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MATRIMONIAL REGIMES

Robert A. Pascal*

CHARACTERIZATION OF ASSETS

*Due v. Due*¹ dealt with the manner in which an attorney spouse's contingent right to a fee, pursuant to a contract made during the existence of the community of gains and not yet due on its dissolution, is to be included, if at all, in the inventory and partition of the community. The trial court had agreed with the attorney husband that the item should not form part of the community inasmuch as the fee would not become due, and therefore not be acquired, until after the termination of the regime. The appellate court had reversed,² reasoning that the fee, if ever it became due, was to be considered partially a community asset and partially a separate asset in proportion to the values of the services rendered under the contract before and after the dissolution of the regime. The supreme court reached the same conclusion. This writer considers the result correct. The supreme court's opinion, however, which was similar to that of the appellate court,³ failed to appreciate the full meaning of article 2402 of the Louisiana Civil Code. The subject must be explored.

Both the appellate and supreme courts succumbed to the error of treating the contingent right to the fee as an *acquisition*. It was not an acquisition, however, but a *product* of labor or industry. The court's opinion mixes the two disparate ideas in a single sentence:

[W]hatever the theoretical nature of the right, a contingent fee contract creates in the husband a patrimonial right, i.e. (in ordinary language) "property", which is acquired by him during the marriage, Article 2334, and which (to the extent that his labor and industry contribute during the marriage, Art. 2402) is an asset of the community⁴

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1. 342 So. 2d 161 (La. 1977).

2. 331 So. 2d 858 (La. App. 1st Cir. 1976).

3. See this writer's brief remarks on the appellate court's opinion in last year's symposium, *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Matrimonial Regimes*, 37 LA. L. REV. 358, 362-63 (1977). These remarks, however, did not appear in print until after the supreme court had rendered its decision.

4. 342 So. 2d at 163-64.

Under article 2402, *products* of labor and industry and *acquisitions* by purchase or similar juridical acts are distinguished. In the instance of products, it is the expenditure of the labor or industry of a spouse during the existence of the regime that characterizes the product as a gain forming part of the common fund. In the instance of acquisitions by purchase or other commutative transactions, however, it is the occurrence of the juridical act during the regime (article 2402) coupled with the use of community assets as the prestation (article 2334 since 1912⁵) that causes the thing acquired to become a community asset. Stated in terms of principle rather than rule, articles 2402 and 2334 give the spouses a usufruct-like right over their assets and energies. Things produced by assets (fruits) and things produced by energies (products) become community assets as original acquisitions, therefore, and things acquired in exchange for community assets (acquisitions by purchase and the like with community funds) become community assets by real subrogation. To inquire, therefore, whether a right arising under a contingent fee contract is a "thing" acquired during the regime is to confuse the rule regarding acquisitions in exchange for things already forming part of the community with that on products of labor or industry. Thus, the question as presented to the court and as dealt with by it was, as this writer noted in last year's symposium, a false one.⁶ Confronted with the problem of characterizing a product of labor or industry as a community or separate asset, one must consider it a community asset to the extent that the labor or industry expended during the regime contributed to its realization. Whether the product is realized during or after the existence of the community regime is irrelevant.⁷

In the light of what has been said immediately above, one might seem compelled to challenge the decision in *Broussard v. Broussard*.⁸ But such is not the case. Mr. Broussard was injured while single, but recovered for his injury after marriage. Part of the damages recovered had been awarded

5. 1912 La. Acts, No. 170, amended article 2334 to provide in part that acquisitions with separate assets are themselves separate assets. Hence, since 1912, only those things (or portions thereof) acquired with community assets properly are characterizable as community assets.

6. *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Matrimonial Regimes*, 37 LA. L. REV. 358, 362-63 (1977).

7. The court did not consider the question, but it must be assumed that costs incurred in earning the fee are to be characterized as community or separate debts according to the same formula, whether or not the contingent fee ever becomes due.

8. 340 So. 2d 1309 (La. 1976).

for loss of future earnings. After divorce, Mrs. Broussard claimed half the amount representing loss of earnings during the marriage. The court of appeal had agreed with Mrs. Broussard. The supreme court reversed. The court reasoned that, although products of industry or labor during marriage and the husband's damages in lieu thereof are community assets under the general rule of article 2334 of the Civil Code, that article itself characterizes the action therefor, and hence the damages themselves, as the separate assets of the husband if he was living separate from her at the time of injury by reason of fault on her part (and this even if the spouses should become reconciled). For all the more reason, the court believed, the action and the damages recovered thereunder should be a man's separate assets if he is single at the time of the injury. The logic here, however, bound up as it is with the idea that the damages are part of an "action" arising at the time of injury, does seem inconsistent with *West v. Ortego*,⁹ in which recoveries for losses of earnings after divorce, but attributable to an injury during marriage, were characterized as separate assets of the husband. The court recognized this in its opinion in *Broussard*. The decision, nevertheless, was correct. Article 2334 treats as separate assets of the husband those damages stemming from an injury to him at a time when the husband is excused from living with his wife. For all the more reason, then, damages recovered by a man for an injury suffered before marriage should be his separate assets. This construction of article 2334, in any event, does permit the reconciliation of *West* and *Broussard*. It may be offered as common sense, moreover, that spouses must be assumed to accept each other as they are at marriage, with whatever defects they may have, including reduced earning capacity.¹⁰

This writer, being of the opinion that the law is to be found in the legislation rather than in prior decisions, no matter how uniform, must take exception to *Barnett v. Barnett*.¹¹ Once more the acquisition of an immovable by a husband with his separate funds was characterized as a community thing because the act of acquisition did not contain the judicially imposed "double declaration" that it was being made with his separate funds and as his separate property. The court was aware of and cited the published comments of this and other writers noting the proper construction of the legislation, but chose to adhere to the judicial practice

9. 325 So. 2d 242 (La. 1975).

10. Mrs. Broussard contended, in addition, that if the entire award constituted separate assets of the husband, he had made a donation of half of it to her. This contention is not discussed here.

11. 339 So. 2d 495 (La. App. 2d Cir. 1976).

for "policy considerations." This writer would be the last to challenge the moral obligation of the judiciary to refuse to apply the dictates of legislation which compelled a moral wrong, but the rule of Civil Code article 2334—that things acquired with separate things are themselves separate things—hardly can be considered one of that kind. The element of certain injustice not being present, the judiciary must not substitute its judgment for that of the legislature. Indeed, the judicial importation of the "double declaration" requirement from French law, where it made sense under the regime of the *community of movables*, to Louisiana, where it makes none under the *community of gains*,¹² itself has worked repeated injustices to husbands. The judicial practice may not even be considered to have generated a custom, for the many attacks on it year after year show that it has not enjoyed the "uninterrupted acquiescence" of the people.¹³ Nor, contrary to the court's suggestion, may the several amendments to article 2334 without attempt to legislate against the double declaration requirement¹⁴ be considered a legislative acceptance of it. There never has been an attempt to amend the portion of article 2334 that specifies that things acquired with separate assets are separate things. The amendments since 1912 all have dealt with the sale, mortgage, or lease of community assets and the characterization of damages for personal injuries recovered by the husband. It is well known, too, that proposers of amendments to articles of the Civil Code limit their efforts to those issues that are their immediate objectives without considering other portions of the article being amended; indeed, attempts to do so are frowned upon by the legislators themselves.

PURCHASES BY SPOUSES SEPARATE IN ASSETS AND LIABILITIES

The regime of separation of property (separation in assets and liabilities) is rare in Louisiana, but its incidence is increasing. In this regime the spouses are as if not married to each other insofar as concerns their patrimonial affairs, except to the extent each is obliged to contribute to the expenses of the marriage. If two unmarried persons, therefore, or two spouses separate in property, acquire an asset in both their names without an indication that their respective undivided interests are unequal, then it is reasonable to assume that their interests are equal. This was the decision reached in *Morrison v. Richards*.¹⁵ The fact that the husband had

12. See this writer's discussion of the issue in *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Matrimonial Regimes*, 36 LA. L. REV. 413 (1976).

13. LA. CIV. CODE art. 3.

14. 1920 La. Acts, No. 186; 1962 La. Acts, No. 353; 1976 La. Acts, No. 679.

15. 343 So. 2d 375 (La. App. 4th Cir. 1977).

paid the entire price invites inquiry, as the court observed, whether he had advanced half thereof to the wife or had made her a donation of the amount, but it does not alter the interests of the spouses in the thing purchased.¹⁶

THE WIFE AS PUBLIC MERCHANT

*Riverlands National Bank v. Clement*¹⁷ dealt with the husband's personal liability to repay a loan made by the wife in community, a public merchant, for the purchase of business supplies and furnishings. The court declared the husband not liable because he had not ratified the loan and because "the community" had not benefited substantially from the business's funds. Articles 131 and 1786 of the Louisiana Civil Code were not mentioned, yet these provisions together indicated that the husband who *permits* his wife to act as a public merchant is liable personally for her acts in trade if theirs is a community regime. There was evidence that the husband "had objected" to the wife's business venture, but the opinion does not indicate he had *forbidden* her privately or publicly to act as a public merchant, or that he had communicated his prohibition to the lender. If such were the facts, then the husband was liable for the loan under articles 131 and 1786.¹⁸

16. In *McGhee v. Harris*, 333 So. 2d 440 (La. App. 3d Cir. 1976) the court applied another familiar judicial rule, that the spouse who joins in the act of the other to admit the latter's acquisition with separate funds is estopped to deny the separate character of the acquisition, even if there is no declaration the acquisition is being made as a separate thing, but that forced heirs are not so estopped.

17. 343 So. 2d 1199 (La. App. 4th Cir. 1977).

18. For more discussion of the obligations of the husband whose wife is a public merchant, see R. PASCAL, LOUISIANA FAMILY LAW COURSE § 6.10 (1973 & 1975).