage note had prescribed. The defendant's answer denied the prescription asserted and alleged that it had been interrupted both by partial payments on and acknowledgment of the mortgage indebtedness. Apparently without objection by the plaintiff,[2] the defendant reconvened and sought judgment on the mortgage note and recognition of the mortgage. The factual issues as to whether there had been any partial payments or acknowledgments which interrupted the current of prescription, decided in favor of the plaintiff by the trial court and in favor of the defendant by the appellate court, possess no particular interest to the professional reader. Settled, but nonetheless important, principles of law applied, however, are of interest. The Court of Appeal, First Circuit, reiterated the rule that prescription on a demand note commences to run from the date of execution, and not from any demand for payment. Both the trial and appellate courts applied the rule that the obligee has the burden of proving interruption of prescription on a written obligation which is prescribed on its face. The appellate

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1. 135 So. 2d 791 (La. App. 1st Cir. 1961).

2. Mandamus is a summary proceeding, LA. CODE OF CIVIL PROCEDURE arts. 2592(5), 3781 (1960); while the reconventional demand is available only in ordinary proceedings. *Id.* art. 851. Had the plaintiff excepted timely to the reconventional demand, it could have been dismissed. *Id.* arts. 926(3), 1036.