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Civil Code and Related Subjects: Persons

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the value of the property in the condition that it was at the time of the sale, the mineral value was very properly considered in this case. That value was definitely proved, as leases had been given by defendant less than a month after they had acquired title to the property and other conclusive evidence was available. Justice Hawthorne, dissenting on the application of lesion[14] rules to a "giving in payment," expressed no opinion on the question of considering mineral value in determining price.

The court overruled an exception of no cause of action in *Wier v. Grubb*.[15] Under the provisions of the original lease and the sublease, defendants were obligated to develop further the lease, and the existence of one producing well did not satisfy this clause. Under Act 205 of 1938,[16] "remedial and procedural in character,"[17] a mineral lessee may protect or defend his interest without the "concurrence, joinder, or consent of the landowner."[18]

PERSONS

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Marriage

Marriage in Violation of Article 99. Article 92 of the Civil Code forbids priests, ministers, and magistrates to officiate at the marriage of males under eighteen years of age and females under sixteen years of age. Four years ago this article was interpreted to impose merely a prohibition against the celebration of such marriages, but not to render null such marriages as might be celebrated in violation of its provisions.[1] By Act 312 of 1948, Article 99 of the Civil Code was amended to prohibit priests, ministers, and magistrates from celebrating marriages before seventy-two hours had elapsed from the issuance of the marriage license. The language used in Article 99 as amended is similar to that found in Article 92, and in *In re State in Interest of Goodwin*[2] the supreme court applied to Article 99, by analogy, its previous interpretation of Article 92.

14. Arts. 1862, 1863, La. Civil Code of 1870.
15. 41 So.(2d) 846 (La. 1949).
16. Dart's Stats. (1939) §§ 4735.4-4735.5.
17. 41 So.(2d) 846, 847 (La. 1949).
18. Ibid.

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1. State v. Golden, 210 La. 347, 26 So. (2d) 837 (1946), discussed in Symposium, The Work of the Louisiana Supreme Court for the 1945-1946 Term (1947) 7 LOUISIANA LAW REVIEW 165, 217 and noted in (1947) 7 LOUISIANA LAW REVIEW 442.
2. 214 La. 1062, 39 So. (2d) 731 (1949).

Marriage of Insane Person. In *Stier v. Price*[3] the plaintiff wife sued for annulment of her marriage on two grounds: (1) that her consent to the marriage had not been given freely in that she would not have consented had she known of her husband's insanity, and (2) that her husband was incapable of consenting to the marriage at the time of its celebration. The only provision of the Civil Code on which the plaintiff could base her first contention is Article 91, which declares in part "consent is not free . . . when there is a mistake respecting the person, whom one of the parties intended to marry." Following previous interpretations of this provision, the court denied the contention of plaintiff, stating that "mistake respecting the person" includes only mistake in the *identity* of the person and does not include mistake as to his qualities or attributes.[4]

The second contention of the plaintiff, that the defendant husband was incapable of consenting to marriage at the time of the ceremony was not as well argued or handled as it might have been. One's *capacity* to consent should be distinguished from the question of the validity of consent formally expressed. Vices of consent can exist only if the person expressing consent has the capacity so to do. Thus in Book III, Title IV, Chapter 2 of the Civil Code, dealing with the requisites for the formation of a valid contract, the introductory Article 1779 provides that the parties must be "capable of contracting" and that "their consent [must be] legally given." Thereafter follow Sections 1 and 2 of the chapter, the first dealing with the *capacity* of persons to contract—in which minority and insanity are treated as incapacities—and the second dealing with the expression of consent and the circumstances which might vitiate the expression of consent, such as error, fraud, and violence. In the same manner, in Article 90 of the Civil Code, in the chapter entitled *"How Marriages May be Contracted or Made,"* it is specifically stated that the parties must be "able to contract" and "willing to contract," capacity and freedom of consent being thus distinguished.[5] Undoubtedly counsel for the plaintiff wife wished to argue the insane person's *incapacity* to marry, for he cites and quotes from non-Louisiana sources to this effect. In his brief, however, counsel phrased his

3. 214 La. 394, 37 So. (2d) 847 (1948).

4. Delpit v. Young, 51 La. Ann. 923, 25 So. 547 (1899), in which the alleged error "respecting the person" was as to the moral character of the other person.

5. The French have had no difficulty in seeing this distinction. See Traité élémentaire de droit civil de Marcel Planiol, I (4 ed. 1948) nos. 795-797.

argument in terms of the inability of an insane person to give a *free consent.*[6] Following this analysis, the supreme court seized upon Article 110 of the Civil Code, under which that person only whose consent was not free may sue to annul a marriage, and denied the plaintiff's right of action.

Possibly counsel for plaintiff deliberately refrained from using Article 90 of the Civil Code. There are no other articles in the chapter in which it appears stating rules for the application of the principle there announced and counsel may have feared the court would apply—as it had applied in the old case of *Ducasse's Heirs v. Ducasse*[7]—Articles 403, 1788, 1791, and 1794 of the Civil Code. These articles, applicable to conventional obligations, severely restrict the circumstances under which the ordinary conventions of insane persons may be attacked and restrict the right of action to the incapable or his representative. Certainly the plaintiff would have lost her case had those articles been applied, but their non-applicability could have been argued forcefully. These articles are designed to protect the economic interests of the two parties to an ordinary contract. The interest of the incapable is in being protected against his own disadvantageous acts and against the advantage which may be taken of him by others. The law ordinarily does not protect a fully capacitated person against disadvantageous acts, unless economic duress or fraud are involved, but it does seek to protect his interest in the certainty of the binding force of agreements. Hence, while the incapable is given the privilege of attacking an ordinary contract, the party who has contracted with him may be certain of the contract's binding force after a certain period, and even during that period he may obtain this certitude by calling upon the incapable's representative to approve or disapprove the agreement. But marriage is not an ordinary contract; under Article 86 of the Civil Code it is regarded as a civil or secular contract as opposed to a religious institution, but certainly it is much more than an ordinary contract. In marriage the principal interests are other than economic, and certainly it cannot be denied that the capable person has an interest in annulling the marriage if the other party proves to have been incapable of consenting thereto. It would be inappropriate to apply articles designed for the protection of mere economic interests to situations in which economic interests are not of primary importance and in which their application could only be contrary to the real interests involved.

6. Brief of plaintiff and appellant, p. 4.
7. 120 La. 731, 45 So. 565 (1908).

It should not be assumed, of course, that every insane person is incapable of contracting marriage. Insanity is not of itself an *impediment* to marriage like relationship within prohibited degrees, previous undissolved marriage, or disparity of race. Only when the insanity is such that the person cannot understand the meaning of consenting to marriage is that person without capacity to contract or unable to consent. Whether or not the defendant husband in the instant case had such capacity was not considered by the court, the basis of its decision making this unnecessary, and it need not be considered here.

Putative Marriage. Two opinions dealt with putative marriage questions. In *Holmes v. Triggs*[8] the issue was one of fact simply, whether the evidence adduced supported the finding of good faith. This needs no discussion. In *Funderburk v. Funderburk*[9] the court repeated two points on the interpretation of the requirement of good faith which now should be accepted, namely, that good faith is simply an "honest and reasonable belief" in the validity of the marriage and that the test of an "honest and reasonable belief" is *relative,* depending on the facts and circumstances in each individual case. The second proposition was so formulated in *Succession of Chavis,*[10] decided in 1947, from which the court quotes with approval. Unfortunately, the court also mentioned, apparently with approval, the old test of good faith, used in *Patton v. Cities of Philadelphia and New Orleans*[11] and in *Ray v. Knox,*[12] that good faith exists so long as the party has no *certain knowledge* of the invalidity of the marriage. This should cause no confusion, however, for the test announced in the *Chavis* case and used in the instant decision is inconsistent with the older standard and must supersede it.

Divorce and Separation

Intrastate Jurisdiction or Venue. There is no legislation excepting suits for separation and divorce for cause[13] from the general rule of Article 162 of the Code of Practice requiring that the defendant be sued in the parish of his domicile. It was on this

8. 214 La. 1083, 39 So. (2d) 739 (1949).
9. 214 La. 717, 38 So. (2d) 502 (1949).
10. 211 La. 313, 29 So. (2d) 860 (1947), discussed in Symposium (1948) 8 LOUISIANA LAW REVIEW 189, at 217-218.
11. 1 La. Ann. 98 (1846).
12. 164 La. 193, 113 So. 814 (1927).
13. Divorce suits based on separation in fact, as distinguished from those grounded on cause, may be brought in the parish of the plaintiff's residence. La. Act 430 of 1938 [Dart's Stats. (1939) § 2202].

absolutely sound basis that *Hymel v. Hymel*[14] the supreme court denied a plaintiff wife's claim to right to sue her husband for separation from bed and board in a parish other than that of his domicile;[15] but the court added language which was totally unnecessary to the decision and which may lead to error in the future. This dictum was to the effect that "the *matrimonial domicile* of these parties was in Ascension Parish and the *cause of action arose there;* therefore, the court of that parish would have jurisdiction in the instant case."[16] The fault with this language is that it contains two implications, neither of which are valid, that the parish of matrimonial domicile and the parish in which the cause of action arises have some special importance in the determination of inter-parish jurisdiction or venue in intrastate separation and divorce cases. Matrimonial domicile was a concept used in matrimonial cases before *Williams v. North Carolina I*[17] to fix *interstate* legislative competence and judicial jurisdiction for full faith and credit purposes. It is now outmoded for such purposes and is used in interstate cases only when state law employs it in voluntary limitation of the occasions on which it will entertain separation or divorce suits with out-of-state elements. An instance of this is the use of "matrimonial domicile" in Article 142 of the Civil Code. Nothing in Louisiana legislation justifies the use of the "matrimonial domicile" concept in intrastate separation and divorce cases. Nor is there any legislation which would give any importance to the place in which the alleged cause of action arises. In intrastate cases there is no question of the applicability of Louisiana law and there would seem to be no reason to distinguish the suit for divorce or separation from other personal actions. The suit should be filed at the defendant's then domicile,[18] even if it be a parish other than that of the "matrimonial domicile" or that in which the cause of action arose.

Another observation may be in order. The fact that the supreme court treated the case as involving the question whether the wife might sue for separation in the parish of *her* domicile, as distinguished from that of her husband, implies that it operated on the assumption that she could acquire an intrastate or interparish domicile separate from that of her husband. Such

14. 214 La. 346, 37 So. (2d) 813 (1948).

15. The plaintiff wife sued in a parish to which she had moved after alleged cruelty on the part of her husband. On the possibility of a wife acquiring an intrastate domicile other than that of her husband, see note on the instant case (1949) 9 LOUISIANA LAW REVIEW 550, 552.

16 Italics supplied.

17. 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942).

18. See note 1, above.

an assumption is contrary to the clear statement contained in Article 39 of the Civil Code, which Article is binding for interparish or intrastate cases if not in interstate cases. The practice of ignoring Article 39 in interstate domicile cases may be entirely justified if one is willing to accept the proposition that a state has no legislative competence in interstate questions; but the judicial departure from Article 39 in interparish or intrastate cases could not be justified in any manner.[19]

Divorce on Basis of Separation in Fact. Well understood and well precedented interpretations of Act 430 of 1938,[20] authorizing divorce on proof of two year separation in fact, were applied in four cases. In *Ridell v. Hyver*[21] and *Clark v. Clark*[22] the supreme court repeated its previous interpretation of the act in its application to cases in which the defendant is insane. The separation must be "voluntary" in its inception, though its continuation need not be so; so a separation caused by insanity of the defendant is not "voluntary," but a separation "voluntary" at its inception is not affected by insanity of the defendant manifesting itself after separation and prior to judgment of divorce.[23]

In *Williams v. Williams*[24] it was repeated that fault is not an issue in divorce cases based on separation in fact except to determine the wife's eligibility for alimony in those instances in which the husband obtains the divorce. This is clear even from a cursory reading of Act 430 of 1938 and Article 160 of the Civil Code. *Joly v. Williams*[25] involved only a question of fact, whether the evidence supported a finding of two years separation.

Miscellaneous. Wendling v. Aucoin[26] and *Schneider v. Schneider*[27] involved questions of fact, whether the conduct complained of constituted cruel treatment and therefore grounds for separation from bed and board. In *De Maupassant v. Clayton*[28] an admission by the defendant that she had (knowingly?) contracted a subsequent bigamous marriage with another was considered an admission of adultery.

Evidence of Reconciliation. In the same case of *De Maupas-*

19. For further discussion of this case, see Note (1949) 9 LOUISIANA LAW REVIEW 550.
20. Dart's Stats. (1939) § 2202.
21. 215 La. 358, 40 So. (2d) 785 (1949).
22. 41 So. (2d) 734 (La. 1949).
23. The leading case is Leveque v. Borns, 174 La. 919, 142 So. 126 (1932).
24. 41 So. (2d) 736 (La. 1949).
25. 215 La. 312, 40 So. (2d) 476 (1949).
26. 216 La. 361, 37 So. (2d) 819 (1948).
27. 214 La. 759, 38 So. (2d) 732 (1949).
28. 214 La. 812, 38 So. (2d) 791 (1949).

sant v. Clayton[29] the supreme court denied that living in the same house as the defendant (her stepmother's residence) constituted evidence of cohabitation, and therefore of reconciliation, with the defendant. Certainly cohabitation as husband and wife is a question of fact, and presumably the record of proceedings indicates that the plaintiff and defendant did not live together as man and wife during this time. The writer is not of the opinion that the instant decision, with its special facts, should be regarded as a relaxation of the standard of old decisions, that is, that evidence of separation is not to be sought behind closed doors.[30]

Alimony

Alimony Pendente Lite. In *Coney v. Coney*,[31] an appeal from a judgment for alimony *pendente lite*, the court indicated it would have raised the amount of the award on the basis of the evidence as of the time of judgment below, but refused to do so because since that time the wife had ceased to be in need of more. Technically speaking, evidence of the wife's increased income should not have been considered on appeal. A change in the circumstances of the parties is cause for a new suit for reduction or increase of alimony, but cannot possibly affect the correctness of a judgment rendered before circumstances changed. The appeal should be considered on the merits of the case as of the time of judgment below and if circumstances develop after the judgment which may warrant a change in the amount of alimony the party interested should seek an increase or reduction, in the lower court, on the basis of the new facts. In this manner the parties may be given some certainty that the amount awarded will reflect needs and circumstances of the time for which alimony is payable. In the present case the wife possibly did not receive sufficient alimony for the time prior to her acceptance of employment to augment her income.

The root of the difficulty in the instant case, of course, is that the husband had not sought a reduction of the award in lower court on the basis of the changed circumstances. The increase of the award on appeal would have meant making him liable at that rate from the date of original demand and until he sought redetermination of the amount in a new action. As a result, the husband would have been made liable for amounts not needed by the wife after her increase in income began. But to this ob-

29. Ibid.
30. See for example, Singleton v. Rogers, 160 La. 195, 106 So. 781 (1926).
31. 41 So. (2d) 497 (La. 1949).

jection the writer would answer that proper legal procedure to correct the situation was available to the husband and his counsel and that they failed to make use of it. And, as mentioned before, in this case the supreme court's decision possibly operated to deprive the wife of an amount to which she was entitled before her increase in income, an amount which she will never receive.

In *Hand v. Hand*[32] the question was simply whether the evidence adduced at the trial was sufficient to justify the amount awarded by the lower court. In *Reich v. Grieff*[33] the issue was again one of evidence, but here the fact that the husband and wife had never lived together after marriage might indicate such fault on the part of the wife as would bar her from claiming alimony under Article 160 of the Civil Code. The supreme court considered the evidence relevant and remanded the case for further hearing on the question of fault.

Alimony After Divorce. Under Article 160 of the Civil Code, alimony after divorce on the ground of separation in fact for two years or more is obtainable by the wife against whom the divorce has been rendered only if she has not been at fault. In *Hawthorne v. Hawthorne*[34] the supreme court sustained the district judge's ruling that under this article the wife is not entitled to alimony in a situation in which both husband and wife are at fault. The article makes the wife's freedom from fault a condition for her recovery of alimony. The mere fact that the husband as well may have been to blame is no reason to deny the application of Article 160. The same issue was presented and apparently decided in the same way as *Sampognaro v. Sampognaro*.[35]

Criminal and Civil Jurisdiction. The distinction between proceedings for alimony under the Civil Code and those under Criminal Code Articles 74 and 75 was clearly made in *State v. Galjour*.[36] Failure to support one's minor child in need is a crime under the first article and under the second the judge may, in lieu of criminal punishment, order the convicted father to pay alimony in certain amounts. In the instant case, a father so convicted excepted to the juvenile court's right to fix his alimony liability to his children. The ground relied on was that he was al-

32. 214 La. 1023, 39 So. (2d) 719 (1949).
33. 214 La. 673, 38 So. (2d) 381 (1949).
34. 214 La. 905, 39 So. (2d) 338 (1949).
35. 41 So. (2d) 456 (La. 1949).
36. 41 So. (2d) 215 (La. 1949).

ready obligated to pay such alimony under a judgment of the civil district court and, that court already having assumed jurisdiction, the juvenile court could not enter an order in the same matter. The opinion of Justice Hawthorne correctly distinguishes between the criminal and civil proceedings in the respective courts and maintains their independence from each other. The order of the juvenile court under Article 75 of the Civil Code is in lieu of criminal punishment by fine or imprisonment. As such, it can only follow conviction for criminal failure to support the children, which conviction in turn can come about only if the father has failed to fulfill his obligation to support them, whether this obligation was fixed by civil court order or not. Only actual support of the dependents will be a defense to the criminal action. The existence or non-existence of a civil judgment to pay alimony of itself has no bearing in the criminal prosecution or liability thereunder.

Filiation

Acknowledgment of Illegitimates. Two questions on the acknowledgment of illegitimates were raised in *State v. De Lavallade.*[37] The first issue was whether, in the absence of "formal" acknowledgment of an illegitimate child under Article 203 of the Civil Code, proof of an "informal" acknowledgment will suffice to entitle the child to inherit from relatives. The court decided in the affirmative, relying on its previous decisions to this effect.[38] Although the opinion does not make this clear, it must be assumed that the acts constituting "informal" acknowledgment occurred after 1870, for the deceased was a miscegenous child and under Article 221 of the Code of 1825 only "formal" acknowledgment might be admitted in favor of children of color.

The second issue involved the application of Article 204 of the Civil Code, which renders impossible the acknowledgment of illegitimates whose "parents were incapable of contracting marriage at the time of conception." The state contended that under this article the deceased could not have been acknowledged, having been born of a negress and a white man. The court apparently was of the opinion that Article 204 would prohibit the acknowledgment of miscegenous illegitimates, but denied its application in this case. The rationale of the decision was that the deceased had been born in 1864, a date at which the law did

37. 215 La. 123, 39 So. (2d) 845 (1949).
38. The leading case is Taylor v. Allen, 151 La. 82, 91 So. 635 (1920).

not prohibit the acknowledgment of miscegenous children (although miscegenous marriages were then forbidden), and that to apply the provisions of the Code of 1870 to the deceased would be to give it retroactive effect in violation of Article 8 of the Civil Code.

Undoubtedly the correct result under the facts was reached in this case, but it is at least arguable that Article 204 of the Civil Code does not prohibit the acknowledgment of miscegenous illegitimates. The article prohibits the acknowledgment of children "whose parents were incapable of contracting marriage at the time of conception," but under the provisions of the Revised Civil Code of 1870 as originally enacted miscegenous marriages were not prohibited and therefore miscegenous children could be acknowledged. Act 54 of 1894 did amend Article 94 of the Civil Code to prohibit the marriages of whites and persons of color, but this fact alone, if enough to warrant, does not compel the conclusion that Article 204 should now be interpreted in such a manner as to make acknowledgment even more difficult than it was under the Code of 1825.

Presumption of Legitimate Filiation. Smith v. Smith[39] involved only a simple application of Article 184 of the Civil Code, which presumes the husband of the mother to be the father of the child conceived during marriage.

Paternal Authority and Tutorship (Including Custody)

Authority Over Illegitimates. Of all areas of family law, that of paternal authority and tutorship, and the relation of custody to each, is probably the least understood. A new, shining bit of evidence of this fact is the case of *State ex rel. Brookshire v. Brookshire*,[40] A wife and mother brought habeas corpus proceedings against the husband and father, from whom she was separated in fact, to regain custody of their five year old child, a child born before their marriage and conceived while the father was married to another woman. Custody was awarded to the mother. The result—undoubtedly for the best interest of the child—was entirely justifiable under the law as it was at the time of the proceedings below, but not for the reasons assigned in the opinion of the supreme court.

First, it should be pointed out that the district judge and the supreme court both properly handled this case as a contest over the custody of an *adulterous illegitimate,* the child being such

39. 214 La. 881, 39 So. (2d) 162 (1949).
40. 214 La. 289, 37 So. (2d) 711 (1948).

at the time of the habeas corpus proceedings. Had the controversy arisen after the effective date of Act 482 of 1948, amending Civil Code Article 198, the child would have been legitimate and it would have been necessary to decide the case on that basis.[41] The brief of the relator-appellee was filed, argument made, and opinion delivered after the effective date of the Acts of 1948, but of course this could not affect the correctness of the judgment rendered below before that time. If the respondent-appellee derived any rights from Act 482 of 1948, the proper procedure for him to follow would have been to institute habeas corpus proceedings on that basis. But the opinion is not justifiable under the law as it stood prior to 1948 and, because of the possible effect it may have in the future as "precedent" or "jurisprudence," the writer feels compelled to discuss it.

The case should have been decided by the application of two very simple provisions of the Civil Code. Under Article 337 the tutor is entitled to the custody of the minor and under Article 256 the mother is entitled to the tutorship of an illegitimate child not acknowledged by the father. The child being adulterous and therefore unacknowledgeable by the father, there should have been no question about the mother's right to the tutorship of the child and therefore to its custody.

Instead of handling the case in the simple manner outlined above, the court—following the brief of the relator-appellee—based its opinion on Articles 238 and 245 of the Civil Code:

> "Art. 238. Illegitimate children generally speaking, belong to no family, and have no relations; accordingly they are not submitted to the paternal authority, even when they have been legally acknowledged."
>
> "Art. 245. Alimony is due to bastards, though they be adulterous and incestuous, by the mother and her ascendants."

Counsel for the relator-appellee argued—and the supreme court agreed—that the exclusion of illegitimates from *paternal* authority leaves the negative pregnant that such children must be subject to *maternal* authority, and that Article 245 is further evidence of the lack of the father's authority over incestuous and adulterous illegitimates. These arguments are in conflict with the basic structure of our law on the authority over minors.

41. Under Act 482 of 1948, amending Article 198 of the Civil Code, adulterous illegitimates are legitimated by the subsequent marriage of their parents with each other if *both* acknowledge them, formally or informally, before or after marriage. All requisites were fulfilled in the instant case.

"Paternal authority" and tutorship are simply two forms of the authority over the custody of minors and their juridical representation. During marriage and as long as the parents are not separated from bed and board, the authority over the legitimate minor children of the marriage belongs to both parents, with the authority of the father prevailing over that of the mother in case of a difference of opinion. It is this authority over the custody and representation of legitimate minors which is known as "paternal authority."[42] "Maternal authority," in the sense in which it was used in the instant case, has no existence in our law. Wherever "paternal authority" ceases or does not exist, either because of the death of one or both parents, or their divorce or separation from bed and board, or because the children are *illegitimate,* the regime of tutorship begins.[43]

The failure of counsel and court to use legislation which would have enabled them to reach the result sought by each cannot be deliberate and could hardly be the result of oversight. The writer believes the cause is twofold: first, the practice of dealing with custody cases independently of the question of tutorship, a practice now so widespread that our judges and attorneys seem to forget that the one is an aspect of the other; and second, the dangerous practice of looking to decisions rather than to legislation for the basic law—in this case to the ancient decision of *Acosta v. Robin.*[44] This case, a contest between a mother and a father over the custody of an illegitimate child, was decided in 1829, *but under the Code of 1808.* That code did not contain a provision corresponding to Article 256, the first such provision appearing as Article 274 of the Code of 1825. Justice Porter, being unable to find any legislation on the tutorship of illegitimates in the Code of 1808 and yet being faced with the problem of finding a legislative basis for his decision, stretched the article in the Code of 1808 corresponding to the present Article 238 and gave custody of the illegitimate child to its mother. In spite of the fact that *Acosta v. Robin* could not and cannot have any meaning under the Codes of 1825 and 1870, both of which contain articles on the tutorship of illegitimates, that decision has been cited and quoted in custody cases ever since. The legislative reform of 1825 still awaits discovery.

Custody After Separation or Divorce. In two new cases,

42. See Arts. 215-226, La. Civil Code of 1870.
43. See Arts. 157, 246 and 337, La. Civil Code of 1870.
44. 7 Mart. (N.S.) 387 (La. 1829).

Johnson v. Johnson[45] and *Roshto v. Roshto*,[46] the supreme court once more[47] expressed its disapproval of the practice of dividing custody between separated or divorced parents, emphasizing the need for continuous control by a single parent; but at the same time the court specifically affirmed the natural right of the parent not awarded custody to visit the child at reasonable times. *Sampognaro v. Sampognaro*[48] involved only an application of Article 157 of the Civil Code consistent with the supreme court's practice of presuming that, after separation or divorce, it is to the greater advantage of the children to place them in the custody of the mother.

PARTNERSHIP. AGENCY.

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Partnership

The proper interpretation of a provision in a partnership agreement relative to the distribution of "capital and effects" on the death of a partner was one of the problems in *Succession of Conway*.[1] The widow of a deceased partner contended the agreement contemplated a distribution of the value of the partnership's business good will as well as other assets. The surviving partners denied this contention. Whether the agreement in question, analysed as a whole, did or did not contemplate the inclusion of good will among the "capital and effects" or "assets and effects" of the partnership is a question of fact which need not be considered here and which should not be considered without a review of the record. The supreme court, however, agreed with the widow's interpretation on the theory that good will was as much "partnership property" as capital assets, citing out-of-state authorities to this effect. Civil Code Articles 2808 and 2809 recognize good will as an asset, even one which may be the contribution of a partner to the total assets of the partnership.

Agency

The only agency case which need be mentioned is *Morgan v. Cedar Grove Ice Company, Incorporated*.[2] According to this

45. 214 La. 912, 39 So. (2d) 340 (1949).
46. 214 La. 922, 39 So. (2d) 344 (1949).
47. See Pierce v. Pierce, 213 La. 475, 35 So. (2d) 22 (1948), and the writer's remarks thereon (1949) 9 LOUISIANA LAW REVIEW 201.
48. 41 So. (2d) 456 (La. 1949).
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1. 41 So. (2d) 729 (La. 1949).
2. 41 So. (2d) 521 (La. 1949).