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THE WORK OF THE LOUISIANA APPELLATE COURTS FOR THE 1977-1978 TERM

A Symposium

[*Editor's Note.* The articles in this symposium discuss selected decisions of Louisiana appellate courts reported in the advance sheets dated July 1, 1977, to July 1, 1978.]

PRIVATE LAW

LAW IN GENERAL

*Robert A. Pascal**

LEGISLATION BY SILENCE

The opinion in *Phillips v. Nereaux*¹ contains the amazing proposition that if the legislature has not enacted law contradicting a judicial practice inconsistent with the legislation on the subject, the practice stands as a "judicially created requirement." The writer knows of only two imperative sources of rules of legal order in Louisiana, legislation as defined in article 1 of the Civil Code and custom in accordance with article 3. A "judicially created requirement" is not legislation, and it is not custom. Custom can come into being only by popular acquiescence. The particular "judicially created requirement" dealt with in *Phillips* is the "double declaration" of the purchaser of an immovable with separate funds if he would avoid a "judicially created" characterization of the immovable as a community asset. That the judicial practice and characterization have not been accepted popularly is attested to by the frequent attacks upon its legitimacy in legal writings and repeated suits down to *Phillips*.²

THE RIGHT TO A MEANINGFUL TRIAL AND TO A MEANINGFUL APPEAL

Having pronounced affirmatively on legislation by silence, the opinion in *Phillips v. Nereaux* proceeds (1) to find the

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1. 357 So. 2d 813 (La. App. 1st Cir. 1978).

2. See the list of cases cited in *Phillips*, 357 So. 2d 813, 818.

“judicially created requirement” of a “double declaration” in violation of the equal protection clauses of the Louisiana and United States Constitutions, but then (2) to refuse to declare it invalid because the Louisiana Supreme Court had affirmed its constitutionality implicitly in a previous decision by denying a writ of review.³ The court openly confesses that it refrains from giving judgment according to its construction of the law because the Louisiana Supreme Court has “mandated” lower courts to follow its decisions.⁴ It is submitted that this subservience renders trials in lower courts and appeals meaningless and wasteful of the litigants’ and the judiciary’s time and money insofar as the issue of law is concerned, for under the practice the litigant has no hope of success in either court. The writer is not suggesting that respect should not be paid to decisions of higher courts, or that judges on lower courts should not be prudent and avoid useless appeals to higher courts. But if the trial or appellate judges believe a litigant to be in the right and that the error in a previous higher court judgment can be demonstrated, then it would seem obligatory on the judge or judges to render a decision in conformity with the law as they see it. This is particularly true of decisions by the Louisiana courts of appeal, for in most instances review by the supreme court is not a matter of right. Human nature being what it is, the appellate judges (unlike those of the court of appeal in this instance) may not interest themselves in an argument they must ignore, and the supreme court justices may fail to give the written petition for review the same attention they would be forced to give to a matter argued orally before them. Under the present circumstances oral argument before the court of appeal on this kind of issue is useless and it is not available before the supreme court as a matter of right.

3. *Barnett v. Barnett*, 339 So. 2d 495 (La. App. 2d Cir. 1976), *cert. denied*, 341 So. 2d 1127 (La. 1977). For reasons given in discussing *Corpus Christi Parish Credit Union v. Martin*, 358 So. 2d 295 (La. 1978), *infra* at _____, the writer would not consider the “double declaration” unconstitutional if it were a rule of law; but this point is of no relevance to the present discussion.

4. 357 So. 2d 813 (La. App. 1st Cir. 1978), *citing* *Johnson v. St. Paul Mercury Ins. Co.*, 256 La. 289, 236 So. 2d 216 (1970) and *Pringle Associated Mort. Corp. v. Eanes*, 254 La. 705, 226 So. 2d 502 (1969).