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MATRIMONIAL REGIMES

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REESTABLISHMENT OF COMMUNITY OF GAINS AFTER RECONCILIATION

Article 155 of the Civil Code permits spouses who become reconciled after a separation from bed and board to reestablish the community of gains "as of the date of the filing of the suit for separation . . . without prejudice to rights validly acquired . . . between . . . the judgment and recordation of the act of reconciliation." In *Cockern v. Cockern*[1] the act reestablishing the community of gains stated it did so as of the date of the filing of the suit for separation but then proceeded to except from its provisions *all assets* acquired by each spouse between that date and the execution of the reestablishing act. What the spouses had attempted to do, as the lower court seemed to recognize without noting its invalidity, was to reestablish the community as of the date of the reestablishing act rather than as of the date of the filing of suit for separation.

The court of appeal nonetheless honored the exception. It is submitted that the decision is most certainly in error. Article 155 permits reestablishment of the community only as of the day of the effective date of the separation of goods and effects invoked by the judgment of separation from bed and board. This implies that all assets and liabilities which would have entered the community of gains had it not been terminated must then be regarded as such *between the spouses.* The rule not tolerating any other kind of reestablishment of the community of gains must be regarded as one of public order, not subject to being contracted against by the spouses. The provision that the reestablishment of the community shall not prejudice rights acquired in the interim can be construed only as referring to *the rights of third persons,* not those of the spouses, for otherwise this clause would be inconsistent with that requiring the reestablishment to be as of the date of the filing of suit for separation.

The public order character of the rule of article 155 as construed above is easy to perceive. By article 2329 of the Civil Code a matrimonial regime may not be altered by any convention once the spouses have married. The rule of article 155 is in an exception in favor of those who find their separation from bed and board a mistake and who wish to resume in every way the relationship which they had before the separation. Any other construction would open the door to

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1. 270 So. 2d 209 (La. App. 1st Cir. 1972).

spouses obtaining separation judgments followed by "reestablishments" which were only partial, and therefore contrary to the rule of article 2329.

WIFE'S ACCEPTANCE WITH BENEFIT OF INVENTORY: PARTITION OF COMMUNITY

Misunderstandings of the rules on the partition of the community of gains and of the effects of the wife's acceptance of the community with benefit of inventory are evident in both the contentions of the parties and the reasoning of the court in *Edwards v. Edwards.*[2] The writer can appreciate the misunderstandings of the court, for he himself shared one of them until at least four years ago.[3] They are misunderstandings, however, and the correct construction of the law must be outlined here.

A divorced husband petitioned for a partition of the "community estate" by licitation. The divorced wife answered denying the husband's right to a partition, accepting the community with benefit of inventory, and reconvened for an administration of the "community estate," praying she be appointed administratrix thereof. The lower and appellate courts both granted the husband judgment ordering a partition by licitation and denying the wife's request for an administration. The proper solution would have been (1) to partition the community assets in kind, if possible, and (2) to appoint someone, possibly the wife, administrator of the assets received by the wife in the partition so that her half of the community debts might be paid with those assets or their proceeds, as far as they would go, and the surplus assets, if any, distributed to her. These points will appear from the exposition below.

On dissolution of the community of gains each spouse becomes entitled, as a matter of law, to one-half of the assets[4] and obliged, *vis-a-vis* each other, to pay half the outstanding community debts.[5] The wife, nevertheless, has three alternatives open to her, and the husband's rights and liabilities ultimately depend on her election. The wife may renounce the community, absolving herself of all responsibility for the community debts, but also giving up her right to demand one-half of the community assets.[6] In that event the husband

2. 268 So. 2d 686 (La. App. 1st Cir. 1972).

3. *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Matrimonial Regimes*, 30 LA. L. REV. 219, 223 (1969).

4. LA. CIV. CODE art. 2406.

5. *Id.* art. 2409.

6. *Id.* arts. 2410, 2411.

becomes owner of all community assets and solely liable, *vis-a-vis* the wife, for all community debts.[7] There is then no occasion for a partition. Next, the wife may accept the community simply (or "unconditionally"), thereby retaining her right to one-half of the community assets, remaining obliged *vis-a-vis* her husband to pay one-half the community debts,[8] and *assuming personal liability* toward his community creditors for one-half their credits.[9] From the moment of the wife's simple acceptance of the community either spouse may demand a partition,[10] which, under the normal rules of partition, must be in kind if this kind of partition is possible under the circumstances and either spouse demands it. (It is to be noted that the Civil Code states that each spouse is entitled to one-half of the community assets, not that each spouse has a one-half interest in the community assets.) Finally the wife, since 1882, has had the right to accept the community of gains with benefit of inventory.[11] This acceptance is a true definitive retention of her right to one-half the community assets; it is also a true retention of her liability for one-half the community debts *vis-a-vis* her husband and a true assumption of liability toward her husband's community creditors for one-half their credits, *but only insofar as,* in each instance, *those assets will be sufficient to pay that liability.*[12] Because the wife accepting with benefit of inventory retains definitively full right to one-half of the community assets, either spouse is then entitled to a partition so that it may be ascertained which of those assets will fall to the lot of each.[13] Because the wife accepting with benefit of inventory is obliged to pay one-half the community debts out of her share of the community assets only, the law wisely requires a payment of these liabilities in an administration *of her share* of those assets; but *it is only her share* of the community assets, determined and fixed in a previous partition, which is ever subject to administration pursuant to the wife's acceptance of the community with benefit of inventory.[14]

7. This inference is from Louisiana Civil Code articles 2406-2411 and the fact that a debt becomes a community debt only by first becoming a debt of the husband, who is head and master of the community under Louisiana Civil Code article 2404.

8. By accepting, the wife retains the rights given her by Louisiana Civil Code articles 2406 and 2409.

9. LA. CIV. CODE art. 2409.

10. LA. CIV. CODE art. 2409 presupposes this.

11. LA. R.S. 9:2821 (1950) (originally La. Acts 1882, No. 4). This legislation gives the wife the same right the "beneficiary heir" has to accept his share of a succession with benefit of inventory, and hence constitutes a reference to those articles.

12. LA. CIV. CODE art. 1032 (by analogy required by LA. R.S. 9:2821 (1950)).

13. LA. CIV. CODE art. 1047 (by analogy required by LA. R.S. 9:2821 (1950)).

14. LA. CIV. CODE art. 1058 (construed with article 1047, all by analogy required

OBLIGATIONS ON THE WIFE'S CONTRACTS

Unpaid creditors of the wife will never cease trying to have the judiciary declare her husband liable for obligations contracted by her. The 1972-1973 decisions have their share of such cases, and as in former years, the opinions are less than fully satisfactory. In *General Tire Service v. Nash*,[15] for example, a wife living with her husband under the community of gains, using her name only, purchased tires, for an automobile registered in her name only, without the knowledge of the husband. The unpaid seller sued the husband. The court of appeal remanded the case for lack of sufficient evidence to permit disposition on appeal, but declared that the husband could be held liable if the tires could be found to constitute "necessaries" and the husband could be shown to have failed to supply them, citing article 1786 of the Civil Code. Certainly the construction and application of article 1786 given and made in *General Tire* are in error. Article 1786 is in a section of the Civil Code treating of the capacity of persons to obligate themselves, and thus with the capacity of the married woman *to obligate herself* for "necessaries" when the husband fails to supply them to her and the family. Until the married women's emancipation legislation the article applied to married women of all ages. Today it applies only to married women under eighteen years of age.[16] The article was never intended to mean that the married woman could obligate her husband for such necessaries, though indeed she might do so as his *negotiorum gestor* in the circumstances mentioned in article 1786 and in others, as long as the conditions of article 2299 are met. The erroneous application of article 1786 is of long standing; but error never generates its own right to be repeated.

There are, of course, other bases on which the husband in *General Tire* might be found liable, the evidence being available. Whether the automobile for which the tires were purchased was a community asset or the separate asset of the wife, for example, if it was being used for family purposes and not merely the separate purposes of the wife, the cost of tires for it might well be considered a normal "expense of the marriage," even if not a "necessary expense"; or, even if the automobile was the separate asset of the wife, if the wife had not recorded her intent to administer her assets and keep their fruits, the husband would be entitled to its administration and

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by LA. R.S. 9:2821 (1950)).

15. 273 So. 2d 539 (La. App. 1st Cir. 1973).

16. LA. R.S. 9:101, 104 (1950). *See also* the remarks of the writer in *The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Matrimonial Regimes*, 28 LA. L. REV. 327, 332 (1968).

its fruits[17] and therefore obliged *vis-a-vis* his wife for its maintenance.[18] In either case, the evidence might show that the seller had understood the wife to be acting in exercise of the Louisiana husband's *customarily presumed tacit mandate* to his wife to obligate him for "expenses of the family," or, at the very least, that the husband had been enriched and the seller correspondingly impoverished without legal cause as to the husband.[19]

Miscellaneous other related decisions may be mentioned. In *American National Bank v. Rathburn*,[20] a wife living separate and apart from her husband had found and used a credit card, issued to her husband without his request, but not destroyed or returned by him, for her own purposes. The court of appeal correctly concluded the husband had not authorized the use of the credit card and could not be liable on that basis. Whether the court was correct in concluding one is not liable for the use of a credit card by one whom third persons might reasonably believe he has authorized is a matter not commented on here. In *National Bank v. Formea*,[21] a wife living separate and apart drew N.S.F. checks on an account standing in the joint names of husband and wife. The payee, the plaintiff bank, sued the husband. The court of appeal correctly gave judgment to the husband. Instead of stating the husband had not authorized the wife, however, the court should have noted simply that a party to a joint account does not obligate the other by drawing a check thereon. Each party may draw on the account, but neither obligates the other by his act in his own name. It may be noted, too, in reference to the above cases, that the tacit mandate, which husbands are presumed to have given their wives to contract in their names for ordinary expenses of the family, cannot reasonably be considered to continue once the spouses have begun to live separate and apart. Finally, in *Friendly Loans, Inc. v. Robinson*,[22] the court of appeal correctly judged the wife personally liable to third persons on a note signed by her. Indeed, since the married women's emancipation legislation[23]

17. LA. CIV. CODE art. 2386.

18. See the remarks of the writer in *The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Matrimonial Regimes*, 28 LA. L. REV. 327, 332 (1968). For a discussion in a student comment by George Bilbe, (now Assistant Professor of Law, Loyola University) see Comment, 30 LA. L. REV. 441, 446, 456 (1970).

19. LA. CIV. CODE art. 2294 (construed in the light of the principle of enrichment without legal cause underlying various rules in the Civil Code and especially articles 2301-14 on the "payment of the thing not due").

20. 264 So. 2d 360 (La. App. 3d Cir. 1972).

21. 272 So. 2d 411 (La. App. 2d Cir. 1973).

22. 268 So. 2d 710 (La. App. 1st Cir. 1972).

23. LA. R.S. 9:101-104 (1950).

there has been no excuse for not holding any married woman over eighteen years of age and not interdicted for any act in her name, even if the act was also or even primarily that of her husband.

WIFE'S CONTRACTS WITH HUSBAND

In *Carney v. Liberty Mutual Insurance Company,*[24] the court repeated the often committed error of construing article 1790 of the Civil Code to forbid the husband and wife to contract with each other except where authorized to do so by the legislation. This is the very converse of the construction of the article which its reading in full would indicate to be reasonable, for its first broad statement is limited by later phraseology that "These [special incapacities] take place only in the cases specially provided for by law under different titles of this Code."[25] The particular issue was whether the spouses might be deemed to have formed a partnership, and the court was correct in stating spouses are unable to do so under our law. But the basis is not article 1790, but article 2329, which forbids the conventional alteration of matrimonial regimes after marriage, for any partnership entered into by husband and wife after marriage would alter their matrimonial regime.

RAMIFICATIONS OF THE ERRONEOUS NOTION THAT THE WIFE "OWNS" ONE-HALF OF THE COMMUNITY OF GAINS[26]

Years ago *Phillips v. Phillips*[27] declared the wife to have a "vested interest" in one-half the community of gains at every moment of its existence. This was a strange conclusion indeed; for when one considers the right of the wife to renounce the community at its dissolution, with all that implies for the avoidance of community

24. 277 So. 2d 175 (La. App. 3d Cir. 1973).

25. LA. CIV. CODE art. 1790: "Besides the general incapacity which persons of certain descriptions are under, there are others applicable only to certain contracts, either in relation to the parties, such as a husband and a wife, tutor and ward, whose contracts with each other are forbidden; or in relation to the subject of the contract, such as purchases, by the administrator, of any part of the estate which is committed to his charge, and the incapacity of the wife, even with the assent of the husband, to alienate her dotal property, or to become security for his debts. These take place only in the cases especially provided by law, under different titles of this Code."

26. This portion of the discussion of Matrimonial Regimes decisions was written and edited before the decision in *Creech v. Capitol Mack, Inc.*, ___ So. 2d ___ (La. 1973). The decision not only reversed the court of appeal but also overruled *Green* and, in part at least, *Phillipps* and *Fazzio*.

27. 160 La. 813, 107 So. 584 (1926).

liabilities,[28] one would be compelled to say something that is very strange in law: that one, by the sheer act of his (or her) will, might avoid his (or her) obligations.[29] This is not to say the wife does not have a *present right as to* the community of gains; but it is only a right to elect to accept it, renounce it, or accept it with benefit of inventory as of the moment of its dissolution. This is an important and valuable right indeed, and it is one which the law has sought to protect with increasing vigor; but it falls very short of a present interest *in* the community of gains. Nor is this to say the husband is *owner* of the community during its existence. The Civil Code describes him as *its* "head and master,"[30] as its steward, as it were, but no more; and whereas this stewardship has caused the community to be considered a part of his patrimony, so far as third persons are concerned,[31] he is not truly owner *vis-a-vis* the wife.

Erroneous decisions often have a cancerous growth, for lawyers have a way of seizing on anything which they might extend logically to achieve the ends their clients desire. Thus we have had such decisions as *Fazzio v. Krieger,*[32] in which the husband's alimentary obligee was declared able to execute his judgment against the husband's half of the community assets only, and *U. S. Fidelity and Guaranty Insurance Co. v. Green,*[33] in which the husband's antenuptual creditors were not permitted to execute against the community assets at all because of the alleged one-half interest of the wife therein. Each of these last mentioned decisions was followed in the last term, for judges are reluctant to depart from previous decisions of judges above them. *Fazzio* was followed in this term by *White v. Klein*[34] and *Green* by *Creech v. Capitol Mack, Inc.*[35] But there were other erroneous decisions, before and during the last term, which may be considered the progency of *Phillips. Gebbia v. City of New Orleans*[36] allowed a wife to sue to enforce a community right on the theory she was part owner of the community and therefore with sufficient interest to sue if the defendant did not take exception timely. This decision may be

28. LA. CIV. CODE art. 2410.

29. Louisiana Civil Code article 3182 declares everyone obliged to discharge *his* obligations from *all* his assets and does not provide for any exception.

30. LA. CIV. CODE art. 2404.

31. The traditional view was expressed in *Davis v. Compton,* 13 La. Ann. 396 (1858) and other decisions.

32. 226 La. 511, 76 So. 2d 713 (1954).

33. 252 La. 227, 210 So. 2d 328 (1968).

34. 263 So. 2d 496 (La. App. 1st Cir. 1972).

35. 268 So. 2d 695 (La. App. 1st Cir. 1972).

36. 249 La. 409, 187 So. 2d 423 (1966).

considered the precursor of the 1970 amendment to article 686 of the Louisiana Code of Civil Procedure, giving the wife the exclusive right to sue for her earnings, though community assets, the most serious inroad ever on the husband's position as head and master of the community of gains. Now, in the last term, arguments appear to have been made which must have been inspired by *Phillips* and its offshoots. Thus in *Fulmer v. Harper*[37] there was an attempt to satisfy the debts of a bankrupt wife from the effects of the community of gains, and in *Holmes v. Holmes*[38] a wife attempted to exercise her husband's claim to workmen's compensation benefits on the ground it was a community asset in which she had an interest. Fortunately these contentions were not honored. Such claims, however, will be made until *Phillips, Fazzio, Green, Gebbia*, and other cases of the kind are overruled.

37. 265 So. 2d 355 (La. App. 4th Cir. 1972).
38. 270 So. 2d 578 (La. App. 3d Cir. 1972).