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Private Law: Matrimonial Regimes

Robert A. Pascal

established by a preponderance of the evidence[15] or it has not, and found that the pile of debris in one lane gave a preponderance. In utilizing this burden to find the facts based upon the evidence adduced, one must keep in mind the distinction between discharging the burden of proof on a disputed fact and discharging the burden of establishing all essential facts requisite to proving the cause of action urged.

MATRIMONIAL REGIMES

*Robert A. Pascal**

SCOPE OF THE SECTION

The Symposium of last year[1] did not contain a discussion of the matrimonial regime decisions of the judicial year 1967-68. For this reason the more significant decisions of that year and the present judicial year will be mentioned here. Space limitations, however, require the writer to minimize his remarks and, it being more important to offer guidance than to praise, most comments will be on inconsistencies of decisions or *dicta* with the legislation and on the inadequacies of current legislation made apparent through the decisions.

PRENUPTIAL DEBTS

Probably the most startling decision of the two-year period was that in *United States Fidelity & Guar. Co. v. Green*[2] in which the court reversed the prior jurisprudence and declared that antenuptial creditors of the husband were not entitled to enforce their credits by execution against community assets. The court relied on two arguments. First, it declared the prior practice to be founded on the notion the wife had no interest in the community assets until termination of the regime and that this notion had been repudiated by later jurisprudence. Second, it declared article 2403, under which debts incurred during marriage are payable out of the separate assets of the indebted spouse, to be conclusive of the issue. Both these arguments were demonstrated to be false in a very able student Note which was pub-

15. *See* Sanders, *The Anatomy of Proof in Civil Actions*, 28 LA. L. REV. 297, 298 (1968).

*Professor of Law, Louisiana State University Law School.

1. *The Work of the Louisiana Appellate Courts for the 1967-1968 Term*, 29 LA. L. REV. 171-327 (1969).

2. 252 La. 227, 210 So.2d 328 (1968).

lished in a previous issue of the *Louisiana Law Review*;[3] and some of the possible implications of the *Green* decision have been noted in other reviews.[4] It is not necessary to repeat here either the demonstrations or the other observations already made, but some additional remarks may be in order. The rules on the community of acquets and gains can be applied properly only if the institution is envisioned as it appears in the Civil Code: a patrimonial contract between husband and wife which, like any other contract, produces effects as to third persons only indirectly by altering the patrimonies of the contracting parties. Third persons, in other words, cannot know a community of acquets and gains because it is an interspousal matter; they can know only the spouses and their respective assets and liabilities. For this reason the important question in *Green* was whether, *so far as the husband's creditor is concerned*, the community assets form a part of the husband's patrimony during the existence of the regime, that is to say, before its dissolution. To this question the historic understanding is in the affirmative. The wife's creditors cannot reach the community assets because her interest in them vis-à-vis her husband is not part of her patrimony so far as they are concerned. The husband's creditors may reach the community assets because they are part of his patrimony so far as they are concerned, whatever his interest in them vis-à-vis his wife.[5] Other imaginable solutions cannot be supported under the legislation. Were third parties privileged to regard the community as owned by the spouses in indivision, then certainly the creditor of each would be entitled to execution against his debtor's half-interest in indivision, for all of the assets of a debtor are the common pledge of his creditors.[6] Not even *Green* suggests this solution, even though part of the rationale offered was that the husband's creditor could not seize the community assets because the wife had an interest in them. Indeed, by not allowing the husband's creditor to obtain execution against the husband's half interest in the community assets, the court may be considered to have regarded the community of acquets and gains as a separate legal entity with its own assets and liabilities separate from those of the spouses; for certainly it did not treat the community assets as wholly within the patri-

3. Note, 29 LA. L. REV. 409 (1969).

4. Note, 43 TUL. L. REV. 376 (1969); Note, 15 LOY. L. REV. 166 (1969).

5. *See* Nina N. Pugh, *The Spanish Community of Gains in 1803*, 30 LA. L. REV. 1 (1969) text at nn. 79, 273. *See also, e.g.*, 9 MANRESA, COMENTARIOS AL CÓDIGO CIVIL ESPAÑOL 8, 150, 151, 529, 540, 635, 637, 655, 687 (5th ed. 1950).

6. LA. CIV. CODE arts. 3182, 3183.

mony of the wife. For this solution, however, there is neither regulation nor support in the Civil Code. To say all this nevertheless does not imply that *as between the spouses* the wife does not have a recognizable and protectable interest during the regime, be that interest described as actual or contingent, present or eventual. So far as third parties are concerned, the nature of the wife's interest vis-à-vis her husband during the regime is irrelevant. What is relevant to them is that the husband has control over the community assets to such a degree that third persons may for most purposes treat them as if his in their entirety. In this respect the language of *Davis v. Compton*,[7] a decision disapproved of in *Green*, was and is quite correct:

> "As the husband has the right to alienate the effects of the community without the consent of his wife, creditors of the husband before marriage ought also to have the right to seize the effects of the community to satisfy their claims."[8]

The decision in *Green*, therefore, must be overruled at the first opportunity.

Wife's Capacity to "Bind the Community"

R.D.M. Corp. v. Patterson[9] is quite correct in its conclusion that a judgment obtained against the wife is not enforceable against community assets. As mentioned before in discussing the decision in *United States Fidelity & Guar. Co. v. Green*,[10] during the existence of the community regime, so far as third persons are concerned, the community assets are part of the patrimony of the husband. From this it follows that only a judgment rendered against the husband can be enforced out of community assets.[11]

There are in the *R.D.M. Corp.* decision, however, two related *dicta* statements which require comment. The statement that "a wife may . . . under certain circumstances, bind the community for a debt incurred by her" is inaccurate and that "when the wife acts as a public merchant, the husband is liable for the

7. 13 La. Ann. 396 (1858).
8. *Id.* at 396.
9. 216 So.2d 623 (La. App. 4th Cir. 1969).
10. *See* text accompanying note 2 *supra*.
11. For this reason articles 686 and 735 of the Louisiana Code of Civil Procedure, naming the husband the proper party plaintiff and party defendant in suits to enforce rights and obligations "for" and "against" "the marital community" are not simply inaccurately drawn, but totally unnecessary.

debts incurred by her in such capacity pursuant to Article 131 of the Civil Code" is misleading because it is incomplete. The husband is head and master of the community of acquets and gains under article 2404 of the Civil Code. No article of the Civil Code or any other legislation gives the wife power *in her own right* to affect a community asset or incur a debt which will enter the community between them. Only the husband's act, therefore, may "affect the community"; for the wife's act to "affect the community" it must be the husband's act as well by reason of his actual or presumed consent to it. No one would have doubted this before the married women's emancipation legislation, for then the married woman clearly could not act without her husband's consent—or the judge's on the husband's denial of consent or inability to give it. This was true even of the wife who was a public merchant. Article 131 did say she did not need her husband's consent for her individual, separate acts in trade *if she were* a public merchant, but under article 1786 she was presumed to have her husband's authorization if he permitted her to act as such. Thus, by implication, she could be a public merchant only with her husband's consent. Nor did the married women's emancipation legislation change any of this. Not only is that legislation restricted to removing those incapacities and disabilities the married woman labored under "as such" (*i.e.*, incapacities associated with the marital power or husband's authority over the wife),[12] but it restricts its effects to that alone, specifically denying any intent to alter the laws on the community of acquets and gains;[13] and it is under the rules of this regime that the husband's consent is always necessary to affect the community and the wife's act is never in itself sufficient.

Surviving Spouse's Entitlement to His or Her Share

Succession of Prutzman[14] points up a discrepancy between the substantive law on the community of acquets and gains under the Civil Code and the provisions of the new Code of Civil Procedure. Under article 2406 of the Civil Code, on dissolution of the community each spouse is entitled to an "equal portion" of the community of assets—not merely to half thereof in indivision, but to an "equal portion," and therefore to a partition to realize that "equal portion." The Civil Code does not in any

12. La. R.S. 9:101 (1950).
13. La. R.S. 9:105 (1950).
14. 209 So.2d 303 (La. App. 4th Cir. 1968).

way condition this entitlement on the total or relative absence of debts, whether separate debts of one or both spouses or those debts which in the accounting or partition between them are to be treated as payable out of community assets. All that article 2409 requires is that each spouse assume his or her share of the latter debts—and personally, out of all his or her assets, for there is no limitation of even the wife's liability to the value of her share of the community assets if she accepts the community unconditionally. Thus it is entirely improper for articles 3001-3008, 3031-3035, and 3061-3062 of the Code of Civil Procedure to limit the surviving spouse's right to an *ex parte* recognition of his or her entitlement to a share of the community assets to those instances in which the deceased's succession is relatively free from debt or in which, in spite of succession debts, creditors of the deceased do not object to such recognition. The surviving wife who accepts the community unconditionally must be considered entitled to an immediate partition of the community assets, regardless of debts of any kind, and the surviving husband, being incapable of rejecting the community, must be given this right if the wife accepts the community unconditionally and therefore claims her share. If the wife accepts with benefit of inventory, however, she should not have the right to demand a partition, for in effect the acceptance with benefit of inventory is a surrender to the husband, or to his heirs, executor, or administrator, of the right to use her share of the community assets to pay half of the community debts. Even though the present Code of Civil Procedure articles do no more than deny to the surviving spouse the right to claim his or her share of the community assets by *ex parte* proceedings (not the right to claim by ordinary suit), they should be amended to conform to the substantive law.

Acquisitions with Separate Funds

Under the Spanish law in force in 1808[15] and under the Digest of 1808 and the Civil Codes of 1825 and 1870[16] all purchases and similar acquisitions during marriage—whether made with separate or community funds—fell into the community of acquets and gains. In spite of the absence of legislated exceptions to this rule, the practice was to regard as separate those things

15. Nina N. Pugh, *The Spanish Community of Gains in 1803*, 30 La. L. Rev. 1 (1969) text at nn. 37-41.

16. La. Digest of 1808, bk. III, tit. V, art. 64; La. Civ. Code of 1825 art. 2371; La. Civ. Code art. 2402.

which had been received in exchange for separate things or purchased with separate funds with the intention that they should form part of one's separate patrimony.[17] In 1902, however, through the decision in *Sharp v. Zeller*[18] the jurisprudence—nearly always harsher on the husband than on the wife—began to require the husband—but not the wife—who would purchase *an immovable* for his separate account to state in the act of purchase the "double declaration" that he was purchasing with separate funds and for his separate account. Failing this double declaration, the husband's acquisition was treated as entering the community.

There was no basis in Louisiana legislation for *Sharp v. Zeller*. The court relied on French doctrine founded on article 1434 of the French Civil Code, of which there was and is no counterpart in Louisiana legislation. The French had good reason for such a rule. Under the French community regime—unlike the Spanish type community regime in Louisiana—normally all movables whenever and however acquired formed part of the community,[19] and ordinarily only immovables acquired before marriage or by donation or inheritance could be separate things. Thus ordinarily the French husband could not have separate money, and of necessity any purchase would be with community funds. But by the special rules of articles 1434 and 1437 of the French Civil Code the price of separate immovables sold could be reinvested in immovables which would be regarded as the separate assets of the spouse whose immovables had been sold. The exceptional availability of separate money to the husband warranted the rule of article 1434 by way of protection for the wife: the husband was required to declare the source of his funds and the reinvestment nature of his purchase or be presumed to have acted either with community funds or to have intended the immovable purchased to form part of the community.

Louisiana, having a community restricted to acquisitions and gains during marriage, always has permitted both movables and immovables to form part of a spouse's separate patrimony. There

17. Savenat v. LeBreton, 1 La. 520 (1830), stated the Spanish practice and it was followed thereafter even though no Louisiana text warranted the exceptions. *See, e.g.*, Fortier v. Barry, 111 La. 776, 35 So. 900 (1904); Smith v. Smith, 230 La. 509, 89 So.2d 55 (1956). *See also* Huie, *Separate Ownership of Specific Property versus Restitution from Community Property in Louisiana*, 26 TUL. L. REV. 427, 445, 462-63 (1952).

18. 110 La. 61, 34 So. 129 (1902).

19. FRENCH CIV. CODE art. 1404 (through 1965); art. 1498 (since 1966).

was much less reason in Louisiana than in France, therefore, to suspect the husband's purchases as acts in fraud of the wife, and the adoption of the "double declaration" rule was improper. Whatever the merits of *Sharp v. Zeller* before 1912, however, it can have none since that date. In 1912 article 2334 was amended to provide that acquisitions with separate funds are separate assets. The legislation does not condition the acquisition of separate assets on any intent to acquire for one's separate account rather than for the common account of the spouses. It is sufficient, under the article as amended, that it be shown that separate funds were used. Moreover, the article does not require any particular mode of proof to establish the use of separate funds and hence any probative evidence should suffice.

For the above reasons, it is not understandable why the progeny of *Sharp v. Zeller* should have been followed at all in *Boulet v. Frugé*[20] and *Hollier v. Fontenot*.[21] In *Boulet* the court admitted the acquisition had been made with separate funds. How, then, could the court rely on decisions based on *Sharp v. Zeller* and ignore article 2334 as amended in 1912? In *Hollier v. Fontenot* the same kind of decision was rendered even though, as pointed out by Judge Tate, dissenting, that the facts were not those of a husband acquiring simply as a husband with separate funds. As Judge Tate noted, the facts did not come within the situation envisioned in the *Sharp v. Zeller* type of decisions. And indeed they did not. In *Hollier*, the husband was one of several partners in a firm and his interest therein was his separate asset. Partnership funds were used to make the purchase for partnership use. It seems that Judge Tate must have been correct in stating there should be no need in such a case to declare either that the husband's separate funds were being used or that he participated in the purchase for his separate account. Such a declaration would have been superfluous under the circumstances.

Return of Paraphernalia or Fraud on Creditors?

The facts in *Deltide Fishing & Rental Tools, Inc. v. Gardner*[22] presented an interesting question. Separate funds of the wife had been used in part to purchase and remodel a house bought by the husband and therefore a community asset. Presumably the funds were so used with the wife's consent, for the opinion does not

20. 221 So.2d 602 (La. App. 3d Cir. 1969).
21. 216 So.2d 842 (La. App. 3d Cir. 1969).
22. 216 So.2d 594 (La. App. 3d Cir. 1969).

state otherwise. Later the husband transferred the house and its land to the wife in repayment of her funds so used. A judgment creditor of the husband attacked the transfer as one in fraud of his creditors. Both the lower and appellate courts regarded the act of the husband as a *dation en paiement* to return the wife's paraphernalia. The writer agrees that the wife does have right at all times to the return of paraphernalia in her husband's hands and that, this being so, the husband may return it to her at any time either in kind or, if the wife accepts, by *dation en paiement.* But the writer cannot agree that the facts present a case of the return of paraphernalia. On the contrary, the facts seem more to present a case of the separate assets of a spouse being used lawfully to "increase or improve" a community asset, which case should be governed by the principle underlying article 2408 of the Civil Code. This article states that when community energies or funds have been used to "purchase or improve" the separate patrimony of either spouse, the spouse whose patrimony was increased or improved must, *at the end of the regime*, reimburse the other spouse half the value of the "increase or ameliorations," not half the funds used. The community assets used, in other words, are deemed to have been invested in the separate asset. If this is true of increases and improvements of separate things with community assets, then the same principle should be applicable to increases or improvements of community things with separate assets. Applying the principle of article 2408, or applying the article by analogy, the wife in this case would have been entitled to half the value added to the community through use of her funds to purchase in part and improve the community asset, *but only at dissolution of the regime.* In the meantime, the husband's creditor should have been able to treat the community asset as the husband's and obtain execution against it. The decision in *Deltide*, therefore, seems erroneous.

Accounting at dissolution

A number of decisions involved accounting between the spouses for separate funds used for community purposes or commingled with community funds.[23] These decisions are not reviewed here. Suffice it to say that one common error is to account in terms of a return "to the community" by one of the spouses or a return "from the community" to one of the spouses.

23. Succession of Sonnier v. LeBleu, 208 So.2d 562 (La. App. 3d Cir. 1968); Gouaux v. Gouaux, 211 So.2d 97 (La. App. 1st Cir. 1968); Broyles v. Broyles, 215 So.2d 526 (La. App. 1st Cir. 1968).

The language and the concept do not correspond to the structure of the law under the Civil Code. At dissolution of the community regime there is no longer any community; there are only husband and wife or their representatives.[24] If the wife has renounced the community, it is she who owes *the husband* the full amount of benefit to her from community funds or energies, and he who owes her indemnification for the value of the increases or ameliorations to the community assets made possible by use of her separate funds. If the wife has accepted the community, then the spouse whose separate assets were used to increase or improve the community assets is entitled to only half the added value, for the other half comes back to the spouse in his or her half of the community assets. Under the same circumstance of the wife accepting the community, the spouse whose separate asset was increased or improved at community expense is obliged to indemnify the other spouse half the benefit realized, for he or she bears the loss of the other half in the reduced value of his or her half of the community assets.

PARTNERSHIP

*Milton M. Harrison**

In *Guerin v. Bonaventure*[1] a concubine asserted a claim to an interest in partnership enterprises of her paramour and his partner. Although article 2804[2] of the Civil Code provides that partnerships formed for any purpose forbidden by law or good morals are null and void, the court cited with approval cases which have recognized the rights of a concubine or paramour in jointly owned enterprises, including what amounts to a partnership, when the commercial enterprise is "independent of the illegal cohabitation"[3] or when the "concubinage is incidental to the commercial venture rather than the business being incidental to the illicit relationship."[4] The court in the instant case found the commercial relationship to be dependent on and an incident to the illicit relationship and denied the claim of the concubine, reversing the trial court.

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24. *See* LA. CIV. CODE arts. 2406-2409.

* Professor of Law, Louisiana State University.

1. 212 So.2d 459 (La. App. 1st Cir. 1968).
2. *See also* LA. CIV. CODE arts. 11, 12.
3. Guerin v. Bonaventure, 212 So.2d 459, 461 (La. App. 1st Cir. 1968).
4. *Id.*