Louisiana Law Review

Volume 13 | Number 2
The Work of the Louisiana Supreme Court for the 1951-1952 Term
January 1953

Substantive Law - Private Law: Persons

Robert A. Pascal

interest."[15] Provisions of the lease agreement are not set forth in the opinion.

PERSONS

*Robert A. Pascal**

MARRIAGE, SEPARATION, AND DIVORCE[1]

The attempts of a husband to have his wife committed to an institution, or his use of "deceit and physical force" in attempting to confine her, do not amount to cruelty warranting separation from bed and board unless the action is taken without probable cause. This is the conclusion in *Kalpakis v. Kalpakis*.[2] The court reasoned that in some instances it may be the duty of a spouse to seek the commitment or confinement of the other, and that often a person in need of mental treatment must be tricked or forced to accept it. Consistent with this view, the court concluded that the plaintiff's petition failed to state a cause of action because it did not affirmatively allege the unjustifiable character of the defendant's conduct. The case is a novel one in Louisiana, but there should be no doubt that such conduct, if actually unjustifiable, constitutes cruelty under the jurisprudence applying Article 138 of the Civil Code.[3]

Eals v. Swan[4] affirmed the judicial practice of applying the doctrine of *comparative rectitude* in separation and divorce cases. In our jurisprudence, as the decisions cited in the *Eals* case show, our legislation allowing divorce or separation for cause has been regarded as measures "for the relief of the oppressed party," and judgments have not been rendered in favor of either in instances in which each party has given cause to the other and neither can

15. Id. at 67.

* Associate Professor of Law, Louisiana State University.

1. Decisions treating of questions of fact or settled legal questions relating to marriage, separation, or divorce and not discussed herein are Succession of Allen, 220 La. 365, 56 So. 2d 577 (1951)—proof of marriage, requirements for putative marriage; Meyer v. Hackler, 219 La. 750, 54 So. 2d 7 (1951)—standard of proof and sufficiency of evidence of adultery and reconciliation, and reconventional demands in divorce and separation suits; and Massa v. Thompson, 220 La. 278, 56 So. 2d 422 (1952), Kieffer v. Heriard, 221 La. 151, 58 So. 2d 836 (1952), and Clay v. Clay, 221 La. 258, 59 So. 2d 182 (1952) —evidence or proof of adultery.

2. 60 So. 2d 217 (La. 1952).

3. Extreme cases on what may be considered cruelty are Spansenberg v. Carter, 151 La. 1038, 92 So. 673 (1922) and Moore v. Moore, 192 La. 289, 187 So. 670 (1939).

4. 221 La. 329, 59 So. 2d 409 (1952).

be said to have been principally at fault. Perhaps this reflects too much of a tort psychology in matrimonial cases. If the question in separation and divorce problems be one of the advisability or inadvisability of continuing a personal relationship, it would seem that genuine bilateral personal fault should increase rather than decrease the justification for awarding a separation. There being no specific legislation on the precise point, in future decisions the court could easily refuse to follow the comparative rectitude doctrine. The existence of a judicial custom or *jurisprudence constante* covering this situation should not be an obstacle, for this is not an area of law in which predictability of result is of prime importance. Nor should a change in policy be rendered difficult by the rule that the wife "who has obtained the divorce," or who originally obtained a judgment of separation and who later is divorced following a period of nonreconciliation, may claim alimony.[5] A judgment for separation or divorce for the causes given by each party could be regarded as a judgment against rather than for each. Nor should the determination of who should have custody of the children present a problem, for today this is always decided on the basis of the best interest of the children.

In three decisions the Supreme Court showed strong determination not to permit existing marital relations to be disturbed by a showing that a divorce previously obtained by one of the parties is a nullity. In *Rouse v. Rouse*[6] the court refused to permit a wife to challange the validity of a divorce obtained by her husband in Mississippi in 1933, stating that by her later remarriage she had acquiesced in that decree. In *Wilson v. Calvin*,[7] after first noting a "strong public policy" against disturbing subsequently acquired personal relationships, it went to great pains to apply a jurisprudentially developed presumption of validity to a judgment of separation later made the basis of a divorce. In *Salassi v. Salassi*[8] it refused to accept the existence and validity of a Nevada judgment decreeing a divorce in favor of the plaintiff and against the defendant, though the defendant was ready to do so, on the technical ground that it had not been proven in the manner required by Article 752 of the Code of Practice. The court noted, in addition, that to admit the validity of the decree

5. Art. 160, La. Civil Code of 1870, and La. R.S. 1950, 9:302.

6. 219 La. 1065, 55 So. 2d 246 (1951). This case is discussed further in the Conflict of Laws section of this symposium.

7. 221 La. 451, 59 So. 2d 451 (1952).

8. 220 La. 785, 57 So. 2d 684 (1952).

would imply the invalidity of the second marriage of the plaintiff. In connection with this last case, it may be well to observe that to accept parties' contentions as to the validity or invalidity of divorce decrees without requiring proof thereof would be analogous to allowing the plaintiff in a separation or divorce suit to have judgment on the face of the papers where the defendant in his answer admits the existence of the cause for divorce. The policy which dictated legislation prohibiting the one would require the denial of the other.

ALIMONY

R.S. 9:301 provides that the wife against whom a judgment of divorce has been rendered on the ground of two years separation in fact may nevertheless claim alimony if she has not been at fault. In *Moser v. Moser*[9] the husband contended the wife could not be considered free from fault in separating from him if she did not have cause for separation from bed and board under Article 138 of the Civil Code. As proof that she did not have such cause he cited a previous judgment against her in a suit for separation she had filed against him on the grounds of habitual intemperance and cruel treatment and noted that the acts of which she then complained were the same as those which she now alleged as excuse for her having left the common home. The Supreme Court felt that proof "that the husband was not at fault would not prove that the wife was at fault."[10] The writer is inclined to prefer the husband's view to that of the court, believing that a spouse should not be considered justified in abandoning the common life, and therefore not without fault within the meaning of R.S. 9:301, whenever he or she has not grounds for demanding a separation from bed and board. If our legislation sanctions a suspension of common life in certain instances only, the implication is that it does not in others, and that in those other situations the parties are to be expected to live together. Furthermore, it would seem proper to say that the use of the word "fault" in R.S. 9:301 and its antecedent legislation beginning with Act 269 of 1916 must have been in the light of our then existing concept of fault in separation cases or more explicit language would have been adopted. In any event, the denial of alimony in instances in which the wife would not have been able

9. 220 La. 295, 56 So. 2d 553 (1951).

10. The same approach seems implied in a second decision rendered last term, Scott v. Scott, 221 La. 249, 59 So. 2d 179 (1952).

to obtain a separation from bed and board might have the salutary effect of discouraging the continuance of some separations in fact and thereby of avoiding the divorces which otherwise would follow.

In *Smith v. Smith*,[11] a decision rendered in the 1949-1950 term, the Supreme Court interpreted Article 160 of the Civil Code to mean that after divorce the *total assets* of the wife, both capital and income, should be taken into consideration in determining whether she is without "sufficient means for her maintenance" and therefore entitled to alimony. Shortly after this decision was reported in the advance sheets the defendant in *Babin v. Babin*[12] suddenly ceased paying the alimony awarded his wife under a judgment of separation from bed and board. When ruled into court he argued that under the decision in *Smith v. Smith* alimony was not due the wife who had sufficient capital assets for her maintenance, showed that his wife had reecived about five thousand dollars in the partition of the community formerly existing between them, and insisted he need not pay further alimony until she proved the expenditure of these assets. The Supreme Court affirmed the district court's judgment[13] against the husband's contention on the ground (as the writer reads the opinion) that the amount of alimony properly awardable to the wife was not an issue before the court in a rule to enforce payment due under a judgment previously rendered and now final.[14] There can be no doubt of the correctness of such an opinion, for once an alimony judgment becomes final and executory, the judgment debtor may not be allowed to refuse performance simply because he believes it to be an incorrect application of the law. The matter is then *res judicata*.

The decision, however, suggests several interesting questions.

11. 217 La. 646, 47 So. 2d 32 (1950).

12. 220 La. 121, 55 So. 2d 888 (1951).

13. The reasons for the district judge's judgment are not given in the Supreme Court's opinion.

14. Such is the writer's interpretation of the words "the . . . argument is . . . without merit. In the case of Smith v. Smith, supra, the husband was contesting the wife's right to alimony, while in the instant case there was no such contest; on the contrary, the husband acquiesced in the judgment awarding alimony by stipulating in the act partitioning the community that the defendant "shall pay to his wife, as alimony, the sum of $140 per month, until such time as she should remarry, *as set forth in the judgment of separation* from bed and board." It does not appear that the court considered the agreement to pay alimony as anything more than evidence of the husband's acceptance of the alimony judgment. Thus the case should not be interpreted as implying that the existence of the contract prevented a reopening of the alimony issue.

The case involved alimony payable after separation from bed and board, not alimony payable after divorce, as in the *Smith* case. Are the criteria for determining the wife's need for alimony after divorce applicable to determine the wife's need for alimony after separation from bed and board? The standards announced in the *Smith* decision are based on Article 160 of the Civil Code, which reads in terms of the *means* of the wife, whereas alimony after separation has been based on Article 148 of the Civil Code, which reads in terms of the wife's *income*.[15] Thus we may well wonder whether the Supreme Court would apply the "capital assets plus income" rule of the *Smith* case to a claim for alimony after separation from bed and board. Nevertheless, an astute commentator on our law, though avoiding the direct application of either Article 148 or Article 160, has suggested that the same criteria of the wife's need should be applied in both instances.[16]

This leads to the second question. Assuming that the criteria sanctioned in the *Smith* case are applicable to determine the amount of alimony after separation (or that the facts in the *Babin* case involved alimony after divorce rather than after separation), is there any procedure which the defendant in the *Babin* case could have followed to obtain a new judgment calculating his future obligation according to those standards? It is to be noted that he would not have been seeking a redetermination of his obligation because of a change in the circumstances of the parties, as clearly permitted under Article 232 of the Louisiana Civil Code, but because of an error of law committed by the court when originally determining the extent of his liability. Would *res judicata* be applicable here? It would seem a violation of natural justice to refuse relief as to payments which would fall due at a time when a different standard for liability would be applied to new cases involving persons similarly situated. Certainly the alimony obligor would be entitled to a redetermination

15. Art. 148, La. Civil Code of 1870, literally applies to alimony pendente lite, but has been extended to cover alimony after separation, concerning which there is no specific legislative text. See Anzalone v. Anzalone, 182 La. 234, 161 So. 594 (1935) and Arnold v. Arnold, 186 La. 323, 172 So. 172 (1937).

16. Lazarus, What Price Alimony, 11 LOUISIANA LAW REVIEW 401, 419 et seq. (1951). The author suggests that (1) although there is no legislation providing specifically for alimony after separation, (2) the parties are nevertheless still married, (3) the wife therefore is entitled to support and maintenance under Articles 119 and 120 of the Civil Code, and (4) the proper standard is the general one prescribed in Article 231 of the Civil Code, under which the "circumstances" as distinguished from the "income" of the person demanding alimony must be considered.

of his obligation if new legislation brought about the change in standards of liability.

In *Moser v. Moser*[17] the husband appealed from a judgment ordering him to pay alimony to his wife, for herself and the child in her custody, alleging the total amount exceeded one-third of his income and therefore exceeded the limit of his liability as fixed in Article 160 of the Civil Code. The Supreme Court correctly upheld the order, noting that Article 160 limited the alimony payable to the wife and for her benefit to one-third of the husband's income, but did not so limit his total alimentary liability to his wife and other persons. It would seem more consistent with our legislation to make separate alimony awards for the wife and the child, for the one's right is based on Articles 148 and 160, whereas the other's is founded on Article 227 of the Civil Code. Actually alimony for the wife should be made payable to her in her own name, but alimony for the child should be made payable to the wife who has its custody in her capacity as tutrix, for only the tutor may receive funds owing to the child. It may even be suggested that such practice would facilitate the proper filing of income tax returns, for whereas the husband may deduct from gross income alimony payable to and for the wife, he is entitled to claim only a dependent's exemption for amounts payable to a child.[18]

The decision in *Uchello v. Uchello*[19] perpetuates an error of law made in a 1925 alimony decision. During a suit for separation and after judgment therein the husband paid alimony at a rate which had been determined in a computation for the purposes of which the revenues from community assets had been considered as his income. At the time of the partition of the community, the husband sought to deduct the total alimony so paid from the total revenue derived from the community assets during the same period. The lower court disallowed the deduction, apparently believing that the husband's separate income was to be so charged, but the Supreme Court allowed the deduction. It is submitted that both courts were in error, and that the alimony should have been deducted from the wife's share of the "community" revenues during the same period.

If a judgment of separation or divorce dissolves the community as of the date of filing suit, then as of that date all assets

17. 220 La. 295, 56 So. 2d 553 (1951).
18. 26 U.S.C. §§ 22(k), 23(u), 25(D) (1946).
19. 220 La. 1061, 58 So. 2d 385 (1952).

formerly belonging to the community must be considered separate property owned in indivision by the spouses. From this, it would follow that from the date of filing suit to that of the judgment of separation or divorce the income from this property must belong half to the husband and half to the wife as separate income. As the wife's right to claim alimony from her husband pending suit is reduced to the extent that she has income,[20] it would seem proper to permit the husband to deduct the alimony he pays pending suit from income of the wife for the same period which may come into his hands.[21] If the standard for alimony after separation is properly the same as that pending suit—and such has been the view of the jurisprudence[22]—then the same rule should apply for alimony paid during this period.[23] This was the solution used in *Hill v. Hill*[24] in 1905. But in 1925 *White v. White*,[25] though citing *Hill v. Hill* as authority, permitted the deduction of the alimony payments from the total "community" revenue, and it is this second decision which the Supreme Court followed in *Uchello v. Uchello*.

That the error is a substantial one can be demonstrated by an application of the two solutions to the facts of the instant case. The total "community" income for the period during which alimony was paid amounted to $6,800 and the alimony payments totaled $3,600. If the wife had been charged with the full amount of this alimony (as in *Hill v. Hill*) then it would have totally consumed her $3,400 share of the revenue from the "community," and the husband's actual contribution as alimony for the period

20. Art. 148, La. Civil Code of 1870.

21. Another way of expressing this, and perhaps a better one, would be to say that the husband's liability for alimony pending suit cannot exceed the difference between the wife's income and her needs, and that if he is obliged to pay alimony computed on the basis of his separate income plus income in his hands properly belonging to the wife, whatever he must pay as alimony should be considered payable first out of such income of the wife and only after this is exhausted out of his separate income. It should be clear that the problem arises only because pending suit the wife does not actually have control over some of the income for this period which later, if a separation or divorce be granted, must be considered hers and not the husband's.

22. Arnold v. Arnold, 186 La. 323, 172 So. 172 (1937). See also note 15 supra, and text above it.

23. The above analysis is valid only so long as the wife's need is computed according to the standard prescribed by Article 148 of the Civil Code. Certainly a different rule should be applied in cases involving alimony paid under Article 160 of the Civil Code, for under that article as interpreted in Smith v. Smith, 217 La. 646, 47 So. 2d 32 (1950), the wife's capital assets as well as her income determine her means and therefore relative lack of need. (See the discussion under Babin v. Babin, 220 La. 121, 55 So. 2d 888 [1951], in this Symposium, p. 256 above.)

24. 115 La. 490, 39 So. 503 (1905).

25. 159 La. 1065, 106 So. 567 (1925).

would have amounted to only $200. On the other hand, by deducting the alimony payments from the "community" revenues, the net revenues of the "community" were reduced to $3,200, of which each spouse finally received $1,600. Thus the wife was obliged to use only $2,000 of her $3,400 income for the period for her support and the husband was made liable for $1,600 more than he should have had to pay.

MINORS[26]

Of considerable interest is the case of *Ball v. Campbell*,[27] which held that the mother who has surrendered an illegitimate child under Act 91 of 1942 may not, by the mere fact of her opposition, prevent the adoption of that child. The decision clearly distinguished that in *Green v. Paul*,[28] in which a surrender for adoption not made under Act 91 of 1942 was deemed not to prevent later effective parental opposition to the adoption. Act 91 of 1942 is no longer law, having been repealed and replaced by the more inclusive Act 227 of 1948,[29] but the decision is nevertheless important, for the language used in this legislation is more forceful than that in Act 91 of 1942 so far as it relates to the surrender of an illegitimate child neither formally acknowledged nor legitimated by the father. It should be noted, however, that the court prefixed the substantial part of its decision with a remark to the effect that, even if the mother has no right to prevent the adoption of an illegitimate child after surrendering it, her opposition thereto should be considered with other factors in determining whether the adoption would be for the best interest of the child.[30]

26. Three cases dealt with the proper evaluation of evidence in parental disputes over the custody of children. These cases are Ane v. Ane, 220 La. 345, 56 So. 2d 570 (1951); Kieffer v. Heriard, 221 La. 151, 58 So. 2d 836 (1952); and Guillory v. Guillory, 221 La. 374, 59 So. 2d 424 (1952). Another decision, not otherwise discussed here, is that of State v. Cronin, 220 La. 233, 56 So. 2d 242 (1951), in which the jurisdiction of the juvenile court for Orleans parish over children emancipated by marriage was upheld. The ground for the objection thereto is not stated in the opinion, and it is difficult to see. R.S. 13:1570 and 13:1569(3), as they read since Act 82 of 1950, expressly give the court such jurisdiction, and Article VII, Section 26 of the Constitution, as amended pursuant to Act 513 of 1948, is certainly broad enough to authorize the language used in that legislation.

27. 219 La. 1076, 55 So. 2d 250 (1951).

28. 212 La. 337, 31 So. 2d 819 (1947).

29. La. R.S. 1950, 9:401-405.

30. A second, but rather obvious, point in Ball v. Campbell was that the six months' prescriptive period for *attacking parental surrenders* of children under Act 91 of 1942, provided for in Act 227 of 1948, § 5 (La. R.S. 1950, 9:405), does not apply to attacks made on grounds not included in that legislation.

CRIMINAL NEGLECT OF FAMILY

Article 74 of the Criminal Code (R.S. 14:74) was amended by Act 164 of 1950 to read in part:

> "Criminal neglect of family is the desertion or intentional non-support:
>
> * * *
>
> "(2) By either parent of his minor child, whether legitimate or illegitimate, who is in destitute or necessitous circumstances. Solely for the purpose of determining the obligation to support, the court shall admit proof of paternity or maternity, or both."[31]

In *State v. Randall*[32] the state sought to prove the alleged actual father guilty under this article even though the child had been born during the marriage of its mother to a man other than the defendant. The Supreme Court applied the presumptions of legitimacy in Civil Code Articles 184-192, ruled the child must be considered that of the husband of the mother, and declared the statute inoperative as to the defendant, whether or not the biological parent. In three later cases, however, *State v. Jones*,[33] *State v. Sims*,[34] and *State v. Love*,[35] the Supreme Court concluded that the article as amended could not be applied to convict the alleged father of failure to support an illegitimate child if his fatherhood had not been determined before the establishment of his failure so to support. The court based its conclusions principally on these grounds: (1) that it is not possible to charge a person with criminal neglect of another unless he had an obligation to support that other before the act of neglect with which he is charged; (2) that Article 74 of the Criminal Code as amended in 1950 did not itself establish that obligation; and (3) that no civil obligation to support illegitimate children exists prior to the establishment of their filiation by acknowledgment or proof of parentage. Whether or not the second and third points are correct, and certainly there is room for argument here, one can sympathize with the court's decisions. No matter how much parents may neglect their children and how great may be the

31. This amendment and the cases mentioned in this section of the Symposium are more fully treated in the Comment, 12 LOUISIANA LAW REVIEW 301 (1952).

32. 219 La. 578, 53 So. 2d 689 (1951).

33. 220 La. 381, 56 So. 2d 724 (1951).

34. 220 La. 532, 57 So. 2d 177 (1952).

35. 220 La. 562, 57 So. 2d 187 (1952).

need for compelling them to perform their obligations, it is shocking to think that one might be accused—and much more so, convicted—of crime for not supporting a child whose paternity he might well have questioned. To permit a civil suit to establish paternity and the duty to support, even for a period prior to the suit, and to permit criminal prosecution for failure to support once the obligation had been established would be quite different things. This is not to say that the legislature cannot provide otherwise, and unfortunately it has provided otherwise since these decisions.[36]

PRESCRIPTION

*Joseph Dainow**

ACQUISITIVE PRESCRIPTION

The case of *Ramsey v. Murphy*[1] illustrates the usefulness of the thirty-year prescription[2] in providing stability for land titles and in making unnecessary a probe concerning the actual validity of very old transactions (which may very well have been perfectly good). Fifty years after the settlement of a succession, the plaintiffs claimed an interest in property which once belonged to their grandparents. In the settlement of the original succession, the property had been sold to pay debts and then it was repurchased by another grandchild who lived on the property. The latter fenced it in, paid taxes, sold timber, granted mineral leases, and mortgaged the property, and then he conveyed it to another, who continued the physical possession by himself and through a tenant until the present suit. Without investigating the plaintiff's charge of invalidity against the succession sale and repurchase half a century ago, the court held that by reason of privity of contract, the present possession could be tacked on to the preceding one, thereby making over thirty years since the plaintiff's majority in 1917.[3] Cases like this demonstrate force-

36. Act 368 of 1952, amending Criminal Code Article 74 (La. R.S. 14:74). Under this amendment, there is no provision for the establishment of the parenthood of the defendant when the civil law establishes a presumption of legitimate paternity in another person. Thus the result which the state sought to achieve in State v. Randall, 219 La. 578, 53 So. 2d 689 (1951), mentioned in the text above, is not possible under this amendment.

* Professor of Law, Louisiana State University.

1. 220 La. 745, 57 So. 2d 670 (1952).

2. Art. 3499 et seq., La. Civil Code of 1870.

3. This also eliminated any need to investigate the effects of the 1920 and 1924 amendments of Civil Code Art. 3478.