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MATRIMONIAL REGIMES

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HUSBAND'S ANTENUPTUAL OBLIGATIONS—STRUCTURE OF COMMUNITY OF GAINS

Creech v. Capital Mack, Inc.,[1] is a superb decision in the best tradition of the Civil Law. It must be read and studied not only for its result—a judicial rectification of past serious errors in the construction of the law—but also for the example it provides of the clarification and comprehension which can result from a study of the law's background sources. The opinion should stand as a monument to its author and to his colleagues who, in concurring with him, demonstrated their intellectual honesty and the courage to reverse their previously firmly announced convictions.

The question in *Creech* was a simple one: may an antenuptual creditor of the husband enforce his right against an asset forming part of the community of gains? Five years before in *United States Fidelity & Guaranty Co. v. Green*,[2] the Louisiana supreme court had answered the question in the negative. *Creech* answered it in the affirmative.

The decision in *Green* had been based on two simple arguments. Civil Code article 2403 appears to say unequivocally that the antenuptual debts of each spouse are to be paid out of the separate assets of the debtor spouse;[3] and, inasmuch as judicial decisions since 1926[4] have affirmed the wife's half ownership of the community assets at all moments of its existence, to permit the husband's antenuptual [and therefore separate] creditor to enforce his right out of the community assets would be to permit the use of the wife's assets to satisfy her husband's obligation. The opinion in *Creech* skillfully resorts to Spanish law sources to demonstrate that whereas the wife does have a *protectible interest* in the community of gains under the Spanish type regime in force in Louisiana, the totality of the assets falling into the community of gains (and all the community debts as well) form part of the husband's patrimony until its dissolution, entitling his

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1. 287 So. 2d 497 (La. 1973).

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

3. LA. CIV. CODE art. 2403: "In the same manner, the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage must be acquitted out of their own personal and individual effects."

4. The principal decisions are *Phillips v. Phillips*, 160 La. 813, 107 So. 584 (1926) and *Fazzio v. Krieger*, 226 La. 511, 76 So. 2d 713 (1954).

creditors, antenuptual as well as postnuptual, to reach them in satisfaction of their rights (and enabling the wife to renounce one-half the community debts at dissolution if she will renounce her right to demand one-half the community assets). Having established this elementary point of the Spanish system, Justice Barham proceeds to show both that the words of Civil Code article 2403 were taken from a passage in Febrero's notarial manual[5] in which that writer was speaking of the payment of debts *after dissolution* of the regime, not during its existence, and that to construe article 2403 literally, rather than in the light of the structure of the community of gains as evidenced by all articles on the subject and their Spanish sources, would result in an internally inconsistent set of rules on the subject. Finally, having achieved this understanding, the opinion overrules *Green* and also *Phillips v. Phillips*[6] and *Fazzio v. Krieger*[7] insofar as they declare the wife to own community assets in indivision with the husband before dissolution of the regime.[8]

An unfortunate expression in the *Creech* opinion is that describing the wife's interest in the community assets before dissolution of the regime as one of "imperfect ownership." Yet those who will have the good will to seek Justice Barham's meaning rather than snipe at a slip will not have difficulty. The opinion is clear enough. The wife has an interest in being able to accept or renounce the community of gains at its dissolution and the law provides what devices it can to protect her in this right without depriving the husband of the freedom he should have to employ and invest the community assets for their common good.

The opinions in *Green* and *Creech* are living proof of the necessity of understanding our institutions well if misconstructions and misapplications are not to result. This is an instance in which legislative positivism and its general foreclosure against resort to historical sources of the law—the cultural framework of the legal rules—would have compelled the continued application of the *Green* misconstruction. As long as our supreme court demonstrates the application and skill evident in *Creech,* the attorneys of the state will need to study

5. FEBRERO, LIBRERIA DE ESCRIBANOS (1789).

6. 160 La. 813, 107 So. 584 (1926).

7. 226 La. 511, 76 So. 2d 713 (1954).

8. The overruling of *Green, Phillips,* and *Fazzio* deprives *United States v. Mitchell,* 403 U.S. 190 (1971), of its false foundation. There the United States Supreme Court declared a wife liable personally for income tax due on half the community income, arguing that the United States tax laws impose liability for the tax on the owner of the income. If the wife is not owner, as *Creech* declares, she should not be liable personally for the tax.

our civil law more deeply and with that they will come to appreciate it more.

SUIT TO RECOVER LOSS OF EARNINGS BY WIFE

Article 686 of the Code of Civil Procedure as amended in 1970[9] declares the wife "is the proper party plaintiff" to sue for her earnings and similar income even though such income is a community asset. The writer construes this amended article to mean that the wife alone may sue for her earnings and similar revenues. Does this construction mean, however, that the wife alone may sue to recover for her loss of earnings attributable to her injury caused by another's delict? *Titard v. Lumberman's Mutual Casualty Co.*[10] allowed a husband to recover for this kind of loss by the wife without discussing article 686 as amended, even though the suit had been filed after the effective date of the amendment. May a distinction be made between a suit to recover earnings and one to recover for a loss of earnings? The writer thinks not. The purpose of the amendment to article 686 must have been consistent with the present tendency to give the wife more control over her earnings and it is submitted that a recovery for loss of earnings should be considered in the same category.

HUSBAND'S RIGHT TO ADMINISTER WIFE'S PARAPHERNALIA

American Indemnity Co. v. Leon Godchaux Clothing Co.[11] reached the conclusion that a husband, living with his wife under the community of gains, could act in his own name to insure the paraphernalia of his wife, demand payment in his name for losses of his wife's paraphernalia covered by the policy, and subrogate the insurer to his wife's rights against the parties responsible for the losses. The decision is correct, but the opinion relies entirely on the law and jurisprudence before 1944 and does not mention the effect of article 2386 as amended in 1944.

In Louisiana both under the Spanish laws[12] in force at the time of the enactment of the Digest of 1808[13] and at all times thereafter, the wife has had the right to administer her paraphernal assets without the assistance of her husband.[14] The husband, nevertheless, has

9. La. Acts 1970, No. 344.

10. 291 So. 2d 857 (La. App. 3d Cir. 1974).

11. 294 So. 2d 623 (La. App. 4th Cir. 1974).

12. Pugh, *The Spanish Community of Gains in 1803: Sociedad de Gananciales*, 30 LA. L. REV. 1, at 14, 15 & n.102 (1969).

13. A Digest of the Civil Laws Now in Force in the Territory of Orleans (La. Digest of 1808).

14. LA. CIV. CODE art. 2384 and corresponding articles of previous civil codes.

been entitled to administer the wife's paraphernalia as long as the wife does not demand its exclusive administration.[15] If both the wife and husband administer the paraphernalia, it is to be considered administered by the husband.[16] Until 1944 the wife could claim her exclusive right simply by opposing her husband's administration in fact, no matter what the matrimonial regime of the spouses. This rule survives today for the wife whose matrimonial regime excludes the community of gains. Under the 1944 amendment to article 2386 of the Civil Code, however, the wife may not claim the exclusive right to administer her paraphernalia unless she files an authentic declaration to this effect in the parish in which the spouses are domiciled.[17] If this construction of the 1944 amendment is correct, then the husband and wife are entitled each to the non-exclusive administration of the wife's paraphernalia until she records the proper declaration.

Dissolution of Community by Judgment of Separation or Divorce

Article 155 of the Louisiana Civil Code currently provides that a judgment of separation [or of divorce] retroactively dissolves the matrimonial regime of the spouses as of the date on which the suit was filed. *Hodson v. Hodson*[18] construed this to mean that the community of gains of the spouses was dissolved as of the date of the filing of the defendant's reconventional demand, on which the separation was granted, rather than on the date on which the plaintiff filed suit. The decision is logical, but the contrary conclusion would have been sustainable under the language of article 155 and would have had the advantage of ending the community of gains somewhat sooner after the spouses' cessation of the common life. Indeed, the amendment of article 155 to terminate the community of gains—as between the spouses, but not as to third persons—as of the time their common life ceased would improve our law. There is no basis for a community of

15. *Id.* arts. 2387, 2388 and corresponding articles of previous civil codes.

16. *Id.* art. 2385 and corresponding articles of previous civil codes.

17. *Id.* art. 2386, para. 1, *as amended by* La. Acts 1944, No. 286: "The fruits of the paraphernal property of the wife, wherever the property be located and however administered, whether natural, civil, including interest, dividends and rents, or from the result of labor, fall into the conjugal partnership, if there exists a community of acquets and gains; unless the wife, by written instrument, shall declare that she reserves all of such fruits for her own separate use and benefit and her intention to administer such property separately and alone. The said instrument shall be executed before a Notary Public and two witnesses and duly recorded in the Conveyance Records of the Parish where the community is domiciled."

18. 292 So. 2d 831 (La. App. 2d Cir. 1974).

gains during a period of separation in fact followed by a suit for and judgment of separation or divorce.

SUITS PENDING SEPARATION OR DIVORCE

Guarino v. Guarino[19] may evidence a serious misconception of the effect of the rule of article 155 of the Civil Code on the husband's capacity, pending suit for separation or divorce, to [sue or] be sued and to stand in judgment on a community [right or] obligation. The facts were that, while a separation suit was pending, the husband failed to take exception to a suit filed against him on notes — presumably signed during marriage — and allowed a default judgment to be rendered against him.[20] The wife sought to have the judgment declared null and, if the writer reads the opinion correctly, both the trial and appellate courts agreed with her on the basis that the judgment of separation operated retroactively to the day the separation suit had been filed and that this retroactivity deprived the husband of the capacity to be sued and stand in judgment as to a community affair.[21]

This decision is not correct. Article 155 must be understood to mean no more than that, *as between the spouses,* that is to say, *for accounting between them,* the judgment of separation dissolves the community of gains retroactively to the day on which the separation suit was filed. It cannot mean more without conflicting with articles 149 and 150 which, in forbidding only *certain* acts to the husband, imply the continuation of the remainder of his authority as administrator of the community of gains (under article 2404) until the rendition of the judgment of separation. Neither article 149 nor article 150 deprives the husband of the capacity to sue and stand in judgment with regard to community rights and obligations. Article 150 merely declares it "unlawful" for the husband to "contract any debt on account of the community" or to alienate community immovables during this time; and even an alienation of a community immovable by the husband in this period is *valid* if it is not made "with the

19. 282 So. 2d 584 (La. App. 4th Cir. 1973).

20. The fact that the suit was filed by the husband's mother long after the obligations had prescribed and that the husband failed to plead prescription may suggest that the purpose of the suit was to deprive the wife of a portion of her interest in the community of gains. The decision, however, appears not to have taken this into consideration, and should not have, for an obligor is not obliged to plead prescription.

21. The writer finds the opinion and decree confusing, for the opinion supports the lower court's decision that the default judgment might be attacked and yet the decree reads as if that decision was being set aside. The writer believes, therefore, that the court of appeal intended to set aside the default judgment in the suit against the husband.

fraudulent view of injuring the rights of the wife." Article 149 gives the wife the right to demand an injunction forbidding the husband to dispose of community assets of every kind, but unless the injunction issues the husband preserves those rights not denied him in article 150, and the capacity to sue or be sued on community rights and obligations is not denied him under that article.

PENSION PLANS AND OTHER EMPLOYEE BENEFITS

Two interesting decisions on employee benefits were rendered by the Fourth Circuit Court of Appeal. They demonstrate forcibly that there is need to study and legislate on the manner in which interests in such fringe benefits should be regulated under the regime of the community of gains.

In *Lynch v. Lawrence*[22] the husband had been employed by the same company before and during marriage under the community of gains, had acquired during marriage the eventual right to receive payments under a pension plan financed totally by the employer, but was not entitled to receive such payments until both retirement and attaining age sixty-five. Reasoning correctly that the eventual payments should be regarded as compensation for services rendered by the husband, the court decided the wife should share in these payments, when actually made to the husband in the future, according to a formula which might reflect her just interest therein deriving from the fact that the husband's earnings enter the community of gains as long as it lasts. The court very wisely refrained from considering the husband obligated as of the moment of the dissolution of the community to pay the wife one half the estimated value of his interest in the pension plan.

The formula determined upon by the court to compute the wife's share of the future pension payments, however, did not do full justice to the husband. The wife was declared entitled to receive a share in each such payment corresponding to the ratio of (1) one-half of the discounted value of the husband's interest in the pension plan as of the termination of the community of gains to (2) the discounted value of his interest in the pension plan as of his retirement and attaining age sixty-five. Two defects may be discovered in the formula. The first is that the court failed to take into consideration that the husband's interest as of the dissolution of the community of gains reflected years of employment before his marriage. The second is that the court failed to provide for the possibility that the husband might remarry before retirement and thus that some of his retirement pay-

22. 293 So. 2d 598 (La. App. 4th Cir. 1974).

ments would reflect earnings during the second marriage. The formula reached by the court, nevertheless, is good in principle; it needs only refinement in application.

The other decision, that in *Succession of Mendoza,*[23] is less understandable. Again the court was dealing with a benefit plan financed by the employer alone, and again the husband had been employed before as well as after marriage. Here, however, the benefit was not one of pension payments, but of a lump sum payable on the employee's death to a "beneficiary" named by him or to his succession. The court decided the death benefit was similar to insurance and should be treated in the same way. Accordingly, the court reasoned, the employee having become entitled before marriage to have the death benefit paid to his beneficiary or to his succession on his death, the death benefit should be regarded as his separate property, he not having named a beneficiary. Judge Lemmon concurred with the result, (mistakenly) considering the court "barred by the authority of [previous] decisions," but argued that the death benefit should not have been considered a part of his succession assets, but only a right of his heirs, the husband never having had a right to collect the proceeds during his lifetime.

It seems safe to say that both the majority of the court and Judge Lemmon were in error. Judge Lemmon's position that the death benefit, though controllable by the deceased, cannot be considered an element of his patrimony, ignores the fact that a right to control economic value is a thing, an element of patrimony. Insurance proceeds payable to a beneficiary other than the insured are not counted as part of the insured's patrimony under Louisiana law only because of Louisiana's decision not to subject such proceeds to the claims of the deceased's heirs and creditors. Certainly such proceeds form a part of one's succession so far as United States tax law is concerned, and justly so. The majority opinion is found wanting in that the amount of the death benefit payable here depended on days of employment after marriage as well as before marriage, and thus the death benefit truly reflected compensation for services after marriage as well as before, or compensation while the community of gains was in existence as well as before. Life insurance proceeds, on the other hand, usually are fixed in amount from the time the policy is taken out. In any event, employee benefits are earnings and any reasoning which permits an employee to deprive his spouse of a half interest therein must be considered in violation of the marriage contract of the community of gains.

23. 288 So. 2d 673 (La. App. 4th Cir. 1973).