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Community Property - Administration of Wife's Separate Property - Intention as to Use of Fruits Not a Criterion

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COMMUNITY PROPERTY—ADMINISTRATION OF WIFE'S SEPARATE PROPERTY—INTENTION AS TO USE OF FRUITS NOT A CRITERION—Plaintiff, wife, received income from three sources—(1) two trusts over which she had no control; (2) stocks which were subject to an agreement authorizing a brother of the plaintiff to vote said stock; and (3) interest on notes of the Jackson Brewing Company. The wife contended that the income was community property and she should be taxed on only one-half the fruits. It was her intention to administer the property for the benefit of the community and the income in question was in fact used for that purpose. The defendant contended that the income was not community property since the plaintiff's husband had not administered either alone or indifferently the wife's separate property from which the income was derived. *Held,* the question as to where the fruits fall depends entirely on whether "the husband had a hand in the management or administration of the separate property of the wife." The "mere clipping of coupons from bonds or the assisting of the wife in going to the bank box, or the giving of advice now and then" did not "constitute such an administration by the husband as is contemplated by the Code." Thus the fruits do not go into the community. *Trorlicht v. Collector of Revenue,* 25 So. (2d) 547 (La. App. 1946).

The Louisiana Civil Code provides that "The wife has the right to administer personally her paraphernal property, without the assistance of her husband;"[1] that "The paraphernal property, which is not administered by the wife separately and alone, is considered to be under the management of the husband;"[2] that "When the paraphernal property is administered by the husband, or by him and the wife indifferently, the fruits of this property, whether natural, civil, or the result of labour, belong to the conjugal partnership, if there exists a community of gains;"[3] and

1. Art. 2384, La. Civil Code of 1870.
2. Art. 2385, La. Civil Code of 1870.
3. Art. 2386, La. Civil Code of 1870. (This Article was amended by Act 286 of 1944, § 1, to read in part, "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 a 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." This amendment was not considered by the court as the issues involved occurred prior to the passing of the amendment.)

that "This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment."[4] But nowhere in the Code is there any express language which defines the word "administer" as used in these articles.

Judging from the judicial interpretations of the word, the best of which is found in *Miller v. Handy*,[5] it appears that administration involves the actual control and management of the property.[6] In order for the fruits to remain the separate property of the wife she has to retain the "sole, separate and exclusive authority"[7] over her property. The minute she permits her husband to take over the control and management, either completely or jointly with her, the fruits cease to be separate and become community property.[8] Therefore, it may be said that administration by the husband depends not so much on what the husband does as what the wife does or, in failing to do, allows her husband to do. The wife has to give her consent either tacitly or expressly. There must also be an intent for the husband to administer the property for his own benefit and that of the community. Without such an intent the administration might amount to no more than that of an agency in which case the fruits would still be sep-

4. Art. 2402, La. Civil Code of 1870, as amended by Act 68 of 1902.

5. Miller v. Handy, 33 La. Ann. 160, 164 (1881) which says, "What is meant by the wife's administration 'separately and alone', is the retention of the administration under her sole, separate and exclusive control and authority, with the view of making the revenues her own. What is meant by leaving the administration to her husband is the exercise of a voluntary election, by which she abandons her own right of authority and control and suffers the husband to manage, not as her agent and subject to her authority, but as if the property were his own. So long as the acts of the spouses make it clear and certain that the wife intends to reserve the administration to herself and for her own benefit, and to permit no acts to be done in reference thereto except by herself either in person or through properly constituted agents, and that the husband does not assume to interfere in the administration except as the express and open agent of the wife, we can see nothing to prevent the administration from being considered as that of the wife 'separately and alone', in the sense of the law."

See also Paul v. Arnoult, 164 La. 841, 843, 114 So. 706, 708 (1927) in which it was said, "Such a case (referring to a case of separate property of the wife under the administration of her husband) is presented only when the husband, with the consent of the wife, uses the separate estate of the wife *for his own benefit* or that of the community. It is not presented when the husband acts merely as the agent of his wife and *for her benefit*." Accord: Lambert v. Franchebois, 16 La. 1, 5 (1840) which says, "the paraphernal property of a married woman is not bound for the debts contracted by the husband; and, . . . the fruits, proceeding from such property, do not belong to the community, unless the wife permits the husband to administer it."

6. Black's Law Dictionary, p. 37; Webster's New International Dictionary of the English Language, Second Edition, p. 34.

7. Miller v. Handy, 33 La. Ann. 160 (1881).

8. Arts. 2363 and 2385, La. Civil Code of 1870.

arate property.[9] It is not meant to imply, however, that such consent and intent without an actual administration by the husband would determine the nature of the fruits.[10]

Property in possession of, and administered by, the husband is presumed to belong to the community.[11] The husband is presumed to exercise administration until the contrary be shown, and the burden of proof is on those who contest it.[12]

It has been argued in federal tax cases that because a wife "who has left to her husband the administration of her paraphernal property, may afterwards withdraw it from him,"[13] she, in effect, never actually loses the administration, and that therefore the fruits never go into the community. The courts, however, have not sanctioned this idea.[14]

There are some proponents who contend that the purpose for which the fruits are used and the intent of the wife as to how they should be used are determining factors as to whether the fruits are separate or community property.[15] Although the courts have held that there is no basis for such a theory, the idea probably originated from Article 1578 of the Code Napoleon of 1804 which was incorporated verbatim[16] in the Louisiana Civil Code of 1808[17] in which it was stated that "If the husband has enjoyed the paraphernal effects of his wife, without a letter of attorney, but without any opposition on her part, he is bound at the time of dissolution of the marriage, or on the first demand of his wife,

9. Simoneaux v. Helluin, 27 La. Ann. 183 (1875); Risher v. Risher, 179 La. 1, 153 So. 1 (1934); K. & M. Store, Inc. v. Lewis, 22 So. (2d) 769 (La. App. 1945). Accord: Lucas v. Commissioner of Internal Revenue, 134 F.(2d) 319 (C.C.A. 5th, 1943); Dodd v. Succession of Orillion, 14 La. Ann. 68 (1859); Miller v. Handy, 33 La. Ann. 160 (1881); Paul v. Arnoult, 164 La. 841, 114 So. 706 (1927); Guss v. Mathews, 179 La. 1033, 155 So. 765 (1934).

10. Commissioner of Internal Revenue v. Hyman, 135 F.(2d) 49 (C.C.A. 5th, 1943); Trezevant v. Holmes, 38 La. Ann. 146 (1886). But cf. Miller v. Handy, 33 La. Ann. 160 (1881); Paul v. Arnoult, 164 La. 841, 114 So. 706 (1927).

11. Art. 2384, La. Civil Code of 1870; Bostwick v. Gasquet, 11 La. 534 (1838); Rashel v. Leroux, 18 La. Ann. 588 (1866); Houghton v. Hall, 177 La. 237, 148 So. 37 (1933).

12. Breaux v. Leblanc, 16 La. Ann. 145 (1861); Fortier v. Barry, 111 La. 776, 35 So. 900 (1904); Houghton v. Hall, 177 La. 237, 148 So. 37 (1933).

13. Art. 2387, La. Civil Code of 1870.

14. Commissioner of Internal Revenue v. Hyman, 135 F.(2d) 49 (C.C.A. 5th, 1943).

15. Miller v. Handy, 33 La. Ann. 160 (1881); Paul v. Arnoult, 164 La. 841, 114 So. 706 (1927).

16. When translating from the Code Napoleon the authors of the Code of 1808 translated the word "fruits" incorrectly and put the word "profits" in the article. 3 Louisiana Legal Archives, Compiled Editions of the Civil Codes of Louisiana (1940) 1311.

17. Art. 60, La. Civil Code of 1808.

only to account for existing fruits, and he is not accountable for such as have been previously consumed." The article was changed, however, in 1825,[18] and since that time the word "administer" appears rather than the word "enjoy." Hence, it would seem that there is now no basis for the theory that the "use" should determine the status of the property.

There are a number of cases analogous to the one under discussion, but in each case where it was held that there was administration by the husband it was clear that he had the actual control and management of the property[19] and that there was no agency. Acts that naturally resulted from the marriage relationship could "not in law be considered as substantive acts of administration."[20] In the principal case it is clear that there was no administration of the trusts by the husband. They, of necessity, had to be administered by the trustee. It is equally clear, judging from the decisions cited above, that there was no administration of the stocks and interest bearing notes by the husband. The proceeds from these securities were in effect continuing gifts, and it is submitted that there was no administration by any one

18. Art. 2363, La. Civil Code of 1825 states, "When the paraphernal property is administered by the husband, or by him and the wife indifferently, the fruits of this property, whether natural, civil, or the result of labour, belong to the conjugal partnership, if there exist a community of gains ...." This article was incorporated in the Louisiana Civil Code of 1870 as Article 2386 and remained unchanged until 1944 when it was amended by Act 286 of 1944, § 1. The complete revision of this article in 1825 of course rendered the comments of French authorities of little or no value to American jurists.

19. Lazard v. Commissioner of Internal Revenue, 153 F.(2d) 348, 349 (C.C.A. 5th, 1946) which said that, "The property here in question was given to the wife by her father, and when the title was vested in her the property had already been leased and oil had been produced on the property. Each month the taxpayer received a check for her oil royalties. The husband had absolutely nothing to do with the management, control or supervision of the property." Dodd v. Succession of Orillion, 14 La. Ann. 68 (1859) in which the wife appointed as her agent and administrator her coproprietor. The court said, "The fact that he (the husband) was consulted by plaintiff's agent as to crops, settlement of accounts, etc., subject always to plaintiff's ratification, did not change the character of the administration. It was an administration of the wife, and not of the husband." On rehearing the court said (speaking of the husband's acts), "They were acts that naturally resulted from the relation of husband and wife, and can not in law be considered as substantive acts of administration by which rights to property are acquired." See also Commissioner of Internal Revenue v. Hyman, 135 F.(2d) 49 (C.C.A. 5th, 1943); Lucas v. Commissioner of Internal Revenue, 134 F.(2d) 319 (C.C.A. 5th, 1943); Guss v. Mathews, 179 La. 1033, 155 So. 765 (1934); Trezevant v. Holmes, 38 La. Ann. 146 (1886); Risher v. Risher, 179 La. 1, 153 So. 1 (1934).

20. Dodd v. Succession of Orillion, 14 La. Ann. 68 (1859).

unless it can be said that clipping a coupon or depositing a check is an administration of property. The conclusion that the court reached is well substantiated by all previous judicial interpretations on the subject.

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INDEMNITY—RIGHT OF MASTER AGAINST SERVANT—NECESSITY OF PRIOR JUDGMENT AGAINST CLAIMANT—A widow brought suit for $44,265 against the driver whose negligence allegedly caused her husband's death and against the driver's employer. The trial in the lower court resulted in a judgment in the widow's favor against the employer in the amount of twelve thousand dollars. Before either party appealed, the claim was compromised by the widow and the employer, the latter paying seven thousand dollars and both agreeing not to prosecute an appeal. The employer then sought indemnity from the driver in the amount thus paid the widow. He stated as his cause of action that he had been compelled to pay seven thousand dollars in order to be rid of the judgment for twelve thousand dollars and that the cause of the judgment being rendered against him was the driver's negligence in causing the death of the widow's husband. On appeal, the Louisiana Supreme Court sustained the driver's exception of no cause or right of action. This decision was based primarily upon the ground that the plaintiff employer had not been compelled by a final judgment to pay any amount to the widow. *Winford v. Bullock*, 26 So. (2d) 822 (La. 1946).

A review of the jurisprudence indicates that Louisiana is among that minority of states which allow contribution between joint tortfeasors.[1] The recent trend toward allowing such contribution has been evidenced in some states by legislative enactments[2] and in others by judicial action.[3] The Louisiana rule,

1. The general rule at common law has long been that there is no right of action for contribution between joint tortfeasors. Gobble v. Bradford, 226 Ala. 517, 147 So. 619 (1933); Central Georgia Ry. v. Swift & Co., 23 Ga. App. 346, 98 S.E. 256 (1919); Village of Portland v. Citizens' Telephone Co., 206 Mich. 632, 173 N.W. 382 (1919); Brown v. Southern Ry., 111 S.C. 140, 96 S.E. 701 (1918); City of Tacoma v. Bonnell, 65 Wash. 505, 118 Pac. 642, 36 L.R.A. (N.S.) 582 (1911).

2. Ky. Rev. Stat. (1944) § 412.030; Md. Code Ann. (Flack, Supp. 1943) art. 50, §§ 21-27; Mo. Rev. Stat. (1939) § 3658; New York Civil Practice Act, § 211-a; N.C. Code Ann. (Michie, 1935) § 618; Tex. Ann. Rev. Civ. Stat. (Vernon, 1935) art. 2212; Va. Code Ann. (Michie, 1942) § 5779; W. Va. Code Ann. (Michie, 1943) § 5482.

3. Underwriters at Lloyd's of Minneapolis v. Smith, 166 Minn. 388, 208 N.W. 13 (1926); Ellis v. Chicago & N.W. Ry., 167 Wis. 392, 167 N.W. 1048 (1918).