Louisiana Law Review

Volume 27 | Number 3
The Work of the Louisiana Appellate Courts for the 1965-1966 Term: A Symposium
April 1967

Private Law: Matrimonial Regimes

Robert A. Pascal

Repository Citation
Robert A. Pascal, *Private Law: Matrimonial Regimes*, 27 La. L. Rev. (1967)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol27/iss3/7

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

MATRIMONIAL REGIMES

*Robert A. Pascal**

OBLIGATIONS OF THE WIFE

Four opinions in cases of the year under review contain holdings or dicta relative to obligations of the wife. In *Leon Godchaux Clothing Co. v. Ruiz*,[1] according to the court's findings of fact, the wife not only had purchased an expensive coat in her own name, but had expressly stipulated that she was not representing her husband and that he was not to be considered obliged by her purchase. Taking these findings of fact as true, there can be no doubt the court acted correctly in deciding the husband was not obligated personally and that the creditor could not reach his or the community assets. It is true that according to custom in Louisiana recognized by repeated decisions (though not specifically as custom or on precisely the same legal basis) it is presumed the husband has tacitly authorized the wife to represent him in contracts ordinarily entrusted to wives for the maintenance of home and family unless he effectively takes steps to negate the presumption or terminate the authority once given. There can be no presumption the wife is acting under such a tacit mandate, however, in instances in which the wife affirms she does not act in representation of the husband; and in such instances the act of the wife can obligate none but herself.

The second decision, that in *Commercial Credit Plan, Inc. v. Perry*,[2] contains dictum which misconceives and misconstrues the above-mentioned custom with regard to the presumed tacit mandate of the wife. The court used language to the effect that *any contract* of the wife will be presumed made with the authority of the husband. The judges cited *Keyser v. James*[3] in uttering their dictum, but that decision certainly does not support them, and they must have been misled by the much too sweeping statement in the unofficial commercial reporter's syllabus. Certainly no other decision has gone so far, and a presumptive mandate in such terms in favor of the wife would make her the *alter ego* of the husband in all things and therefore

*Professor of Law, Louisiana State University.
1. 179 So. 2d 661 (La. App. 4th Cir. 1965).
2. 186 So. 2d 900 (La. App. 1st Cir. 1966).
3. 153 So. 2d 97 (La. App. 1st Cir. 1963).

violate the division of authority between husband and wife in all matrimonial regimes.

The third and fourth decisions evidence opposite opinions on essentially similar facts. In *Midland Discount Co. v. Robichaux*[4] both husband and wife had co-signed a note *in solido*. Later the husband petitioned for and was discharged in bankruptcy. Apparently both creditor and the court assumed that the husband's discharge had also discharged the wife. Certainly this was error. If the wife co-signed the note she was obligated personally and primarily to the creditor, even though as between the spouses she may have been only the husband's surety. *Commercial Credit Plan, Inc. v. Perry*,[5] however, previously mentioned in connection with another issue, decided correctly on this point, for it recognized that the wife is personally and independently obligated in such circumstances and that she is not discharged in bankruptcy simply because her husband is discharged.

HUSBAND'S RECOVERY FOR DELICT

Under articles 2334 and 2404 it is implied that damages recovered for delicts and quasi delicts suffered by the husband fall into the community of acquets and gains unless he is living separate from her by reason of her fault constituting sufficient cause for separation or divorce. On the other hand, under the same articles recoveries by the wife for delicts and quasi delicts are always her separate property. *Talley v. Employers Mutual Liability Ins. Co.*[6] presented facts in which the husband was injured before termination of the community of acquets and gains but recovered damages after its termination. The court of appeal affirmed a lower court judgment making two awards, one to "the community" for "personal injuries" sustained between the date of the delict and the termination of the community, and one to the husband "individually" for "permanent injury to the lower lip, and future loss of earnings." Granted that the legislation is guilty of unequal justice to husband and wife in this matter of damages for delicts, it nevertheless must be asked by what authority any sums for "injury to the lower lip" or even for "future loss of earnings" — both being attributable to a delict occurring during the community regime — can

4. 184 So. 2d 93 (La. App. 4th Cir. 1966).
5. 186 So. 2d 900 (La. App. 1st Cir. 1966).
6. 181 So. 2d 784 (La. App. 4th Cir. 1966).

be considered the separate assets of the husband. The case, nevertheless, points up the need for legislative reforms.

PENSIONS

In *Scott v. Scott*[7] a pension payable to a wife-teacher under the State Teachers Retirement System was said to be the separate asset of the wife, and therefore properly excluded from the inventory of the community of assets and gains dissolved by separation or divorce, even though over $4500 of her earnings during marriage (and therefore community assets) had been paid into the pension fund. The court, not being presented with the issue, expressly refrained from deciding whether the husband could recover half the payments made into the pension fund from the wife's earnings.

The court based its conclusion that the pension itself was separate property in part on the narrow and somewhat inconclusive ground that the statute on the pension system limits members therein to "teachers." The court also drew an analogy between a wife-pensioner under a plan into which community funds have been paid and the wife who is irrevocable beneficiary under an insurance policy issued on the husband's life and paid for with community funds, observing that the jurisprudence treats such wife-beneficiary as absolute owner of the policy. This analogy too is inconclusive, for there is all the difference in the world between an insurance policy paid for by the husband, who is the administrator of the community of acquets and gains, and a pension plan into which some community funds are paid without his consent. Actually, the only legislation which might be applied, the omnibus clause of article 2334, would result in the pension being classified as a community asset; but certainly the omnibus clause was not written with pensions in mind any more than it was intended to cover insurance policies, long declared *sui generis*. Classification of pensions, therefore, is an instance of the need to approach a new problem under principles rather than rules, but the principles and their specification are far from certain. If a pension has a social security purpose, it would seem more fitting to regard *the pension itself* as the separate property of the husband or wife who earned it, but at the same time to treat payments made pursuant to it as community assets if paid during a marriage to a pensioner living

7. 179 So. 2d 656 (La. App. 2d Cir. 1965).

under the community regime. This is the conclusion enacted into law in Spain in 1888[8] and in France under the marriage regime reforms of 1965.[9] The matter, however, deserves careful study and eventual legislative regulation.

COMMINGLING OF SEPARATE AND COMMUNITY ASSETS

The jurisprudence of recent years has been more and more sympathetic to the idea that a mingling of community and separate funds should not be deemed to convert the whole into community funds if they can be separated by accounting methods or other evidence. In the last year the Court of Appeal for the Third Circuit has showed itself very sensitive to this new trend.[10]

THE COMMUNITY IN PUTATIVE MARRIAGE

The facts in *Succession of Choyce*[11] were that Frank Choyce had abandoned his first wife and, without obtaining a divorce, married a second time to one deemed to be in good faith. Choyce had acquired a home after contracting the second marriage and at his death the court awarded a one-half interest in it to each wife. The judgment is correct so far as it goes if it is to be assumed that the legal wife is entitled to benefits of the community of acquets and gains between her and Choyce; that the putative second spouse was entitled to community rights against Choyce under article 118 of the Civil Code; that the house, having been acquired by Choyce, the common spouse, entered both communities; and that if the common spouse is in bad faith the expectancies of the legal and good faith spouses in their proper communities should not be prejudiced. The record, however, as distinguished from the opinion on appeal, reveals that the good faith second spouse had used her earnings to pay at least many of the installments on the house. Frank Choyce, nevertheless, because of his bad faith, would not have been entitled to claim the benefits of article 118 and that the earnings of his good faith second wife had entered a community of acquets and gains between them. Thus the good faith second spouse, having used her separate funds to make payments on the price of what as to her was a community asset, should have been

8. SPANISH CIVIL CODE art. 1403 (1888).
9. FRENCH CIVIL CODE art. 1404, as amended by Law of July 13, 1965.
10. Bordelon v. Bordelon, 177 So. 2d 137 (La. App. 3d Cir. 1965); Succession of Joseph, 180 So. 2d 862 (La. App. 3d Cir. 1965); Succession of Hollier, 184 So. 2d 790 (La. App. 3d Cir. 1966).
11. 183 So. 2d 457 (La. App. 2d Cir. 1966).

reimbursed one-half the amounts so paid, the amount corresponding to the value she had contributed and which was not being returned to her as an interest in the house. Beyond this, however, there is at least serious question whether the house should have been deemed to form part of the community of acquets and gains between Choyce and his legal wife. The opinion indicates she herself ignored their marriage, assuming it to have been terminated by divorce long before Choyce acquired the house. Under such circumstances, certainly unforeseen by the legislation, it seems that article 21 of the Civil Code might be invoked to deny her the benefits of the black-letter application of the rules on marriage regimes.[12]

PARTITION OF COMMUNITY ASSETS BEFORE TERMINATION OF REGIME

In *Lloyd v. Register*[13] the court found as facts that a sale of a community asset by a husband to his mother-in-law before termination of the community of acquets and gains between him and his wife was in fact (1) a simulated sale to his wife and (2) made to effectuate a partition of community assets before the regime had been terminated. The court decided the transaction was an absolute nullity, assigning as its reason that under articles 1790 and 2446 of the Civil Code husband and wife have no capacity to sell to and buy from each other. Be that as it may,[14] the transaction was an absolute nullity, nevertheless, for an attempt to partition community assets before termination of the regime constitutes a direct violation of article

12. See the author's remarks on Prince v. Hopson, 230 La. 575, 89 So. 2d 128 (1956), 17 LA. L. REV. 303 (1957).

13. 184 So. 2d 279 (La. App. 1st Cir. 1966).

14. Article 1790 contains the statement that interspousal contracts are forbidden, but this statement is not in itself a general rule; for the last sentence in the article qualifies it by saying "These [instances of incapacity] take place only in the cases specially provided by law, under different titles of this Code." Moreover, whatever the extent of the interspousal contract prohibition in article 1790, a contract in violation of this rule only, and not some other as well, is only a relative nullity, not an absolute nullity. Thus article 1795, in the same section as article 1790, suggests ratification of the act is always possible when the cause of the incapacity (marriage here) has ceased.

Nor is every sale or transfer between husband and wife in violation of article 2446 an absolute nullity. Thus a transfer to effect modification or termination of the community of acquets and gains before separation from bed and board would be an absolute nullity because it violates the rule of public order contained in article 2329 forbidding modification of the marriage regime by convention; but the husband's sale of his separate assets to his wife over eighteen years of age purchasing them as separate assets would not violate article 2329 and would not otherwise appear to be contrary to public order, and therefore would be only relatively null under the rules of articles 1790 and 1795.

2329, under which the matrimonial regime may not be altered conventionally during marriage. The case in any event illustrates the nullity of partitions of community assets before termination of the regime, an all too frequent practice.[15]

OBLIGATIONS

*J. Denson Smith**

Although recovery on the theory of unjust enrichment has a long and venerable history in the civil law, it still suffers from lack of clarity. In *Louisiana State Mineral Board v. Albarado*,[1] the court applied the principle and granted the relator (one of the Boutte heirs in a very small amount) recovery in *quantum meruit* to cover services rendered by him over a period of some thirty years which inured to the benefit of all of the heirs. The court of appeal had found inapplicable the so-called "fund" doctrine applied in the *Interstate* case,[2] which permits recovery from a fund by one whose efforts have been solely responsible for its creation. It also found that relator had at all times acted on the basis of contractual agreements entered into with some of the heirs, and was motivated by the compensation provided for therein. It did not count his action, therefore, as taken for the benefit of all of the heirs so as to support recovery on the theory of unjust enrichment. In the earlier case of *Succession of Kernan*,[3] attorneys who had succeeded in securing a judgment invalidating a particular legacy were denied recovery against other legatees who had refused to employ them. This holding was apparently distinguished by the Supreme Court in the instant case on the ground that the attorneys in *Kernan* rendered

15. When incorporated in judgments of separation or divorce, of course, the provisions of such null conventional partitions become effective as judicial partitions. They cannot be ratified as conventional partitions, for ratification would render them effective as of the date on which they were made, a time at which they were forbidden as a matter of public order. On the other hand, there is no reason why the provisions of such null conventional partitions might not be incorporated into a new act entered into after separation or divorce and effective as of its proper date.

*Professor of Law, Louisiana State University.

1. 248 La. 551, 180 So. 2d 700 (1965).

2. *In re* Interstate Trust & Banking Co., 235 La. 825, 106 So. 2d 276 (1958). On this point the opinion of the Supreme Court was in accord.

3. 105 La. 592, 30 So. 239 (1901).