Louisiana Law Review

Volume 32 | Number 2
The Work of the Louisiana Appellate Courts for the 1970-1971 Term: A Symposium
February 1972

Private Law: Matrimonial Regimes

Robert A. Pascal

Repository Citation
Robert A. Pascal, *Private Law: Matrimonial Regimes*, 32 La. L. Rev. (1972)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol32/iss2/6

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.

through repairs to the family automobile.[19] None of the earlier jurisprudence explains why vicarious responsibility has barred an action in the same fashion as contributory negligence. The instant opinion gives an interpretation of article 2318 which is completely sound.

MATRIMONIAL REGIMES

*Robert A. Pascal**

"Actions for Damages . . . Suffered by the Husband"

The Digest of 1808 did not contain any specific provision on the separate or community character of damages recovered by either spouse for personal injuries. Presumably during the life of that Digest, and consistently with the Spanish law of which it was a digest, recoveries for personal injuries to either spouse belonged to that spouse as separate assets. The Civil Code of 1825, however, introduced an "omnibus clause" into what is now article 2334 of the current Civil Code, providing that "[c]ommon property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared [to be separate property]." Under this clause, the judiciary came to declare that amounts recovered for personal injuries to either of the spouses entered the community of gains. Act 68 of 1902 amended article 2402 to read in part that "*damages* resulting from personal injuries to the wife . . . shall always be . . . separate property of the wife." Then Act 170 of 1912 amended article 2334 to read in part that "*actions* for damages resulting from offenses and quasi-offenses [to the wife] . . . are [the wife's] separate property." Finally Act 186 of 1920 further amended article 2334 in part to provide that "[a]ctions for damages resulting from offenses and quasi-offenses suffered by the husband, living separate and apart from his wife, by reason of fault on her part, sufficient for separation or divorce shall be his separate property." From this time on, certainly there could be no doubt that *actions* for damages for personal injuries to the wife occurring during the existence of the community of gains form part of her separate patrimony, whereas similar *actions* for personal injuries suffered by the husband during the community of gains are common assets unless he has suffered the injuries while liv-

19. This holding was accomplished in footnote 3 of the opinion by expressly overruling *Funderburk*. 257 La. 567, 574, 243 So.2d 259, 261 (1971).

* Professor of Law, Louisiana State University.

ing separate and apart from his wife under circumstances entitling him to separation or divorce from her by reason of her fault. Already by 1920, then, Louisiana law gave preferential treatment to the wife over the husband far beyond the dreams of the proponents of "women's lib."

It was only in 1965, however, that any question was raised concerning the application of the above-mentioned legislation in instances in which the husband's injury occurred during the existence of the community regime, but the recovery thereon made after its termination and at least in part for the effects of the injury continuing beyond that time. In that year the Fourth Circuit Court of Appeal decided, in *Tally v. Employer's Mutual Liability Insurance Co.*,[1] that damages awarded to the husband for such pain and suffering and medical expenses as occurred after the termination of the regime by separation from bed and board belonged to him alone. Review was refused, the supreme court finding "the results are correct."[2] Then in 1970 the Third Circuit Court of Appeal, in *Alfred v. Alfred*,[3] not only followed the lead in *Tally*, but decided that all damages *recovered* by the husband after the dissolution of the community of gains should belong to him alone. Judge Miller dissented on the ground that articles 2402 and 2334 could not support the "equitable" result, and later joined Judge Hood in dissenting from a refusal of the court to grant a rehearing in the case. Almost simultaneously, the First Circuit Court of Appeal, in *Chambers v. Chambers*,[4] adhered more closely to the reasoning in *Tally* to decide that the wife was not entitled to participate in that portion of an amount received in a compromise which pertained to effects of the injury "*accruing* after the dissolution of the community regime."

The supreme court reviewed the *Chambers* decision in exercise of its supervisory jurisdiction. Justice Hamiter, writing for the majority, declared:

> "We agree with the Court of Appeal that [the wife] is not entitled to participate in that portion of the [funds recovered in a compromise on the *amount* of the damages

1. 181 So.2d 784 (La. App. 4th Cir. 1965).
2. 248 La. 785, 181 So.2d 783 (1966).
3. 237 So.2d 94 (La. App. 3d Cir. 1970).
4. 238 So.2d 30 (La. App. 1st Cir. 1970).

> without prejudice to the determination of their proper distribution] that compensate [the husband] for damages accruing after the dissolution of the community regime."[5]

After saying this, nevertheless, Justice Hamiter's opinion goes on to find that, on the basis of the condition of the record and other circumstances of the case "[i]t will be virtually impossible to reconstruct exactly how much weight was given by the negotiators to each of the items with respect to future pain and suffering and loss of wages," and on this basis decided that the wife should receive half of the total amount recovered by the husband. Justice Sanders concurred in the decree, but not in the majority's reasoning, emphasizing that under the legislation *the cause of action itself* is a community asset and citing the present writer's remarks on *Tally* in 27 *Louisiana Law Review* at pages 456-457. Justice Dixon also concurred in the result, he too emphasizing that the cause of action itself was a community asset under the Civil Code's articles. Justice Tate rendered a masterful and passionate dissent, in which Justice Barham concurred. He not only noted the husband's entitlement to have the judiciary apply the law as construed by the majority to the facts of his case, as difficult as that might be under the circumstances, but observed that the absolute language of articles 2334 and 2402 need not be taken as having been intended to apply in cases such as *Chambers*. Quite correctly, in the writer's opinion, Justice Tate argued that the *Chambers* facts presented a case *not covered by express law* and therefore that the judiciary should proceed under article 21 of the Civil Code to decide "equitably," that is to say, in accordance with natural justice and right reason. But this was not the end of the matter.

On application for rehearing, the court rendered a per curiam opinion, adopting in essence the reasons given by Justices Sanders and Dixon in their dissents and by Judge Miller in his dissent in *Tally*, stating that the majority *had intended* to say just that in the first instance. Justice Summers dissented stating that "*the time* of the husband's injury determines whether the award for injury is community or separate property," but that such sums as are awarded for such items as earnings or pain and suffering calculated to accrue after termination of the community regime should belong to the husband alone. In the writer's opinion,

5. 259 La. 246, —, 249 So.2d 896, 903 (1971).

Justice Summers' dissent is internally inconsistent. Justices Tate and Barham dissented from the per curiam opinion emphasizing that it did not represent the views of the majority of the court.

Having already stated his agreement with Justice Tate's dissent in *Chambers*, the writer hardly need add that the strict application of the words and implications of articles 2402 and 2334 to circumstances of the kind dealt with in *Tally*, *Alfred*, and *Chambers* could not have been intended by a thoughtful legislature. Circumstances such as these, therefore, as Justice Tate remarked, should be considered outside the coverage of those articles. It is therefore with the utmost remorse that the writer is conscious of the fact that his own remarks on *Tally*, in 27 *Louisiana Law Review* at pages 456-457, seem to have contributed to Justice Sanders' formation of his opinion on the case, and possibly to Justice Dixon's formation of his and to Judge Miller's view in *Tally*. The writer's specific words were:

> "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 [recovered by the husband for personal injuries occurring during the community regime] can be considered the separate assets of the husband."[6]

The writer cannot believe that he was ever of the opinion those words express and would like to believe his original manuscript would show additional remarks along the lines of those in Justice Tate's dissenting opinion; but that manuscript was destroyed long ago, and the writer must accept blame for having failed in this case to give proper guidance to the legal community.

Legislation on the subject is in order. The writer recommends that all recoveries in indemnification of personal injuries as such be declared the separate assets of the person injured and that recoveries for losses of wages and for medical and other expenses *after* the date of the dissolution of the regime should be declared the separate assets of the injured spouse. The new legislation should provide also that, in the event of the dissolution of the community of gains after the receipt of damages awarded in compensation for loss of future earnings or for future medical and similar expenses, there should be withheld from the

6. 27 LA. L. REV. 456-57 (1967).

wife's share of the community assets such amounts as can be deemed to represent one-half of the injury-caused expenses not yet incurred and one-half of so much of the amount originally awarded for loss of earnings as may be determined to have been given for the period beyond the date of the dissolution of the regime; otherwise the wife would be enriched without cause at the expense of the husband.

Obligations Incurred by the Wife

Decisions continue to confuse the laws relating to (1) the married woman's *capacity* to obligate herself, (2) her *power* to obligate her husband, and (3) her *power* under matrimonial regime law, or, more specifically, the community of gains.

The capacity of a married woman to obligate herself is a matter of the law of *persons*, and more particularly of the law of *marriage*. If the married woman is under eighteen or interdicted, she has only the capacity of an emancipated minor[7] and, in addition, *being under her husband's authority*, she requires his concurrence or consent to obligate herself in any matter other than the *administration* of her paraphernalia[8] or the purchase of necessaries for herself and family in instances in which he has failed to supply them.[9] If over eighteen and not interdicted, she has full *capacity* to obligate *herself personally* in any matter whatsoever.[10] No matter what her age, however, she lacks the *power* (*legal right* rather than *capacity*) to obligate her husband by her voluntary act except as his mandatary[11] or as his *negotiorum gestor*.[12] And, accordingly, the husband alone having the *legal right* or *power* to incur obligations by voluntary act which will enter the community between the spouses,[13] no voluntarily incurred obligation of the wife, though it pertains to the community of gains between the spouses, may enter that community unless she has acted as his mandatary or his *gestor*. Moreover, although the husband may *ratify* the unauthorized act of the wife entered into *in representation of him*, he may not ratify any act entered into by her as principal; in the latter

7. LA. CIV. CODE arts. 379-384.
8. LA. CIV. CODE arts. 2384, 2390, 2393, 2394, 2436.
9. LA. CIV. CODE art. 1786.
10. LA. R.S. 9:101-105 (1950).
11. LA. CIV. CODE art. 1787.
12. LA. CIV. CODE arts. 2295, 2299.
13. LA. CIV. CODE art. 2404.

instance he may only *assume* the wife's obligation under the same conditions that he might assume any other person's obligation.

Examined in the light of the above exposition, the decision in *Credit Service Corp. v. Dickson*[14] is open to question. A wife *living separate and apart from her husband* contracted for medical services without consulting her husband, or, it is assumed, even notifying him of her need. The court decided the husband was liable to the assignees of the persons with whom the wife had contracted for these services on the grounds (1) that under Civil Code article 120 the husband owes the wife support and (2) that under Civil Code article 2403 "the debts contracted during the marriage enter into the . . . community of gains." For additional support of its conclusion the court relied on a previous decision declaring (3) that, "so far as the general public is concerned, the wife has implied authority" to obligate her husband for medical services unless circumstances indicate otherwise.[15] None of these reasons can support the conclusion that in a case such as this the husband is obliged directly to the suppliers of medical services or their assignees. Civil Code article 120 purports to do no more than establish an obligation from husband to wife; it does not pretend to create an obligation of the husband toward third persons. Moreover, under matrimonial regime law, which applies only between husband and wife, the wife is obliged for that portion of the cost of the medical attention to her *or to her husband* (as an expense of the marriage) which corresponds to the ratio of her separate income to her husband's income.[16] Again, as detailed above, the husband is never obligated because the "community" is obligated; but rather an obligation enters the community of gains only by the husband being obligated and the subject matter of the obligation being one of common concern. Besides, the existence or non-existence of a community of gains has nothing to do with the question

14. 243 So.2d 827 (La. App. 2d Cir. 1971).

15. Overton v. Nordyke, 10 La. App. 317, 120 So. 544 (Orl. Cir. 1929).

16. LA. CIV. CODE art. 2389 which, construed against arts. 2395 and 2435, (applicable to instances in which the spouses are separate in property by contract or judgment) must be taken to mean that, there being a community of gains between the spouses, if the wife does not bring a dowry and if she has any separate income, she must bear a share of the expenses of the marriage corresponding to the ratio of her income to her husband's, but not more than one-half her income in any case. Although the article mentions only income from paraphernal assets, and not income from earnings, it must be recalled that it was written long before 1912, when the earnings of the wife living separate and apart were first declared her separate assets.

of the husband's liability *toward third persons* for obligations contracted by the wife. The community of gains, being a contract between the spouses, can have *direct* effects only between them. The husband's *direct* liability toward those with whom the wife contracted, then, can exist only if she has acted as his mandatary or as his *gestor* in an appropriate case. It is true that the wife *living with her husband* can be said to have, by custom consistent with law, a tacit mandate from her husband to contract in his name for day-to-day expenses of the marriage, including ordinary medical services, unless he has revoked that mandate; but this mandate cannot reasonably be presumed when the spouses are living separate and apart.[17] Finally, it cannot be said that the third party with whom the wife acts as the husband's *negotiorum gestor* acquires a *direct* right against the husband unless the wife has acted in his name. Under Civil Code article 2295 the principal is obligated to the third party only if the *gestor* has acted in the principal's name; if the *gestor* has acted in his or her own name, though for the benefit of the principal, it is only the *gestor*, and not the third party, who acquires a *direct* right against the principal.[18] The *gestor's* creditor then should be able to exercise the obligor's (the *gestor's*) right against the principal,[19] but only subject to whatever limitations it might have. At best, therefore, the assignees of the wife's creditors for medical services should have been allowed to recover from the husband only that portion of the fees and charges which corresponded to the husband's proportionate obligation to contribute to expenses of the marriage according to the formula given in article 2389 of the Civil Code.

Language in a second decision holding the husband liable for obligations contracted in the name of the wife also may be criticized under the observations made at the initiation of this section and on other grounds. In *Royal Furniture Co. v. Benton*,[20]

17. PLANIOL, TRAITÉ ELEMENTAIRE DE DROIT CIVIL [FRANÇAIS] III (11th ed. 1937) no. 1462 *bis*, holds the same opinion for French law.

18. LA. CIV. CODE art. 2299.

19. A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS 3.3.66 (1808), which expressly gave creditors the right to exercise their debtors' rights, was deleted from the Civil Code of 1825 (and not reinserted in the Civil Code of 1870); but the comments of the redactors at page 263 of the Projet of the Civil Code of 1825 (reprinted in LA. LEGAL ARCHIVES) indicate that the deletion of the article was not intended to abrogate the rule itself, but only to remove the article from an inappropriate section of the Civil Code.

20. 242 So.2d 69 (La. App. 1st Cir. 1970).

the wife had used her name only in purchasing furniture. Part of the opinion of the majority reads as follows:

> "Purchases made and debts contracted during the existence of the community are, as a general rule, presumed to be for the benefit of the community. Articles 2402 and 2403, Civil Code. The husband can repudiate the transactions entered into by his wife, but if he is aware of them and takes no action to set them aside, he is deemed to have ratified them. [Case citations.] Article 1817, Civil Code.
>
> "We hold that in cases . . . in which the wife was acting for the community . . . the husband as head and master of the community is a proper party defendant . . . ."[21]

The first observation must be on the incorrectness of the general judicial practice, of which this decision is only a specimen, of treating the community of gains as a legal entity with which third persons may have direct legal relationships, and of which the husband is the chief but not sole representative, but for which he is full surety. On the contrary, the community is not a legal entity, but only a convention between husband and wife which, like other conventions, can give rise to *direct* legal effects only between the spouses as parties. Third persons cannot know or have legal relations with the community of gains as such; they can have legal relations only with the husband or wife *as persons*. Creditors of the husband may enforce payment out of *his patrimony* which, while the community is in existence, includes both his separate assets and the community assets; and creditors of the wife may enforce payment out of *her* patrimony, which includes only her separate assets. Thus the wife never may be said to "act for the community." She may act *in representation of her husband*, with his consent or as his *gestor*, but then she obligates *him personally*, and not the community of gains as such.

The writer is well aware that the views above expressed are inconsistent with many decisions[22] and also with the impli-

---

21. *Id.* at 71. Judge Landry dissented, but only on a question of negotiable instruments law of no relevance to this discussion.

22. *See* United States Fidelity & Guaranty Co. v. Green, 252 La. 227, 210 So. 2d 328 (1968), so ably demonstrated to be inconsistent with the proper understanding of the Legislation in a student note by George Bilbe (now Assistant Professor of Law, Loyola University) 29 LA. L. REV. 409 (1969). *See also* the writer's comments in *The Work of the Louisiana Appellate*

cations of some legislation of recent years if taken very literally;[23] but in the writer's opinion such inaccuracies of language result from past failures to understand the structure of the institution, rather than from the desire to alter it, and should be construed accordingly.

The second observation to be made on the above-quoted language from *Benton* is that it exaggerates the limits of the tacit mandate from husband to wife presumed by custom consistent with law. It is one thing to say there is a custom to the effect that the husband may be presumed to have authorized his wife to act as his representative in incurring ordinary family expenses, or expenses of the marriage, as mentioned before. But it is another to say that "as a general rule" the acts of the wife will be presumed to have been authorized by the husband unless he takes action to "repudiate" them. Under such language even acts intended by the wife to obligate herself alone might be deemed to have consequences for the husband if he did not "repudiate" the transactions timely. It may be observed that it is not unusual for married women to make acquisitions or enter into other transactions intending to have sole benefit of the effects of those transactions and to obligate themselves alone. The general language of *Benton*, therefore, would give uncalled-for advantage to creditors of the wife against her husband, and often would transform an advantage sought by a married woman for herself alone into one for the husband as well. It should not be forgotten that in Louisiana the community of gains is only part of the total marriage regime. Each spouse remains separate in property as to assets and liabilities existing at marriage or acquired or incurred during marriage, either by the use of separate funds or by succession or donation. No doubt the excesses of the judiciary in decisions like that in *Benton* at times may have been inspired by an economy oriented toward creditor security; but the legislation does not provide a base for such decisions and the writer, for one, doubts that the substance of the words used in *Benton* can be said to have such popular approbation as to warrant a finding that a custom to that effect exists.

Court for the 1968-1969 Term—Matrimonial Regimes, 30 LA. L. REV. 219-21 (1969).

23. *See, e.g.*, the amendment to LA. CIV. CODE art. 1787 by La. Acts 1944, No. 49; LA. CODE CIV. P. arts. 686 and 735.

Partition on Dissolution

Lester v. Lester[24] is to be noted as a decision very correctly recognizing that, on the termination of the community of gains by separation from bed and board, the wife accepting the community simply may demand an immediate partition regardless of what debts the spouses may have. This, indeed, is exactly what articles 2406-2409 of the Civil Code state; and, moreover, if the Civil Code is construed correctly, not even the wife's acceptance with benefit of inventory may operate to deny to her or the husband the right to an immediate partition regardless of debts. Any other constructions would be inconsistent with article 1047 of the Civil Code, made applicable by R.S. 9:2821 to the wife's acceptance of her share of the community of gains with benefit of inventory.

It is regrettable, however, that the opinion in *Lester* does not demonstrate the correctness of its conclusion on the basis of the legislation. Indeed, the only discussion of legislation in *Lester* is the denial, correct in itself, that article 2403 of the Civil Code implies the necessity of a "liquidation" of the community simply because it specifies that separate debts are to be paid with separate funds and community debts with community funds. That article does no more than state a rule of accounting between the spouses.[25] The misunderstandings on this point and many others in the law of the community of gains can be traced to the tendency to regard the community as an "entity" with its own rights and obligations rather than as a purely contractual arrangement between the spouses. The error of this "entity" concept, however, has been alluded to in the previous section and has been demonstrated quite convincingly in a recent student comment.[26] The demonstration need not be repeated here.

PARTICULAR CONTRACTS

*J. Denson Smith**

A considerable number of cases decided by the appellate courts during the 1970-71 term dealt with sales, leases, and other

24. 245 So.2d 478 (La. App. 3d Cir. 1971).
25. *See* Bilbe, Note, 29 LA. L. REV. 409 (1969).
26. LeBlanc, Comment, 30 LA. L. REV. 603 (1970).
* Professor of Law, Louisiana State University.