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evidence when as a whole it shows that the event or causation sought to be proved is more probable than not."¹³

Apparently the court correctly relied on the expert medical testimony that causation was likely as the major proof of causation. It is interesting to note the fine line separating the areas of competence of the experts. In this case the chemical experts could testify as to the qualities of the ingredient, but were not competent to testify as to the ingredient's effect upon human skin, a point at which a medical expert became the paramount authority.

MATRIMONIAL REGIMES

Robert A. Pascal*

"Earnings" and "Fruits"

*Wurst v. Pruyn*¹ decided that the wife's earnings were not "fruits of labor" within the meaning of article 2386 of the Louisiana Civil Code and therefore that the wife's filing of a declaration reserving to herself the administration of her paraphernalia and all rights to its fruits, including those "from the result of labor," had no effect on whether her earnings were separate or community income. In *Smith v. Smith*,² decided in 1960, the Court of Appeal for the Second Circuit had decided the same issue in contrary fashion, but the *Smith* decision clearly was in error. Article 2386 refers to "fruits of the paraphernal property of the wife" only, but lists all three kinds of fruits, those "natural," "civil," and "from the result of labor," which latter phrase is substantially the definition of "cultivated fruits" under article 545 of the Civil Code.

There are instances, however, in which it becomes more difficult to decide whether income consists of "earnings," "fruits," or capital gains. Perhaps the classic instance is that of *Hellberg v. Hyland*, decided in 1929,³ in which the supreme court treated as earnings the capital gains made by the wife through the manipulation of her paraphernal assets. *Paxton v. Bramlette*⁴ may become equally celebrated. A wife placed paraphernal immov-

13. *Id.* at 628.

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1. 233 So.2d 255 (La. App. 1st Cir. 1970).

2. 117 So.2d 670 (La. App. 2d Cir. 1960).

3. 168 La. 493, 122 So. 593 (1929).

4. 228 So.2d 161 (La. App. 3d Cir. 1969).

ables in a corporation, which she managed, and filed the declaration authorized by article 2386 of the Civil Code reserving to herself the administration of her paraphernalia and its fruits. The corporation's assets produced fruits, but instead of taking them as dividends, which would have belonged to her as paraphernalia because of the declaration, she paid them to herself in the form of remuneration for her services as an officer of the corporation. The court of appeal ruled the "salary" constituted "earnings" rather than "fruits" and treated it as a community asset under the construction given article 2334 of the Civil Code by *Houghton v. Hall*.⁵

No fault is to be found with this decision. On the contrary, fault can be found with any provision of the law on the community of acquets and gains which treats the substantive interests of husband and wife differently under the same circumstances. All earnings of the husband and all fruits of his separate assets fall into the community regardless of circumstances. If this is good law, then so should all earnings of the wife and all fruits of her assets fall into the community, regardless of circumstances.

Profit Sharing Plan Benefits

There can be no quarrel with the conclusion in *Laffitte v. Laffitte*⁶ that those rights in a profit sharing plan earned by a spouse during the existence of the regime fall into the community. After reasoning to this conclusion, however, the court in its judgment proper seemed to recognize the non-employee spouse as entitled to half the amount credited to the account of the employee spouse both before and during marriage. If so, there was error inconsistent with the reasoning of the court.

In addition, the judgment proper seems to have considered the employee spouse accountable to the other immediately on dissolution of the regime, even though he could not obtain payment of the amount due him under the plan unless and until his employment terminated under circumstances which would not work a forfeiture of its benefits. The employee spouse, moreover, apparently had the right under the plan to designate a "beneficiary" on death and thus the plan incorporated an "insurance" feature. It is submitted that the non-employee spouse should

5. 177 La. 237, 148 So. 37 (1933).

6. 232 So.2d 92 (La. App. 2d Cir. 1970).

have been treated as entitled to a one-half interest in so much of the amount earned by the employee during the marriage, but only as of the day on which he effectively received or disposed of the funds under terms of the plan itself. The court seems to have reasoned that on termination of the matrimonial regime the non-employee spouse had an immediate right to a one-half interest in so much of the fund as was earned during marriage simply because the employee spouse could have claimed it by terminating his employment at that time. The condition was one based on the exercise of a faculty, but it was not potestative, for its exercise might have resulted in serious detriment to him. In the opinion of the writer, the employee spouse should not have been made to account immediately for one half the fund.

Separate Funds in a Joint Account

One of the issues in *Succession of Smith*⁷ was whether the wife, after death of the husband, could claim restitution of a sum transferred during marriage from her separate account to the spouses' joint account. The court refused to permit the wife to obtain reimbursement, but apparently not because she had failed to prove the funds had not been disbursed for her separate benefit. The court reasoned that the wife was entitled to demand return of her paraphernal funds only if they had been "abandoned" or "surrendered" to the control of her husband and that in placing the funds in a joint account she had retained control over them. The court must have confused the right of the wife to a return of her paraphernalia in the hands of her husband with the general right of anyone to claim what is his. The question in *Smith* was of the latter kind. Besides, the wife in *Smith* was seeking an accounting *after* her husband's death. Article 2391 of the Civil Code, which declares the wife may sue the husband during marriage for the return of her paraphernalia, can apply only during marriage and does no more than make it clear that paraphernalia, unlike dowry, is always subject to control by the wife if she wishes to exercise it.

The *Smith* decision contains other language which implies a misunderstanding of the wife's rights as to her paraphernalia. Thus the court stated that under *Miller v. Handy*,⁸ decided in

7. 232 So.2d 569 (La. App. 4th Cir. 1970).

8. 33 La. Ann. 160 (1881).

1881, the wife may recover her paraphernalia only if she has not delivered it to her husband as her mandatary. This would be strange law indeed. Not only is mandate always and essentially revocable under article 3028 of the Louisiana Civil Code, but *Miller v. Handy* addressed itself to the question of the return of the fruits of the paraphernalia, not the paraphernal capital itself. Moreover, it may be observed that *Miller v. Handy*, though often followed, was itself erroneous; for it was based on previous decisions founded on Digest of 1808, 3.5.59, deleted in the Civil Code of 1825 and superceded therein by the contrary rule inserted into what is now article 2402, that all fruits of any assets administered and enjoyed by the husband "either of right or in fact" fall into the community. Since 1944, of course, whether the fruits of the wife's paraphernalia enter the community depends on whether she has reserved these to herself by filing a declaration to that effect consistently with article 2386.

Partnership Interest Under the Community Regime

*Dubuisson v. Moseley*⁹ gives a ray of hope for a general approach to handling a spouse's interest in partnership capital. At the time of his death the husband's share in a checking account in the name of the partnership of which he was a member was greater than his share thereof at the time of his marriage. The court applied the principle of article 2408 of the Louisiana Civil Code to rule that only the increase in value was a community asset. In doing so the court rejected the argument that partnership funds deposited to the same account during marriage were partly "community funds" and that through commingling the entire share of the husband in the partnership account at his death was to be treated as a community asset. The court's reasoning was that the account was one of the partnership, in effect an enterprise not to be identified with the husband himself, and that it could not be said that any partnership funds as such entered the community between husband and wife until they were disbursed to the husband. The extension of this very reasonable attitude would go far to eliminate many so-called "commingling" situations with their frequent consequences of a spouse being deprived of his or her separate capital.

9. 232 So.2d 870 (La. App. 3d Cir. 1970).