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Civil Code and Related Subjects: Persons

Robert A. Pascal

aware of the probable reactions. They were quick to suggest at the meeting of the Mineral Section of the Louisiana Bar Association meeting in session immediately after the issuance of the decision in this case that remedial legislation should be passed. The following passage from the dissenting opinion is interesting:

> "My views accord thoroughly with the following observations contained in the brief of plaintiff's counsel: 'The only basis for sustaining these Conservation Orders is that they are fair and reasonable and do justice and equity to all parties concerned. Under the defendant's contention, if a lease contained 1000 acres and only one acre happened to be placed within a unit and no well was drilled on that particular acre, nevertheless, the entire 1000 acres would be held indefinitely beyond the primary term but would share in only 1/640 x 1/8, or 1/5120th of the production from the unit. Such a result as this makes it obvious that neither the Legislature nor the Commissioner intended any such thing.' "[24]

The court suggested that the lessors might find relief under the development clause, an expensive and circuitous route to an end which in the writer's judgment might well have been accomplished in the instant litigation.

PERSONS

*Robert A. Pascal**

Marriage

The good faith of the wife in an alleged putative marriage was at issue in *Succession of Chavis*.[1] Counsel contended the wife had not been in good faith at the time of the marriage because she knew of the husband's previous marriage, had only his statement that he had been divorced, and had failed to investigate the truth or falsity of this statement. In an extremely well considered opinion, adopted and quoted by the supreme court, the trial judge declared that the extent of the obligation to investigate "to ascertain whether there exists any legal impediment . . . will depend upon the facts and circumstances in each individual case." The relative (and subjective) quality of good faith is noted and the manner in which a trial judge

24. 31 So. (2d) 10, 17.

*Assistant Professor of Law, Louisiana State University.

1. 211 La. 313, 29 So. (2d) 860 (1947).

should evaluate the statements made in prior decisions on the subject is especially well considered. Following this discussion the judge found the wife had not simply relied on the husband's statement he had been divorced, but that there were "additional reasons why the second wife was led to believe no impediment existed to her marriage with the deceased."

Our jurisprudence does contain statements to the effect that a wife cannot be considered in good faith if she relies solely on the word of her husband that he is divorced. A clear cut case of this kind was presented in *Succession of Glover* in the court of appeal,[2] and in *Succession of Thomas*[3] and *Succession of Taylor*,[4] decided by the supreme court. Each of these cases can be distinguished on their facts, however. In the *Taylor* case, the wife had been told shortly before marriage, by the first wife and two close friends, that the intended husband had not been divorced. In the *Thomas* case the court found that the alleged second marriage ceremony had never taken place. And in the *Glover* case (which quoted from the *Thomas* case), the court disbelieved the wife's actual good faith. In the case of *Evans v. Eureka Grand Lodge*,[5] decided in the court of appeal, the obligation of a spouse to ascertain the truth or falsity of information as to an impediment to the marriage is affirmed; but it is made clear that the obligation is relative and varies with the nature and source of the information and the intelligence and education of the spouse. This, of course, is in accord with the relative or reasonableness test of good faith announced in the famous *Marinoni* case,[6] and the *Chavis* case might be considered in confirmation of this view.

Separation and Divorce

The separation and divorce cases were routine. *Walcup v. Honish*[7] affirmed the interpretation of the word "residence" in Act 430 of 1938,[8] the two year divorce law, to mean "domicile."[9] *Sam-*

2. 153 So. 497 (La. App. 1934).

3. 144 La. 25, 80 So. 186 (1918).

4. 39 La. Ann. 823, 2 So. 581 (1887).

5. 149 So. 305 (La. App. 1933).

6. Succession of Marinoni, 183 La. 776, 164 So. 797 (1935).

7. 210 La. 843, 28 So. (2d) 452 (1946).

8. Dart's Stats. (1939) § 2202.

9. See Spratt v. Spratt, 210 La. 370, 27 So. (2d) 154 (1946) and Spring v. Spring, 210 La. 576, 27 So. (2d) 358 (1946), noted in Symposium, The Work of the Louisiana Supreme Court for the 1945-1946 Term (1947) 7 LOUISIANA LAW REVIEW 219.

pognaro v. Sampognaro[10] and *Wojahn v. Soinat*[11] presented only ordinary issues of fact as to the existence of cruelty and habitual intemperance alleged in suits for separation from bed and board.

Alimony

Keeney v. Keeney[12] is a most interesting case. After divorce the wife remarried. The second marriage was declared a nullity. The wife then sued her divorced husband for alimony. The majority opinion denied her alimony on the grounds alimony after divorce is not due under Article 160 of the Civil Code "in case the wife should contract a second marriage," interpreting the word "marriage" therein to mean a "marriage ceremony," valid or invalid. The minority opinion of Justice Hamiter reasons Article 160 properly interpreted allows alimony to the divorced wife as long as she is in necessitous circumstances and another husband has not acquired the obligation to support her.

The minority opinion would seem the more reasonable. Otherwise, not only is the attempt to contract a second marriage made penal, but the admitted social purpose of alimony under Article 160 is defeated.

The majority opinion discussed at length the "uncertainty" which would attach to the former husband's liability if the attempt at a second marriage would not necessarily terminate the wife's right to alimony. It may be observed that a similar uncertainty as to the extent of liability always exists, for the needs of a former wife might arise or increase considerably *at any time* after divorce and there is no prescription of the former wife's claim for alimony.

Williams v. Williams[13] again affirmed the practice of using summary process to fix the amount of unpaid arrearages of alimony[14] and reiterated the impossibility of reducing the amount of such arrearages.[15] *Schneider v. Schneider*[16] and *Russo v. Russo*[17] involved simply questions of fact, the amount of alimony due in the particular cases. In the course of the opinion in the latter case the court repeated the propriety of adjusting alimony due under Article 160 of

10. 211 La. 105, 29 So. (2d) 581 (1947).
11. 211 La. 562, 30 So. (2d) 431 (1947).
12. 211 La. 585, 30 So. (2d) 549 (1947).
13. 211 La. 939, 31 So. (2d) 170 (1947).
14. This procedure was sanctioned in Snow v. Snow, 188 La. 660, 177 So. 793 (1937) and Cotton v. Wright, 193 La. 520, 190 So. 665 (1939), and was admitted proper in Edwards v. Perrault, 170 La. 1011, 129 So. 619 (1930).
15. Snow v. Snow and Cotton v. Wright, supra note 14.
16. 211 La. 959, 31 So. (2d) 176 (1947).
17. 210 La. 853, 28 So. (2d) 455 (1946).

the Civil Code at any time to conform to the changing needs of the wife and ability of the husband to pay. In *Weaver v. Burks*[18] the wife seeking an increase in alimony payments charged her husband with discontinuing records of his earnings in order to avoid such increase. The supreme court considered this move "grave error" on his part, but concluded from the evidence that the trial judge had not abused his discretion in denying the increase.

Custody

Ard v. Ard[19] simply applied Article 157 of the Civil Code. For the greater advantage of the child its custody was awarded to the father, against whom a divorce had been rendered, rather than to the mother. *State ex rel. Eastham v. Traylor*[20] recognized the surviving parent's right to custody of a child not abandoned or surrendered to others. Our legislation makes this clear. Under Article 337 of the Civil Code custody belongs to the tutor and under Article 250 tutorship belongs to the surviving parent. Unless the parent is excluded or removed from the tutorship for cause, therefore,[21] or unless the parent has abandoned or surrendered the child to others[22] or neglected it,[23] the parent should never be denied custody. The supreme court did not mention this legislative basis for its action.

Adoption

The effect of an adoption of a minor without consent of its parents was at issue in *Foster v. Richardson*[24] and *State ex rel. Simpson v. Salter.*[25] Parental consent has been required under all acts on the subject. In the first case, an adoption under Act 31 of 1872, Justice Fournet was able to maintain the validity of the adoption by finding the child had once been adjudged delinquent and neglected and removed from parental authority. In the second case, a then unmarried mother had signed a document purporting to be a surrender of custody under Act 91 of 1942.[26] Shortly thereafter she sought custody of the child from parties seeking to adopt it. The court found she had "unwillingly" signed the surrender and that

18. 211 La. 913, 31 So. (2d) 17 (1947).
19. 210 La. 869, 28 So. (2d) 461 (1946).
20. 210 La. 1003, 29 So. (2d) 43 (1946).
21. Arts. 302-305, La. Civil Code of 1870.
22. Art. 213, La. Civil Code of 1870; La. Act 173 of 1910 as amended by La. Act 427 of 1938 [Dart's Stats. (1939) §§ 4891-4895].
23. As, for instance, under La. Act 169 of 1944 [Dart's Stats. (Supp. 1947) § 1709.5].
24. 210 La. 922, 28 So. (2d) 610 (1946).
25. 217 La. 918, 31 So. (2d) 163 (La. 1947).
26. Dart's Stats. (Supp. 1947) §§ 4895.1-4895.2.

this surrender, in addition, had not been made in accordance with the formalities prescribed by Act 91 of 1942. Accordingly, the child not having been abandoned, neglected, or legally surrendered, the mother had not lost her right to its custody.

In the *Foster* case, the child had been placed in an institution by order of the court finding it delinquent and neglected and by this institution placed in the custody of a Mrs. Reese. On Mrs. Reese's becoming seriously ill the child was left without care and attention and a Mrs. De Lay charitably cared for it until its adoption. It was she who signed the act of adoption. On this basis Justice Fournet reasoned the child was a *foundling* who, under Article 213 of the Civil Code, may not be claimed by its parents unless they prove the child was taken from them by force, fraud, or accident. Judicial action scarcely can be considered any of these and therefore it seems the parental right to custody could have been denied on this basis alone. Whether this denial of the right to custody under Article 213 is the same as the termination of parental right to oppose an adoption might be argued, but this result was reached in the *Succession of Dupre,*[27] relied upon by Justice Fournet, and it seems that the result is reasonable.

Tutorship

Article 337 of the Civil Code declares the tutor incapable of purchasing or leasing the property of the minor and of accepting the assignment of any right or claim against his ward. Article 343, however, provides the parent (who is tutor)[28] may have the minor's interest in property held in indivision with the parent adjudicated to the latter by following specific procedure. In such case the minor's share in the property remains mortgaged to the minor to secure payment of the price unless, under Article 344, a special mortgage is substituted therefor.[29] No security need be given by the purchaser. In *Wenk v. Anisman*[30] the contention was made that

27. 116 La. 1090, 41 So. 324 (1906).

28. Although Article 343 mentions only the word "parent," it is clear from the section of the code in which the article is found, its context, and its history that the reference is to the parent tutor or natural tutor. The text contains references to the under tutor and family meeting, which do not exist except in tutorship. The legislative origin of Article 343 is undoubtedly Section 2 of Act 21 of 1809, which with some changes became Article 338 of the Civil Code of 1825. Although this Section 2 reads simply "father or mother," the entire act (Sections 1-8) applies to tutorship matters and by its title is an amendment to the title on tutorship in the Civil Code of 1808.

29. La. Act 209 of 1932, §§ 1-8 [Dart's Stats. (1939) §§ 4844, 4847.4], on the private sale of property of minors, allows the sale of property held in indivision with a minor and its purchase "by any co-owner or co-owners thereof."

30. 211 La. 641, 30 So. (2d) 567 (1947).

Act 209 of 1932 allows the tutor co-owner, as well as any other, to purchase the minor's interest, thus to that extent modifying Article 337 and rendering Article 343 obsolete. The court decided in the negative, relying on the general nature of Act 209 of 1932, the specific nature of Article 343, and on the argument that the history of Act 209 fairly well leads to the conclusion that its provisions were never intended as amendments to Article 337 and 343.

The minor in the *Wenk* case was greatly benefitted by the decision for, although the sale to the tutor had been authorized *for cash,* the price actually had not been paid and the minor would have been without a security device to insure such payment. It may perhaps be suggested, however, that it was not necessary to conclude that as a matter of law the tutor may not purchase the minor's interest under Act 209 of 1932. It might be argued that Act 209 of 1932 contemplates cash sales, whereas Article 343 of the Civil Code contemplates adjudications without the necessity of the parent paying the price until the termination of the tutorship. Certainly there is no reason for the mortgage under Article 343 or 344 if the price is paid by the parent and it seems that in such a case such mortgage should be subject to cancellation. Whether the tutor receives money from a third person as a result of a cash sale under Act 209 of 1932 to effect a partition with such third person co-owner, or whether the tutor is compelled to pay his personal funds to himself in the capacity of tutor is of little difference. In each case the tutor must invest the cash in accordance with the requirement of Article 348 of the Civil Code. The important thing, therefore, is to make certain that the price agreed upon under Act 209 of 1932 is actually paid by the tutor. It is suggested that under Article 275 of the Civil Code[31] it could be considered the undertutor's obligation to represent the minor—and therefore to receive and give receipt for him—in the case of a private sale under Act 209 of 1932. If this approach were adopted any tutor, whether parent or not, could be sold the property of the minor under Act 209 of 1932. Otherwise the prohibition of Article 337 would apply and the tutor other than a natural tutor could never obtain the minor's interest in property in which he is co-owner. To effect a partition in such a case the tutor would be required to sell his own interest to third persons.

31. Art. 275, par. 1, La. Civil Code of 1870:
"It is the duty of the undertutor to act for the minor, whenever the interest of the minor is in opposition to the interest of the tutor."