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Private Law: Matrimonial Regimes

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v. Lake Charles American Press[30] that a newspaper enjoyed no privilege in publishing its false report that plaintiff failed to appear for arraignment on a Peeping Tom charge. Plaintiff was surety on the bond for the person arraigned, and it was clear error on the part of the newspaper to report as it did. The issue was whether defendant could claim privilege as set forth in *Rosenbloom v. Metromedia, Inc.*,[31] in which the U.S. Supreme Court held that the public figures subject to fair comment absent reckless disregard included private individuals involved in a matter of public interest. Justice Sanders in speaking for the majority on rehearing pointed out that it was the failure to show for arraignment which was the matter of public interest and there was no factual connection or involvement of plaintiff with that failure to appear. If the involvement of a private individual in a matter of public interest could be founded upon a false report of involvement then no erroneous reporting whatever would be beyond the privilege. Accordingly, the liability of the defendant was upheld. It is a laudable decision, furnishing some restraint on the rapid erosion of an already too-small island of privacy enjoyed by private citizens.

MATRIMONIAL REGIMES

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Effect of Amendments to Legislation on Pre-Existing Matrimonial Regimes

Probably the most important single issue of law raised in any matrimonial regimes decision discussed in this section of the *Symposium* is whether the 1944 amendment to article 2386 of the Civil Code applies to community of gains regimes then already in existence. The Court of Appeal, Second Circuit, dismissed the affirmative contention with the statement: "We do not believe this to be the intent of the amendment. The amendment was intended to affect existing community of . . . gains as well as those established after its enactment."[1] The matter deserves more consideration.

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30. 265 So.2d 206 (La. 1972).
31. 403 U.S. 29 (1971).

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1. McElwee v. McElwee, 255 So.2d 833, 888 (La. App. 2d Cir. 1971).

Under Louisiana law, *every* matrimonial regime is no more or less than a *contract between the spouses.* The entire subject matter is treated under the title "Of the Marriage Contract, and of the Respective Rights of the Parties in Relation to Their Property."[2] Spouses are permited to specify their matrimonial regime before marriage in an express marriage contract.[3] Only if the spouses fail to specify the particulars of their matrimonial regime does the "legal"[4] regime, the community of gains, come into effect "by operation of law"[5] or "of right."[6] The law's provisions on the "legal" regime, therefore, are *suppletive*, supplying the provisions of the marriage contract which the spouses are presumed to have *entered into tacitly* in view of their presumed knowledge of the effect the law would attach to their failure to enter into an express marriage contract. It must be concluded, therefore, that an amendment to legislation on matrimonial regimes may not operate to alter matrimonial regimes already in existence, whether by express or by tacit marriage contract, without violating the Constitutional injunction against the impairment of obligations of contracts.

This conclusion is far-reaching, going far beyond the amendment to article 2386 by Act 286 of 1944. Examples may be given. The rights of a wife to require her consent to the husband's alienation of certain assets under amendments to article 2334 of the Civil Code will depend on whether her particular regime was contracted before or after the date of the relevant amendment; and Louisiana matrimonial regimes should not be considered affected by the proposed Equal Rights Amendment if ever adopted, for that proposed amendment does not purport to prohibit contracts between men and women specifying their responsibilities and their interests in things as married persons.

THE HUSBAND'S LIABILITY FOR OBLIGATIONS CONTRACTED BY THE WIFE

The husband's liability for obligations contracted by the wife is not really a matter of matrimonial regime law, but one of the law of marriage proper, for the marriage regime of the

2. LA. CIV. CODE bk. III, tit. VI.
3. LA. CIV. CODE arts. 2325, 2329.
4. LA. CIV. CODE, title to Book III, tit. VI, ch. 3, § 1.
5. LA. CIV. CODE art. 2332.
6. LA. CIV. CODE art. 2399.

spouses has nothing to do with the question. The decisions often introduce confusion on the point, nevertheless, because of their use of expressions—themselves inconsistent with law—speaking of contracts of the wife or husband obligating or not obligating "the community," or of the husband being obligated *because* he is head of the community of gains. It has been explained sufficiently in previous *Symposia* that the community of gains is not an entity, that the community of gains as such can neither be entitled nor obligated, that only husband and wife as persons can be entitled or obligated, that the husband is never obligated because he is the head of the community of gains, that the wife cannot obligate the husband for "necessaries" except as his *negotiorum gester*, and that, so far as third persons are concerned, the matrimonial regime of the spouses is relevant only to determine the assets to be considered part of the one or the other's patrimony out of which executions of his or her obligations can be compelled.[7] There is no need to repeat those expositions here. Suffice it to say that the two decisions discussed below contain faulty expressions of the kind mentioned. It would be well for our judges to be more careful in adhering to the structure of the law, for not to do so can only lead to a misunderstanding of the law itself.

The decisions in *Royal Furniture Co. v. Benton*[8] and *Watson v. Veuleman*[9] both correctly hold that the husband is not obliged by the mere fact the wife has contracted an obligation in her name. Both can be understood to say—though employing incorrect language of the type mentioned above—that the husband may be obligated by the wife's act as his mandatary. But both are incorrect insofar as they give the impression the husband may become obligated by *ratifying* an act of the wife not contracted originally on his behalf, for no one may ratify an act not contracted on his behalf. Ratification of the act of another is possible only if that act was contracted in the interest of the principal, but without his authority.[10] It is true, of course, that anyone may *assume* the debt of another, and the husband, therefore, may assume the debt of his wife; but the

7. *See* 32 LA. L. REV. 219, 223-28 (1972); 30 LA. L. REV. 219, 221-22 (1970); and 28 LA. L. REV. 327, 330-33 (1968).
8. 260 La. 527, 256 So.2d 614 (1972).
9. 260 So.2d 123 (La. App. 3d Cir. 1972).
10. *See, e.g.*, LA. CIV. CODE art. 2931.

assumption of the debt of another may not be proved by parol.[11] In *Royal Furniture*, the supreme court was content to find an *assumption* of the wife's obligation because (1) the plaintiff had alleged the *liability* of the husband through *ratification* by payments made (by whom?) on the wife's obligation, and (2) the trial court had given judgment to the plaintiffs "on their producing due proof" in support of their demand.[12] It seems to the writer that had the record disclosed a writing in which the husband had assumed the wife's debt Justice Barham's opinion would have mentioned it and that resort to a presumption of regularity in favor of the proceedings below ignores the fact that probably there would have been no suit, much less an appeal, had a written assumption of debt been executed by the husband. *Watson* is to be considered correct in holding the burden of proving that a wife's act was on behalf of her husband rests on the party alleging it. A contrary solution would *in fact* render husbands liable for most acts of their wives. Given the liberty of the wife to obligate herself without the authority or concurrence of her husband, the result would be intolerable and, in the writer's opinion, lack the fairness essential to due process.

Profit Sharing and Retirement Plans

In *Laffitte v. Laffitte*,[13] the court of appeal clarified its previous judgment in the same case.[14] The language of the first decision had left the impression that the wife was being awarded a one-half interest in *the whole* of a profit-sharing plan contributed to by the husband both before and after marriage and declared entitled to the value thereof immediately on termination of the community of gains even though the husband would not be entitled to any of the fund until retirement. This decision, so understood, was criticized by the writer in the February 1971 *Symposium*.[15] The clarifying second decision both emphasizes the wife's participation in the retirement plan for that period

11. La. Civ. Code art. 2278(3).
12. 260 La. at 534, 256 So.2d at 617.
13. 253 So.2d 120 (La. App. 2d Cir. 1971).
14. 232 So.2d 92 (La. App. 2d Cir. 1970).
15. 31 La. L. Rev. 252, 253-54 (1971).

only in which there was a community of gains between her and her husband and her entitlement to her interest only on the husband's being able to demand the funds himself without prejudice. A second decision involving retirement plans, decided by the Second Circuit Court of Appeal, rendered between the first and second *Laffitte* decisions, follows the first.[16] The Second Circuit should correct its error as soon as the occasion arises, for otherwise the supreme court will be compelled to issue a writ of review the first time any application is made on the point from any court of appeal, thus adding unnecessarily to its burdens.

A third decision on retirement plans appears to the writer to run contrary to the intent of the special legislation on teachers' retirement benefits. *Blalock v. Blalock*,[17] rendered by the Second Circuit Court of Appeal, correctly decided that under special legislation on the subject, teachers' retirement benefits are the teacher's separate assets even though the teacher's contributions issue from earnings considered community funds; but then, following previous decisions on the question, *Blalock* awarded half the retirement fund to the non-teacher spouse by applying the general rule of article 2408 of the Civil Code. That article does indeed require the spouse whose separate assets have been augmented or improved by the expenditure of common efforts or funds to reimburse the other spouse one-half the added value at the termination of the community of gains; but it is submitted that the teachers' retirement legislation intended to classify the retirement fund as separate property of the teacher without imposing on him or her the obligation specified by the general rule of article 2408. The writer expressed this opinion in a previous *Symposium*[18] and refers the reader to it.

OTHER MATTERS

The decisions considered above by no means exhaust those on matrimonial regimes. They evidence both the increasing

16. Hamilton v. Hamilton, 258 So.2d 661 (La. App. 3d Cir. 1972).
17. 259 So.2d 367 (La. App. 2d Cir. 1972).
18. 28 LA. L. REV. 327-28 (1968).

awareness of the bar and the bench to the possibilities of each spouse demanding compensation for value added to the community of gains through the expenditure of separate funds, or vice versa.[19] The main criticism of these cases is not of their results, but of the method of accounting employed. It is incorrect to speak of compensating "the community" for the whole of its expenditure resulting in augmentation of a spouse's separate patrimony and likewise incorrect to speak of compensating one spouse's separate patrimony for augmentations to "the community." The proper method is indicated by article 2408 of the Civil Code. When the separate assets of one spouse have been augmented by community funds or energies, one-half the augmentation should be returned to him, the other half being returned to him automatically as part of his share of the community assets. Similarly, when separate funds have been used to augment community assets, only one-half the augmentation should be returned to the spouse, for he receives the other half as part of his share of the community assets. The usual practice is consistent only with the erroneous practice treating the "community" as an entity with its own creditors and debtors and preferences in favor of "community creditors" not recognized by the legislation.

The increased sensitivity toward accounting between the spouses seems to be accompanied by increasing judicial willingness to be realistic in appraising evidence of the non-use of separate funds deposited in common accounts. *Owens v. Owens*[20] is a good example.

Hurta v. Melcher[21] is to be noted as a decision correctly characterizing mortgage interest, taxes, and similar upkeep expenses on a separate asset used as a home for the spouses as expenses to be paid out of community funds.

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19. McElwee v. McElwee, 255 So.2d 883 (La. App. 4th Cir. 1972); Owens v. Owens, 259 So.2d 454 (La. App. 3d Cir. 1972); and Blalock v. Blalock, 259 So.2d 367 (La. App. 2d Cir. 1972). It may not be clear from *Blalock* that the basis of compensation should be the *added value* as of the time of the dissolution of the community of gains and not the amount originally expended. *See* LA. CIV. CODE art. 2408.

20. *See* note 19 *supra*.

21. 260 So.2d 324 (La. App. 4th Cir. 1972).