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# Private Law: The Community of Acquets and Gains

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United States Savings Bonds payable on the death of the deceased to one of the legatees. After removing the United States bonds from the succession assets<sup>44</sup> and after reducing the legacies in order to satisfy the legitime of the forced heir, the court held that since there were not sufficient assets to pay all the particular legacies, the cash legacies must fail.<sup>45</sup>

### *Identity of Legatee*

In *Succession of Rome*<sup>46</sup> the court had no difficulty in determining from the testimony adduced at the probate of the testament, that the plaintiff was actually the person intended by the testatrix as her legatee. Where the legatee's name is not given in full, the court states, parol testimony is admissible under articles 1714 and 1715 of the Civil Code to remove the obscurity or ambiguity.<sup>47</sup>

## THE COMMUNITY OF ACQUETS AND GAINS

*Robert A. Pascal\**

### PROOF OF ACQUISITION WITH SEPARATE FUNDS

The *Succession of Winsey*<sup>1</sup> is of more than usual interest. A wife had purchased immovables in her own name through authentic acts in which the husband had admitted the parapher-

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44. Although the United States Savings Bonds were fictitiously added to the mass in order to determine the legitime of the forced heir, the court had already held that these bonds were governed by federal law and should therefore be paid to the beneficiary thereof. *Succession of Mulqueeny*, 156 So. 2d 317 (La. App. 4th Cir. 1963). The effect of excluding the bonds, therefore, is that they were not subject to reduction as were the other legacies, in order to make up the legitime of the forced heirs. See *Free v. Bland*, 369 U.S. 663 (1962).

45. LA. CIVIL CODE art. 1635 (1870): "If the effects do not suffice to discharge the particular legacies, the legacies of a *certain object must be first taken out*. The surplus of the effects must then be proportionally divided among the legatees of sums of money, unless the testator has expressly declared that such a legacy shall be paid in preference to the rest, or that the legacy is given as a recompense for services." Cf. *Succession of Berdon*, 202 La. 607, 12 So. 2d 654 (1943), 5 LA. L. REV. 519-520 (1944).

46. *Succession of Rome*, 169 So. 2d 665 (La. App. 1st Cir. 1964).

47. LA. CIVIL CODE art. 1714 (1870): "In case of ambiguity or obscurity in the description of the legatee, as, for instance, when a legacy is bequeathed to one of two individuals bearing the same name, the inquiry shall be which of the two was upon terms of the most intimate intercourse or connection with the testator, and to him shall the legacy be decreed."

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1. 170 So. 2d 732 (La. App. 1st Cir. 1964).

nality of the funds used by her. On the husband's death the notary public taking an inventory of his succession listed these immovables as community assets, presumably because of the presumption established in article 2405 of the Civil Code that at dissolution of the regime all assets possessed by the spouses are to be regarded as forming part of the community until it is proved otherwise. The surviving wife attempted to establish the paraphernal character of the acquisitions, but the court of appeal, finding the evidence inadequate to prove the paraphernality of the funds used, allowed the presumption in article 2405 to stand and declared the immovables community assets. The writer submits that both the notary public and the court were in error.

The acquisitions had been by authentic acts and the husband had admitted in each the paraphernality of the funds used to pay the price. Authentic acts not forgeries are full proof of their contents even against forced heirs<sup>2</sup> unless the latter prove them to be simulations, or donations in disguise.<sup>3</sup> Thus it was not for the notary public to inventory the immovables as community assets; the allegations in authentic acts should overcome the presumption established by article 2405, a jurisprudence to the contrary notwithstanding;<sup>4</sup> and until the forced heirs prove the donation in disguise, all persons are bound to respect the authentic act for what it purports to be. Moreover, it is submitted that there was no question of a donation in disguise here. Even if the husband had in fact supplied the purchase price to the wife in each case, it must be remembered that husbands may donate either community funds or their separate assets to their wives and that the donation of funds may be made manually. Had the husband given the funds to the wife manually two years, two months, two days, or two minutes before she had made each purchase, there could not have been any basis in the legislation for considering these acts anything but valid donations. The husband's admissions in the acts of purchase

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2. LA. CIVIL CODE art. 2236 (1870).

3. *Id.* art. 2239, as amended in 1894. Before this amendment forced heirs could not avoid a donation in disguise, but only have it reduced to the extent it exceeded the disposable portion. The writer believes the original rule was preferable.

4. There is much jurisprudence to the contrary. A very clear statement of the jurisprudence's stand is to be found in the dissenting opinion of the late Judge Herget in *Murray v. Shaw*, 165 So. 2d 697, 702 (La. App. 1st Cir. 1964). The writer does not agree with this jurisprudence for reasons which appear in the body of the discussion of this subject.

would then have been technically accurate. But even if we assume that what actually transpired was that the husband paid the price on the wife's behalf, intending a donation to her, were the forced heirs placed in a position different from that in which they would have been as a result of manual donations preceding the acts of purchase? Notice or recordation of donations of non-mortgageable things is not required and forced heirs could not have complained of the lack of notice of manual donations. On proving a donation, of course, the forced heirs would have been entitled to demand a reduction of it to the extent it exceeded the disposable portion, but the immovables were in all events the assets of the wife by purchase with separate funds.

Conceding *arguendo* that the transactions involved donations in disguise of the funds used to pay the price, the following observations might be made:

1. The allegations in the authentic act should have been deemed to overcome the presumption established by article 2405 and thus neither should the notary have inventoried the immovables as community assets, nor should the court have made article 2405 the basis of considering them to be such.
2. If the acts of purchase were simulations, they were so only as donations in disguise of the funds used and not as donations of the immovables. The immovables themselves had not been taken from the community assets or those of the husband, and as between the third party seller and the spouses and their representatives, there was a valid act of purchase *in the name of the wife*, whatever its effect as between the husband and wife or their representatives.
3. Had the forced heirs brought suit and proved the funds used to have been donations in disguise from the husband's separate assets, then they would have been entitled to judgment for the full amount of the funds donated.
4. Had the forced heirs proved the donation to have been made from community funds, then it would have been necessary to ascertain whether, under the legislation as it now stands, the acquisition in the name of the wife with consent of the husband and with funds derived from a donation which is (subject to being declared?) a nul-

lity, is to be considered (a) a community asset or (b) the paraphernal asset of the wife. Under solution (a) the forced heirs would have been entitled to one-half interests in the immovables themselves; under solution (b) they would have been entitled to a judgment for one-half the amounts donated, applying article 2408 of the Civil Code.

5. If, once the donations in disguise were proved to have been made with community assets and declared null, the acts of purchase were to be treated as simple acts of purchase with community funds in the name of the wife and with concurrence of the husband, then a mechanical application of the traditional solution would result in the acquisitions being considered community assets. The writer submits, however, that the traditional rule served a principle of the regime of community of acquets and gains formally abandoned in the amendment to article 2334 in 1912 and should itself be abandoned where the intention of the parties indicated another result. Before 1912 even purchases with separate funds became community assets simply because all "acquets" during marriage were to be considered such. Now that acquisitions during marriage may be separate, under article 2334, there is no reason to apply the older rule to acquisitions in the name of either spouse concurred in by the other, for in either case the concurring spouse intends that the acquisition be the separate asset of the spouse in whose name it is made. If the donation of community funds implicit in this solution is considered null as one in disguise or otherwise, the acquisition itself would continue to be the separate asset of the spouse in whose name it was made even though the forced heirs would be allowed to claim one-half of the community funds used to purchase it.

#### ACTS OF THE WIFE IN RELATION TO THE HUSBAND AND THE COMMUNITY OF ACQUETS AND GAINS

With one possible exception, that pertaining to the acts of the wife as a public merchant,<sup>5</sup> there is no legislation whatsoever

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5. LA. CIVIL CODE art. 131 (1870). This article, as limited by article 1786 of the Civil Code, means that the husband who permits his wife to act as a public

stating that the wife may obligate the husband personally, or administer, obligate, encumber, or dispose of a community asset. Article 1786, so often cited as authority for the proposition that the wife may obligate the husband for "necessaries" for herself and the family, if he fails or neglects to supply them, does no more than authorize the wife to *obligate herself* in such an event.<sup>6</sup> As far as acts of administration, encumbrance, or disposal of community effects are concerned, article 2404 indicates that it is the husband alone who may accomplish these. The married women's emancipation acts have not increased the wife's power in any of these respects.<sup>7</sup> It has always been understood, however, that the act of the wife affecting a community asset (or an asset of the husband's separate patrimony) made with the husband's concurrence or consent obligates him as well as her. And this understanding seems proper, for in concurring or consenting to an act affecting assets under his control, the husband, in substance if not in technical form, constitutes the wife his mandatary. The judgment in *Mid-State Homes, Inc. v. Davis*,<sup>8</sup> in which the wife acting alone had attempted to hypothecate a community immovable, is consistent with what has been said here.

On the other hand, the results reached in many cases, if not the language of the opinions, imply that the wife can acquire assets which will fall into the community of acquets and gains even if she acts in her own name and without her husband's concurrence or consent. Thus in four cases of the 1964-65 term the Supreme Court and the courts of appeal presumably would have found immovables purchased by wives to be community assets had they or their heirs not proven the purchases to have been made with separate funds.<sup>9</sup> The writer submits that the

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merchant is presumed legally to authorize her contracts in trade and that he as well as she is obligated by them if there is a "community of property" between them. In question today, with regard to the wife over eighteen years of age since the enactment of the married women's legislation (LA. R.S. 9:101-105 (1950)), is whether the wife who acts as a public merchant without her husband's consent can ever bind him in view of a provision of the emancipation legislation itself (LA. R.S. 9:105) under which the laws on the community of acquets and gains are not to be deemed affected or modified thereby.

6. LA. CIVIL CODE art. 1786 (1870). The wife, nevertheless, may justly be presumed to have a mandate from him, at least while they are living together, to charge ordinary purchases and expenses for running the household and for maintaining the family, unless he has taken such steps as he may be required to indicate that he has not given or revoked such authority; and she may also obligate him by acts of negotiorum gestio under article 2299 of the Civil Code.

7. LA. R.S. 9:101-105 (1950).

8. 173 So.2d 326 (La. App. 4th Cir. 1965).

9. *Succession of Smith*, 247 La. 921, 175 So.2d 269 (1965); *Murray v. Shaw*,

wife acting in her own name and without her husband's consent or concurrence cannot be said to have the capacity to acquire things which will fall into the community of acquets and gains any more than she can be said to have the capacity to obligate the husband or dispose of community assets, whether the funds used form part of the community of acquets and gains, her husband's separate patrimony, or her own. Article 2402 does say acquisitions in the name of the wife fall into the community of acquets and gains, but when that article was written no act of acquisition by the wife could be opposed to her husband unless he concurred in the act or gave his consent in writing. Today the married woman may contract without her husband's concurrence or consent under the married women's emancipation legislation; but that legislation itself states that its provisions are not intended to alter the laws on the community of acquets and gains,<sup>10</sup> which laws include article 2404 of the Civil Code making the husband head and master of the community and giving him complete control. It is suggested that under the present law if the wife has acquired something in her own name and without her husband's consent, it is always hers; but if community funds or separate funds of the husband have been used to make the acquisition, the husband has the right to recover from her the sums used as he might from any third person.<sup>11</sup>

The jurisprudence admits that the husband is not rendered liable by the acts of the wife clearly in her name and on her credit alone. Thus in *Hagedorn Motors, Inc. v. Godwin*,<sup>12</sup> in which the evidence indicated quite clearly that the wife and husband had made it known to the seller of an automobile that she alone was purchasing it, the court had no hesitancy in finding the husband not liable. Again, the decisions do not hold the

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165 So.2d 697 (La. App. 1st Cir. 1964); Succession of Evans, 171 So.2d 738 (La. App. 1st Cir. 1965); and Succession of Marshall, 174 So.2d 234 (La. App. 4th Cir. 1965).

10. LA. R.S. 9:105 (1950).

11. There is no legislation forbidding the husband to sue the wife in any case for any reason, although R.S. 9:291 forbids suits by the wife against the husband except in certain cases, one of which is to recover her paraphernal assets in his hands. The jurisprudence has recognized the right of the husband to sue the wife in instances in which she could sue him, but has gone no further. See *Seeling v. Seeling*, 133 So.2d 168 (La. App. 4th Cir. 1961), an instance of a suit to recover separate assets in the wife's hands. Probably this jurisprudence would be interpreted to permit the husband to sue for community assets in the wife's hands, but the writer submits no restriction on suits by the husband against the wife exists at all.

12. 170 So.2d 779 (La. App. 1st Cir. 1964).

husband obliged for purchases by the wife, without his consent or authorization, even though they might fairly be said to have been made on the husband's credit, unless they are purchases of "necessaries." Thus in *Nationwide Acceptance Co. v. Griffin*,<sup>13</sup> the husband was not held liable for the purchase of a large quantity of meat in a case in which both seller and wife intended to obligate the husband, because the quantity purchased exceeded that "necessary" at the time of purchase. It is submitted, however, that by custom supplementing the law in Louisiana, the husband may be presumed to have tacitly authorized his wife to make not only necessary purchases, but also all contracts which might be deemed usual or ordinary in the course of providing for the life of the family according to her husband's means and station in life, unless he has effectively revoked or terminated this authority. Under this rule not only necessaries, but also purchases ordinary or usual in the light of the family's means and station in life, unless he has effectively revoked or by the wife acting as his mandatary under express or tacit authorization. It is well to remember too that the seldom invoked rule in article 2299 might be used in appropriate cases to hold the husband liable for acts accomplished on his credit by the wife. Using the presumption of tacit mandate or article 2299, the misuse of article 1786 and notions of "ratification by inaction" could be avoided.

#### TRUST INCOME ACCUMULATED FOR HUSBAND

*Dunham v. Dunham*,<sup>14</sup> if allowed to stand, will provide a method by which certain income of the husband might be excluded from the community of acquets and gains without resort to a marriage contract. The husband, while yet unmarried, had been made sole beneficiary of a trust the income from which was to be accumulated during the life of the trust. The beneficiary married and was divorced before the trust ended. At its termination the former wife demanded one-half of the income from the trust during the period of the marriage, alleging it to have been income which fell into the community of acquets and gains. In deciding that the accumulated income belonged to the beneficiary husband's separate patrimony the court reasoned that (1) article 2402 of the Civil Code considers income a community

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13. 171 So. 2d 701 (La. App. 4th Cir. 1965).

14. 174 So. 2d 898 (La. App. 1st Cir. 1965).

asset only if it is from effects of which the husband has administration and enjoyment; that (2) the trustee and not the husband beneficiary *owned* the assets in trust; that (3) the trustee and not the husband had administration of the assets in trust; and that (4) the income being accumulated throughout the marriage, the husband did not have enjoyment of it during that time.

In reaching conclusion (2) above the court specifically rejected the notion that the beneficiary owned the assets in trust while the trustee had administration of them for him, a position which had been reached in the federal court decision in *United States v. Burglass* (1949),<sup>15</sup> and in so doing added another obstacle to the integration of trust law with Louisiana property law concepts. Had the court understood the trustee's position to be administrative or managerial and not proprietary, it would have been easy for it to see that income from a trust should be a community asset as much as the income from an interdict's patrimony being administered by a curator. And although the interdict does not have administration in fact of his assets, his income falls into the community of acquets and gains if he is married and living under that regime; so too should the income from a trust. The root of the difficulty here is that the court failed to understand that the phrasing of article 2402 was not intended to mean that actual administration by the husband of his own assets is necessary for the income to fall into the community, but rather that income from the dotal or paraphernal assets of the wife, and probably that of the assets of children under paternal authority, were to be regarded as gains falling into the community. Moreover, the "and enjoyment" phrase in article 2402 was almost certainly intended to mean only that income from assets which the husband administered, but to which he was not entitled, did not fall into the community of assets and gains. Income from assets of a minor in the husband's tutorship, and that from assets of the wife administered by him under mandate from her, under the jurisprudence as it stood before 1944, when article 2386 of the Civil Code was amended, might be given as examples. Finally, the trust was not known when article 2402 was drafted and the situation presented here could not have been foreseen. In short, a comprehension

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15. 172 F.2d 960 (5th Cir. 1949).

of the meaning of article 2402 in the light of its historical and functional setting would have enabled the court to avoid the error committed in this case. Under the regime of community of acquets and gains all profits, or income, from assets of the husband are to be considered community assets. The accumulated trust income was income of the husband credited to his account, even though not paid to him, and therefore enjoyed by him within the meaning of article 2402.

The opinion in *Dunham* does not say income paid to the husband during the marriage would not be a community asset, but it is submitted that under conclusions (2) and (3) reached by the court and mentioned above, the same result would be indicated. A third party (the trustee) would *own* the property and that party would be *administrator* of it, even though the husband-beneficiary would "enjoy" the income under the court's construction of that word. Furthermore, the reasoning in *Dunham* would seem to apply equally well to a trust established during marriage in favor of the husband. Here the opportunity for fraud on the wife's expectancies under the matrimonial regime are obvious.

#### DELICTUAL OBLIGATIONS OF HUSBAND TO WIFE

Under R.S. 9:291 as interpreted, the wife may not enforce her substantive rights against her husband during marriage in any but a few specified instances, none of which includes injury or damage suffered because of the delict or quasi delict of the husband; but the jurisprudence allows her to sue one obligated with her husband for the same wrong. The obligation arising from delict being solidary as to the person injured or damaged, but joint among the co-obligors themselves, the obligor cast in judgment may demand contribution from his co-obligor. Thus it is that in *Smith v. Southern Farm Bureau Cas. Ins. Co.*<sup>16</sup> the obligor sued by the wife filed a third party demand for contribution against her husband should he be cast in judgment as a co-obligor. The co-obligor was cast, and the court allowed the demand for contribution. The husband objected that to allow him to be joined in suit and cast in judgment in this manner was to permit indirectly what cannot be done directly under

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16. 247 La. 695, 174 So. 2d 122 (1965).

R.S. 9:291; but in addition he complained that, inasmuch as he himself was not insured, a judgment against him would be payable out of community funds, which were half his wife's, thus in fact reducing her recovery by half the amount payable to the co-obligor. The writer submits that neither contention was sound and that the Supreme Court reached the proper result.

Whatever the merits of R.S. 9:291 between husband and wife as such, it would be unthinkable to deny the husband's co-obligor the right to contribution merely because the legislation makes the husband safe from suit by the wife during marriage. Moreover the husband's argument with regard to the wife's recovery being reduced because the co-obligor could enforce his judgment against community funds is not well founded. Although a third party creditor, such as the husband's co-obligor in this case, may always obtain satisfaction out of the community funds as well as the husband's separate funds, it does not follow necessarily that ultimate liability is to be shared by the wife. Thus, for example, even though the husband's pre-marital (and therefore separate) creditors may enforce their rights out of the community funds as well as out of the separate assets of the husband, as between husband and wife these pre-marital debts are to be paid out of the husband's separate funds, as article 2403 of the Civil Code indicates, and on termination of the regime the wife is entitled, under the principle announced in article 2408, to receive from the husband an amount equal to one-half the amount of community funds used to pay the husband's separate debts. The writer suggests that the husband's delictual obligation to the wife is to be considered his separate obligation, for one spouse should not be made to suffer a loss caused by the fault of the other; and accordingly that although the co-obligor, like any separate creditor of the husband, might enforce his right against community funds, the husband would have to account to the wife at the termination of the regime for one-half the community funds used to satisfy the co-obligor's claim. On the other hand, even if it were said that the husband's delictual obligation to the wife is one which as between them is to be paid out of community funds, the wife would have no right to complain, for then her "loss" would result from the matrimonial regime presumably agreed upon between her and her husband.