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Community of Acquets and Gains - Antenuptial Obligations of the Husband - Article 2403

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use his remedies of appeal or injunction to prevent the unauthorized seizure and sale. However, the creditor's suit for a deficiency judgment does not involve the policy considerations of protecting third persons who purchase at judicial sales. Therefore, since the bona fide purchaser doctrine is not applicable, the court in *League* approves the general principle that a debtor beset by executory proceedings is not required to attack the seizure and sale of the property in order to assert defenses to the deficiency judgment. He may wait to do so until a deficiency judgment is actually sought against him.²²

Samuel A. Blaize

COMMUNITY OF ACQUETS AND GAINS—ANTENUPTIAL
OBLIGATIONS OF THE HUSBAND—ARTICLE 2403

Proceedings were instituted to enforce a judgment rendered against a husband prior to his marriage by garnishment of his wife's salary¹ and community funds in a joint bank account. Judgment debtor and his wife intervened, praying that the garnishment be dissolved and that the judgment creditor be enjoined from obtaining execution against these assets. *Held*, the wife's salary and community funds in a joint bank account are not subject to garnishment to pay an antenuptial obligation of the husband. *United States Fidelity & Guar. Co. v. Green*, 252 La. 227, 210 So.2d 328 (1968).

The Civil Code does not mention the right of creditors of either the husband or wife to have execution against the community assets. This is understandable. As Article 2807² states, "the community of property . . . is the effect of a contract" and contracts create rights only between the contracting parties.³ Furthermore, the articles on the community are found in the title captioned "Of The Marriage Contract, And Of the Respective Rights Of The Parties In Relation To Their Property."⁴

22. *LeBlanc v. Rock*, 84 So.2d 629 (La. App. 1st Cir. 1955).

1. It was assumed without question that the wife's salary was a community asset. The classification of a wife's salary was made uncertain by La. Acts 1912, No. 170. However, *Houghton v. Hall*, 177 La. 237, 148 So. 37 (1933) held that the earnings of the wife living with her husband were not affected by this amendment to LA. CIV. CODE art. 2334.

2. LA. CIV. CODE art. 2807: "The community of property, created by marriage is not a partnership; it is the effect of contract governed by rules prescribed for that purpose in this Code."

3. *Id.* art. 1901: "Agreements legally entered into have the effect of laws on those who have formed them."

4. *Id.* bk. III, tit. VI.

This title clearly emphasizes both the contractual nature of the community regime and the fact that it concerns only the relations of the spouses to each other. Thus, the rights of creditors of either husband or wife to seize the community assets must depend on the respective rights of the spouses in these assets. Previously, the court has allowed the husband's antenuptial creditors to obtain satisfaction from community assets. In *Davis v. Compton*⁵ the court, basing its conclusion on an analysis of the husband's power as head and master of the community, said:

"As the husband has the right to alienate the effects of the community without the consent of his wife, the creditor of the husband before the marriage ought also to have the right to seize the effects of the community to satisfy these claims."⁶

In *Green*, the court relied on cases which have described the wife's interest in the community as ownership rather than an expectancy and discredited the *Davis* reasoning, stating that the decision "was based solely . . . on the false assumption that the wife's interest is a mere expectancy."⁷ Then as a further ground for its decision, the court added that the husband's power to alienate the community assets without his wife's consent did not imply a right for his separate creditors to seize these assets "in face of the positive pronouncement" of Article 2403 that the "debts of both the husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects."⁸

Even though the wife's interest in the community assets was termed an expectancy in *Davis*, such a characterization was by no means integral to the theory which the case advanced.

Regardless of the name by which the wife's interest is designated, the community assets are subject to the husband's control, and this control is the primary basis of the *Davis* reasoning.⁹ The cases in which the court described the wife's interest

5. 13 La. Ann. 396 (1858).

6. *Davis v. Compton*, 13 La. Ann. 396 (1858).

7. *United States Fid. & Guar. v. Green*, 252 La. 227, 229, 210 So.2d 328, 330 (1968).

8. LA. CIV. CODE art. 2403: "In the same manner, the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects."

In *Fazio v. Krieger*, 226 La. 511, 76 So.2d 713 (1954), the court construed article 2403 in a similar manner; however, the decision was based on another ground.

9. In *Davis v. Compton*, 13 La. Ann. 396 (1858), the court based its decision on the husband's control over the community assets and then mentioned the eventual nature of her interest as an additional ground.

as ownership were not concerned with the rights of the husband's antenuptial creditors¹⁰ and admit that the wife's ownership is subject to the husband's power under Article 2404.¹¹ The power of the husband as head and master should then be examined to determine whether his control over these assets is sufficient to justify the *Davis* conclusion that seizure should be permitted.

Article 2404¹² outlines the husband's power as head and master of the community. He administers the assets, disposes of the fruits which they produce, and except as specifically limited in particular instances¹³ and sell both the movables and immovables without the consent of his wife. Moreover, his power of disposition is not limited to onerous conveyances. He can also make valid donations of particular movables to the benefit of any person. On the other hand, donations of immovables and of all or a quota of the movables are prohibited. The court has ruled that these transfers are nullities; however, the action to recover these assets does not arise until the dissolution of the community.¹⁴ With these exceptions, all dispositions by the husband are within his power as head and master.

10. See, e.g., *Azar v. Azar*, 239 La. 941, 120 So.2d 485 (1960) (wife has no action to set aside her husband's sale of community property as long as the community exists); *Succession of Wiener*, 203 La. 649, 14 So.2d 475 (1943) (only one-half the value of the former community should be included in a man's succession in computing inheritance tax); *Phillips v. Phillips*, 160 La. 813, 107 So. 584 (1926) (considered the effect of the wife's failure to accept the community within thirty days after separation from bed and board).

11. See, e.g., *Phillips v. Phillips*, 160 La. 813, 826, 107 So. 584, 588 (1926): "[T]he wife has . . . the absolute ownership of half the community property during the existence of the marriage, *subject of course to the husband's power of administration.*" (Emphasis added.)

12. LA. CIV. CODE art. 2404: "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."

13. *Id.* art. 2334: ". . . Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written authority or consent where she has made a declaration by authentic act that her authority and consent are required for such lease, sale or mortgage and has filed such a declaration in the mortgage and conveyance records of the parish in which the property is situated." See LA. R.S. 9:2801-2804.

14. *Melady v. Bonnegent*, 142 La. 534, 77 So. 143 (1917); *Bister v. Menge*, 21 La. 216 (1869).

It is arguable that Article 2403 prohibits voluntary payment of antenuptial debts out of community funds and thereby limits the husband's control of these assets under Article 2404. In *Davis*, however, the court held that this provision must be construed with Article 2403 and ruled that payment from the community is permissible. Consistent with this analysis, Article 2403 provides that these obligations are not ultimate charges of the community and establishes an accounting principle which applies upon dissolution if antenuptial obligations of either spouse have in fact been paid with community funds.¹⁵ This interpretation of the Code is confirmed by an examination of the counterpart of Article 2404 in the Digest of 1808.¹⁶ As well as acknowledging the husband's power to sell and donate the community assets, the article contained a statement that the wife had "no sort of right" in the community assets until her husband's death. If she had no interest in these assets, her husband's unrestricted right under Article 2404 to alienate them must certainly have included the right to transfer them in payment of his antenuptial obligations.

This statement negating the existence of an enforceable interest is seemingly inconsistent with the ownership theory currently advanced in the jurisprudence. However, the classification of the wife's interest is not pertinent here. What is pertinent is the extent of the husband's control over these assets, and this statement in the Digest of 1808 emphasized that his control was complete. Because the Code of 1825, to protect the wife, slightly limited the husband's power to alienate the community property—his donative powers were limited to particular movables—the statement regarding the wife's lack of interest was logically deleted. But in no other way was the husband's control decreased. Because his control over them is so extensive, it is logical to regard these assets as the husband's so far as third persons are concerned. This interpretation is in accordance with the Spanish background of the Louisiana community regime.¹⁷

15. *Davis v. Compton*, 13 La. Ann. 396 (1858).

16. La. Digest of 1808, bk. III, tit. V, art. 66: 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 the same without the consent and permission of the wife, because she has no sort of right in them until her husband be dead." See 3 LA. LEGAL ARCHIVES, COMPILED EDITIONS OF THE CIVIL CODES OF LOUISIANA 1322 (1942).

17. According to the notes of Moreau Lislet, one of the redactors of the Digest of 1808, the sources of the articles on the community of acquets and gains are predominately Spanish. See A REPRINT OF MOREAU LISLET'S COPY OF A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS, 1808, at 337-41 (1968). A similar opinion is expressed in *Dixon v. Dixon's Exr's*, 4 La. 188 (1832).

Manresa, a highly respected twentieth century commentator, states that during the marriage the assets of the community are regarded as though they were a part of the husband's patrimony. As to third persons, the husband and the community are one.¹⁸ Under the foregoing analysis it is reasonable to allow the husband's separate creditors to seize the community assets. To recognize this right in the creditors is consistent with Article 3182: "Whoever has bound himself personally, is obliged to fulfill his engagements out of all his property, movable and immovable, present and future."

If Article 2403, as *Green* states, prevents the husband's antenuptial creditors from obtaining execution against the community assets, that is, if the community assets are not part of the husband's patrimony as far as third parties are concerned, then this article must also forbid the husband to pay such debts voluntarily with these assets. If this is so, it is contrary to the provisions of Article 2404. The *Green* case did not consider this question, but the prior jurisprudence has always allowed the husband to use the community funds in this manner.¹⁹ It seems doubtful that the court intended to so restrict the husband's power as head and master.

As the court observed, to allow the husband's antenuptial creditors to seize the community assets could prejudice the wife if at dissolution her husband lacks sufficient assets with which to reimburse her. In *Green*, this potential injustice seems more dramatic since the wife herself is the source of the community funds which are to be garnished. However, the effect of the *Green* case on creditors cannot be denied. As a result of this decision a man without separate assets can suspend, if not defeat, the rights of his unsecured creditors simply by marriage. It is quite possible that the *Green* decision will make it difficult for single men to obtain credit without specific security. Thus, strict adherence to this decision will result in abuses to creditors which will appear at least as dramatic as the potential injury to the wife if seizure had been permitted. Any arbitrary solu-

18. Manresa also explains that this analysis is somewhat attenuated by several provisions of the present Spanish Code, including Article 1410, which conditions seizure by antenuptial creditors on several factors. These limitations are noted hereafter in the text. The following is one of Manresa's statements which supports the general concept expressed in the text above: "*De este exceso de facultades del marido se deducen dos consecuencias importantes. . . . Es la otra que, ante los terceros, el marido y la sociedad son, en términos generales, una sola y misma cosa, algo que se confunde y se identifica en cuanto es posible sostener tal confusión.*" MANRESA, COMMENTARIOS AL CÓDIGO CIVIL ESPAÑOL arts. 1412-1416 (1950).

19. There are no cases denying this power.

tion such as allowing garnishment only of the community assets contributed by the husband cannot be justified in principle since there is no distinction within our community structure between assets contributed by the husband and those contributed by the wife.

Certainly, the considerations in the *Green* case illustrate the need for legislative reform of our community system. The wife's interest in community assets should be protected, but at the same time the creditor's rights should not be defeated. Within a framework similar to Louisiana's, the Spanish allow execution against the community assets if the husband has insufficient separate assets but only if such seizure will not interfere with the payment of obligations contracted since marriage.²⁰ There are of course other possibilities. For the present, however, it seems preferable to follow the traditional interpretation of the law and allow execution against the community assets. Then if the community is solvent upon dissolution, the wife can be reimbursed²¹ and prejudice to both wife and creditor can be avoided.

George L. Bilbe

CONSTITUTIONAL LAW—WRONGFUL DEATH—ILLEGITIMATE CHILDREN—EQUAL PROTECTION

An action was brought in behalf of five illegitimate children for the wrongful death of their mother. The district court dismissed the suit holding that these children have no right of action since the word "child" in Louisiana Civil Code Article 2315¹ did not include illegitimate children. This decision was

20. CÓDIGO CIVIL ESPAÑOL arts. 1408, 1410.

21. If a separate obligation of one spouse has been paid with community funds, then the other spouse should be reimbursed one-half the amount of this payment at dissolution. This procedure is implicit in LA. CIV. CODE arts. 2403 and 2408 and is the method of accounting proposed in *Davis v. Compton*, 13 La. Ann. 396 (1858).

1. LA. CIV. CODE art. 2315 provides: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

"The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal instituted, or irregular heirs, subject to the community of the surviving spouse.

"The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parents surviving. The survivors in whose favor this right of action survives may also recover the