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Civil Code and Related Subjects: Persons

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of cattle which had escaped from the fenced area by virtue of defendant's trespass and the third item was for damage to woods, gates, et cetera.

The court refused to allow damages for the acreage already under lease as the reversionary value for releasing was too speculative both as to whether it would ever revert in the first place and second as to possible leasing value if and when it did. Royalty value was also refused as no appreciable market value could be proved nor could it be shown that the survey had affected the value in any way. The court pointed out that "the price of royalty is controlled solely by the demand."[33]

PERSONS

*Robert A. Pascal**

Marriage

State v. Golden[1] presented the issue whether a marriage celebrated in violation of Article 92 of the Civil Code is null. The article forbids priests, ministers, and magistrates to marry males under eighteen or females under sixteen years of age. It does not contain language indicating nullity of such marriages. Nor does it contain within itself any reference which would lead to that conclusion, such as a declaration that the ages listed are the minimum ages for marriage. The only reason for inferring nullity of the marriage celebrated in violation of Article 92 would be the article's position in the same chapter with other articles on causes of nullity of marriage. The supreme court interpreted the article literally as no more than a prohibition on celebrants and accordingly decided the marriage was valid.[2] It was affirmed by implication in *State v. Priest*.[3]

The marriage issue in *Cameron v. Rowland*[4] was one of fact only, whether the plaintiff's mother and alleged father, both deceased, had ever married. There being no direct proof of the fact of marriage, the court relied on the general reputation which the parties enjoyed and numerous acts of the parties indicative of

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33. 209 La. 1014, 1027, 26 So.(2d) 20, 24.

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1. State v. Golden, 26 So. (2d) 837 (La. 1946).

2. The case will be more fully discussed in a note in the March issue of the Review.

3. 27 So. (2d) 173 (La. 1946). See discussion of case infra, page 226.

4. 208 La. 663, 23 So. (2d) 285 (1945).

the existence of a legitimate relation. This type of evidence is always acceptable if better evidence is not obtainable.[5]

Separation

Incompatibility of tempers is not a cause for separation or divorce in Louisiana, but no cause other than two years voluntary separation need be alleged for the purpose of obtaining a divorce under Act 430 of 1938. Nevertheless, because the period for obtaining final divorce under that act is one year longer than that for divorce following separation from bed and board under Article 138 of the Civil Code and because the issue of fault cannot be avoided if the husband contests the wife's claim for alimony, there are frequent attempts to have any difficulties construed as "cruel treatment." *Schneider v. Schneider*[6] seems to have been such a case. The supreme court found from the evidence that the alleged cruel treatment—if any existed at all—was a direct result of incompatibility and refused to allow the separation.

Divorce

Four cases were decided on Act 430 of 1938, allowing divorce on basis of two years separation. Two consider the manner in which the separation might begin and two consider the "residence" requirement of the act.

Davis v. Watts[7] involved separation of husband and wife six months before the husband's induction into the armed services and the contention that the period of time spent in the armed forces could not be considered "separation" within the terms of the act. The court merely affirmed that such period could be considered "inasmuch as the separation took place prior to the husband's entry into the armed forces." This decision is in line with *Vincent v. LeDoux*[8] in which divorce was allowed even though the period of separation commenced voluntarily and had not been completed before the wife's confinement in an insane asylum. In *Otis v. Bahan*[9] the plaintiff husband contended the wife left him while he was away in the armed forces. The court apparently was willing to consider the possibility of such a separa-

5. See, for example, Oliphant v. Louisiana Long Leaf Lumber Co., 163 La. 601, 112 So. 500 (1927).

6. 209 La. 925, 25 So. (2d) 900 (1946).

7. 208 La. 290, 23 So. (2d) 97 (1945), noted in (1946) 6 LOUISIANA LAW REVIEW 472.

8. 146 La. 144, 83 So. 439 (1919).

9. 209 La. 1082, 26 So. (2d) 146 (1946).

tion under the act, but it concluded that the separation had not been proved.

In the opinion of the writer, these judgments are ill-advised. It seems that Act 430 of 1938 was designed to allow divorces to such persons as might demonstrate for a full two years that they are irreconcilable. Reconciliation is not probable if the parties have not the *opportunity* of coming together. It would seem especially unwise to allow *commencement* of a period of separation while a meeting of the parties is impossible because of conditions beyond their control. The trial is not being fulfilled for the two year period. Cases such as *Vincent v. LeDoux*[10] and *Leveque v. Borns*,[11] involving separation by reason of confinement for insanity, present a separate problem: the admissibility of divorces if one party cannot fulfill the marriage obligations. If divorce is to be allowed in such situation, it should be by amendment to Article 139 of the Civil Code, which lists the causes for divorce. The writer does not wish to indicate he would approve such a provision, but merely wishes to emphasize that divorce on grounds of two years separation should be allowed only if the parties have had a two-year opportunity to effect reconciliation and have failed so to do.

The cases of *Spratt v. Spratt*[12] and *Spring v. Spring*[13] both interpreted the residence requirement of Act 430 of 1938 as a requirement of domicile. This interpretation has been constant since *Lepenser v. Griffin*[14] in 1920. *Spratt v. Spratt* applied this interpretation to the facts presented therein. *Spring v. Spring* was in the same vein, but the actual decision seems to have rested on the failure of the plaintiff, a soldier stationed at Barksdale Field for over two years, to show that he ever performed any act which would evidence an intention to remain in Louisiana as a domiciliary of the state.

Reconciliation. Articles 152-154 of the Civil Code provide that the action of separation from bed and board or of divorce shall be extinguished by a *reconciliation* of the parties, either after the facts which might have given grounds to such action or after the action has been commenced, but fail to define reconciliation. In *Hornsby v. Hornsby*[15] the defendant contended

10. Supra, note 8.
11. 174 La. 919, 142 So. 126 (1932).
12. 27 So. (2d) 154 (La. 1946).
13. 27 So. (2d) 358 (La. 1946).
14. 146 La. 584, 83 So. 839 (1919).
15. 208 La. 316, 23 So.(2d) 105 (1945).

that the wife's continuance to live with him until she abandoned him for the purpose of bringing suit amounted to "reconciliation" and a forgiveness of prior cruel treatment. The wife's answer was simply that she had endured the offenses of her husband as long as she could and of course the supreme court did not consider her action a reconciliation. In its ordinary connotation, reconciliation implies previous break in marital relations, but such cannot be required even if only to prevent resurrection of long forgotten offenses for the purpose of obtaining a separation or divorce at a time when lawful grounds do not exist. In the last analysis, it should be for the court to decide whether the facts indicate that the offended spouse has so forgiven the offending spouse as to renounce the right to sue for separation or divorce. This seems to be the view taken in France on the similar provision in Article 244 of the French Civil Code.[16]

Alimony judgments. In *Comstock v. Bourge*[17] alimony in the amount of thirteen dollars per week was awarded in the divorce judgment, an amount which coincided with that being paid under order of juvenile court. The husband then obtained an ex parte amendment of the "wording" of the judgment by which the words "Thirteen. . . Dollars per week" were eliminated and "alimony as set by order of the Juvenile Court" inserted. The husband's attorney then secured dismissal of the prosecution in the juvenile court. The question before the supreme court was whether the dismissal of prosecution in juvenile court put an end to the district court's alimony judgment. The supreme court found that it had not and that the amendment to the original judgment was simply one of words and not one of substance. To have decided otherwise would have been the equivalent of a judicial authorization to the district court to delegate its power to fix alimony. It is difficult to understand why the district court allowed the amendment in the first place.

In *Blank v. Barrileaux*[18] a divorce judgment in favor of the plaintiff husband on grounds of two years separation failed to award alimony to the wife or to mention whether she had been denied alimony, for fault, under Article 160 of the Civil Code. The supreme court was able to affirm the decision on the basis that the husband's income in relation to that of the wife as indicated by the evidence did not warrant award of alimony. In-

16. Planiol, Traite elementaire de droit civil (12 ed. 1939) no. 1208.
17. 210 La. 20, 26 So. (2d) 220 (1946).
18. 210 La. 116, 26 So. (2d) 473 (1946).

asmuch, however, as it could not be determined from the record whether the lower court's decision was based on a finding of fault on the part of the wife or on the inability of the husband to pay, the supreme court declared that the wife would not be precluded from suing for alimony when the relative financial situations of the ex-spouses changed and that the issue of fault could be determined at that time.

Although the supreme court could not decide otherwise, the situation is most unfortunate. If the lower court's decision was based on the relative financial position of the parties and a finding of no fault on the part of the wife, the wife will be compelled to prove again her freedom from fault in any future suit for alimony. Conceivably she might then fail where she had once succeeded. If the decision was based on the wife's fault, then the husband may be prejudiced by a different finding on the evidence produced in a future suit. Article VII, Section 43, of the Louisiana Constitution requires a judge to render written findings of fact and reasons for judgment in contested appealable non-jury cases only if requested by either party. Attorneys hesitate to demand reasons or findings of lower court judges. The only satisfactory remedy would be a legislative requirement to that effect.

Custody of Children

Although the general scheme of our legislation warrants the statement that custody of children belongs to both parents, if married and not separated, and to the tutor in all other instances, Act 79 of 1894 authorizes the judicial removal of custody from anyone to anyone else "as may be available and in [the judge's] judgment most suitable," if the "physical or moral welfare" of the child "is seriously endangered by the neglect, abuse, or the vicious, or immoral habits or associations" of the person having custody, or by such person's "inability, refusal or neglect" properly to care for such child. Enlarging on the policy announced in this act, which extends only to cases of *serious danger* to the physical or moral welfare of children, the supreme court has adopted the principle that the child's welfare is paramount in all cases. Little more than lip-service is paid to custody aspects of paternal authority or tutorship.

The custody cases decided during the 1945-1946 term are no exceptions. In *State ex rel. Munson v. Jackson*[19] and in *State ex*

19. 210 La. 1, 26 So. (2d) 152 (1946).

rel. Guinn v. Watson[20] the supreme court allowed strangers to retain actual custody of illegitimate children against their mothers. In the *Jackson* case the evidence was not clear as to whether the relator had lost custody voluntarily, but it appeared she was the mother of three illegitimates by as many men and of unsteady income. In the *Watson* case, the mother seemed to be a good woman, guilty only of the transgression which resulted in the birth of the child, and happily married at the time of suit to a man who seems to have desired to rear the child as his own. Yet the supreme court affirmed the lower court's decision to deny her custody, considering "not only... the mother's rights, but also the future welfare and best interests of the child." The decision seems harsh, for the mother had placed the child with the defendants at a time when she could not care for it; but it is in accord with the adopted policy of the supreme court and with the spirit of Article 213 of the Civil Code, according to which parents may not reclaim "foundlings" from persons who have received and reared them unless the child was taken from them by force, fraud, or accident.

The spirit of Article 213 was detectable as well in *State ex rel. Conerly v. Sonier.*[21] The shiftless claimant had shown no interest in his child until its *stepfather* (the mother had remarried after divorcing the child's father) made it the beneficiary of a $10,000 insurance policy and recipient of a thirty dollar allowance as a soldier's dependent. The supreme court allowed the maternal grandmother, who had cared for it since the mother's death, to retain custody.

The supreme court's policy extends even to contests over children pending separation or divorce suits. Article 146 of the Civil Code specifies award of custody in such cases to the mother "unless there should be strong reasons to deprive her of it." Construing this article with Article 157 of the Civil Code, there is no doubt that the Civil Code contemplates award of custody to parents only and not to other persons. Nevertheless, in *State ex rel. Theriot v. Pulling*[22]—a case begun as a *habeas corpus* proceeding but converted into an issue of custody pendente lite by the subsequent filing of a suit for separation—the supreme court affirmed the decision of the district court awarding custody of the child to the paternal grandparents upon a showing of the mother's "unfitness" and the father's absence with the armed forces.

20. 210 La. 265, 26 So. (2d) 740 (1946).
21. 209 La. 138, 24 So. (2d) 290 (1945).
22. 209 La. 871, 25 So. (2d) 620 (1946).

A serious consequence of the supreme court's policy of welfare of the child above all is exemplified by the cases involving custody after separation or divorce. Article 157 of the Civil Code establishes as a basic principle that the party against whom the separation or divorce has been rendered should not have custody of the child. Exception is authorized if the judge in his discretion believes that all or some of the children should, for their best interests, be awarded to the party at fault. The supreme court has gone beyond this, in effect ignoring the primary policy of the article and considering only the welfare of the child. As the welfare of young children seems to warrant custody to the mother except for serious reasons and as change of custody except for serious reasons seems frowned upon, the innocent husband who is forced to seek separation or divorce because of the faults of his wife often loses forever the possibility of guiding and watching the development of his children. Little consideration seems to be given to the fact that the mother whose fault prompted her husband's action actually has already deprived the child of the greatest advantage it could have, a happy family life. When to this is added the inquiry whether a person responsible for disrupting conjugal life can be the better influence for creating a proper attitude toward married life, doubt is cast on the soundness of the well intended policy of the supreme court.

Willis v. Willis[23] and *Sanford v. Sanford*[24] were two cases in which these considerations appeared strongly. In the first, the husband who had obtained separation from bed and board on grounds of abandonment was denied custody although the lower court's decision in his favor would seem to indicate he was a fit person. In the second case, the husband had obtained separation and later divorce on grounds of cruel treatment. He had been denied custody at the time of the separation judgment, probably because the child was then not quite five months old. In the present suit, five years later and after the remarriage of the mother and her contemplated permanent emigration from the state, the trial judge had awarded custody to the father. The supreme court reversed the decision.

In the above cases we have additional evidence of the need of written findings of fact and reasons for decision.[25] In both the *Willis* and *Sanford* cases the supreme court felt compelled to re-

23. 209 La. 205, 24 So. (2d) 378 (1945).
24. 208 La. 1073, 24 So. (2d) 145 (1945).
25. See discussion of Blank v. Barrileaux, 210 La. 116, 26 So. (2d) 473 (1946), supra, page 220.

verse the lower court's decisions although in neither did it have the advantage of knowing *why* the trial judge had decided in favor of the other party. The supreme court should have power to reverse the lower court's findings or decision, if such findings or decision clearly are unwarranted, but the supreme court should at least have the benefit of knowing the bases of the lower court's action. A transcript of evidence is not sufficient in this respect.

A final case on custody of children, that of *Veillon v. Landreneau*,[26] involved only questions of fact to which the supreme court applied its policy of awarding custody of the child to the mother if at all possible. The principal reason for opposing award of custody to the mother was an alleged "lack of interest" as manifested by her voluntary surrender of the child to its father pending the litigation. The supreme court found she had done so because her emotional condition at the time of suit would have prevented her from giving it proper care. The facts, of course, distinguish this case from that of *State ex rel. Guinn v. Watson*, discussed above,[27] in which a mother had surrendered her illegitimate child to strangers because she could not care for it and sought its custody two and a half years later.

Filiation and Legitimacy

In *Cameron v. Rowland*,[28] the marriage aspect of which was dicussed above,[29] a child sought to prove *paternal* filiation and the legitimacy thereof so as to recover property in her alleged father's succession then in the hands of his widow by a second marriage. The plaintiff alleged marriage of her deceased mother and her alleged father and issue from this union. The defendant denied both the paternal filiation and the marriage. Maternity was not at issue. The supreme court quoted the opinion of the judge below in which he discussed and considered proved, in order, the marriage, the paternal filiation, and the date of the plaintiff's birth. It is worthy of note that Articles 193-197 of the Civil Code were correctly applied to this situation. Articles 184-192 apply only to the case of the child who is known and admitted to have been born of a woman during marriage or within three hundred days thereafter, and actually treats only of presumptions of conception by the husband of the mother. If the

26. 209 La. 1060, 26 So. (2d) 139 (1946).
27. See p. 222, supra.
28. 208 La. 663, 23 So. (2d) 285 (1945).
29. See p. 217, supra.

child does not enjoy the reputation of birth during the period above mentioned, Articles 193-197 apply.

Legitimation

Before amendment of Act 50 of 1944, Article 198 declared that illegitimate children of parents who could have married at the time of conception were legitimated by the marriage of their parents "whenever the latter have legally acknowledged them for their children, either before their marriage by an act passed before a notary and two witnesses, or *by their contract of marriage itself.* In *Cormier v. Cormier*[30] the supreme court had interpreted the italicized words to mean "at the time of the celebration" and as early as *Succession of Fortier* (1899)[31] had declared sufficient a verbal acknowledgment at the time of the celebration. The situation in *Succession of Cambre*[32] was identical with that in the *Fortier* case and the supreme court decided the former on the basis of the latter. Although there may be question as to the correctness of the *Fortier* case—and possibly even of the *Cormier* case—their spirit received legislative sanction in Article 198 as amended by Act 50 of 1944, and that article now provides that marriage will have the effect of legitimating children if their parents acknowledge them formally or informally, before or after marriage. As the facts in the *Cambre* case occurred before the amendment of Article 198, the decision could have been based either on that article as interpreted in the *Fortier* case or, by giving the amendment retroactive effect, on the article as amended. It chose the former solution and thereby avoided considering the retroactive, or remedial character, of the amendment.

Curatorship

The sole question in the *Curatorship of Parks*[33] was whether the curator appointed under Act 71 of 1932 (amended and reenacted by Act 256 of 1944), the so-called "Veteran's Guardianship Act," could sell the home of the ward and purchase another with the proceeds of the sale. The act provides for the purchase of a home with proceeds obtained from the Veterans Administration, but failed to provide expressly for the contemplated transaction. The court decided in the affirmative by considering the

30. 185 La. 968, 171 So. 93 (1936).
31. 51 La. Ann. 1562, 26 So. 554 (1899).
32. 27 So. (2d) 296 (La. 1946).
33. 210 La. 63, 26 So. (2d) 289 (1946).

purpose and object of the act. This is valid procedure under Article 18 of the Civil Code. The court, however, instead of simply citing that article, went to the needless trouble of noting previous cases and a common law authority.

Minors

State v. Priest[34] was an attempt in juvenile court, Caddo Parish, to compel a fifteen year old married woman to attend school. Act 239 of 1944 requires minors under sixteen years of age to be sent to school by their parents, "guardians" or other persons having "control or charge" of them and makes no exception for emancipated minors or married minors. The court decided that compulsory attendance at school was inconsistent with the married state and that a married woman could not be considered within the terms of the act. To give the decision legal form, the court noted that the woman had been emancipated by marriage under Article 379 of the Civil Code and that, although the act creating the juvenile courts for Caddo and Orleans Parishes did not so specify, the act creating the juvenile courts in other parishes expressly negatived jurisdiction over emancipated minors. This case is a good example of a court's adjustment of faulty new legislation to the general scheme of other legislation.

Emancipation

In *State v. Priest,* above, the emancipation of the married woman involved was not contested. It will be recalled that *Guillebert v. Grenier,*[35] decided in 1902 against strong dissent, fixed the jurisprudence of the supreme court denying emancipation by marriage to minors marrying without consent of parents or tutors. The *Succession of Hecker,*[36] decided in 1938, partially eliminated this incongruity of married persons under tutorship by seizing upon a 1908 amendment of Article 382 of the Civil Code[37] to declare emancipated all married persons of eighteen years of age, whether the marriage had been contracted with or without consent of parents or tutors. As yet, however, the *Guillebert v. Grenier* jurisprudence seems to hold in cases of minors not yet eighteen years of age and married without such consent.

In *State v. Golden*[38] the supreme court had an excellent op-

34. 27 So. (2d) 173 (La. 1946).
35. 107 La. 614, 62 So. 238 (1902).
36. 191 La. 302, 185 So. 32 (1938), noted in (1939) 1 LOUISIANA LAW REVIEW 457.
37. Article 382, La. Civil Code of 1870 as amended by Act 224 of 1908.
38. 210 La. 347, 26 So.(2d) 837 (1946), the marriage aspect of which is considered at page 217, supra.

portunity to overrule this unfortunate jurisprudence. It restrained itself, however, to the mere statement that the status of marriage was incompatible with parental custody.

CONVENTIONAL OBLIGATIONS

*J. Denson Smith**

During the period here being considered, the supreme court had before it nine cases under this title involving the admissibility of parol evidence in relation to a written act. In general, the cases adhere to the view that except where fraud or error is alleged or the act is indefinite or ambiguous parol evidence is inadmissible to vary or contradict any recital, whether factual or promissory, contained therein. A further limitation exists in the rule that where a charge of error rests only a lack of knowledge concerning the provisions of the act, occasioned by a failure to read it or to listen attentively while it is being read, relief will not be granted.

The last mentioned rule was relied on in *Rousseau v. Rousseau,*[1] in rejecting an offer of parol evidence to contradict a recital that the property covered by a deed was being purchased with the wife's paraphernal funds.

The rule that parol evidence is admissible for the purpose of explaining the terms used in a written act if they are incomplete or their meaning is uncertain was applied in *Walker v. Ferchaud*[2] to complete the description of the property covered by an offer to purchase which referred to it only by its municipal street number, and in *Plaquemines Oil and Development Company v. State*[3] to explain the meaning of the words "east" and "west" in a patent prepared by the Registrar of the State Land Office. Similar evidence was admitted in *Krauss v. Fry*[4] to explain the true intention of the parties in a deed containing a mineral reservation clause.

A kindred problem was presented in *Gulf Refining Company v. Garrett.*[5] The dispute concerned the interpretation of a settlement agreement between a widow and certain heirs of the decedent. On rehearing the case was remanded for the introduction of parol evidence. The Chief Justice and Judge Rogers dissented,

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1. 209 La. 428, 24 So.(2d) 676 (1946).
2. 210 La. 283, 26 So.(2d) 746 (1946).
3. 208 La. 425, 23 So.(2d) 171 (1945).
4. 209 La. 250, 24 So.(2d) 464 (1945).
5. 209 La. 674, 25 So.(2d) 329 (1946).