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PERSONS

Robert A. Pascal*

DIVORCE

The case of *Davidson v. Helm*¹ requires careful comment on its decision, dictum, and implications, both on the basis of internal Louisiana law and on that of federal constitutional law. The facts are simple. An estranged Mississippi domiciliary wife sued her Louisiana domiciliary husband at his parish domicile for divorce under Revised Statutes 9:301. This legislation is as follows:

"When married persons have been living separate and apart for a period of two years or more, either party to the marriage contract may sue, in the courts of his or her residence within this state, provided such residence shall have been continuous for the period of two years, for an absolute divorce, which shall be granted on proof of the continuous living separate and apart of the spouses, during the period of two years or more."

The trial judge dismissed the suit, so the appellant's brief² and the majority opinion state, apparently because he did not believe the legislation permitted a non-domiciliary plaintiff to sue for such a divorce in Louisiana. The majority of the Supreme Court, Justices Hawthorne and McCaleb dissenting, reversed the trial judge and allowed the divorce. This decision is without doubt erroneous in its interpretation of Revised Statutes 9:301; it repeats grave errors committed in the decision of *Wreyford v. Wreyford*³ and *Latham v. Latham*,⁴ decided in the 1949-50 term; it resulted in a judgment which, it is submitted, is not entitled to full faith and credit in any other state, and which, the writer believes, is not valid under the United States Constitution.

The rationale of the majority's opinion seems to be as follows:

- (1) Revised Statutes 9:301 establishes two years separation in fact as a ground for divorce so long as either

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1. 222 La. 759, 63 So. 2d 866 (1953).

2. Brief for Appellant, p. 4.

3. 216 La. 784, 44 So. 2d 867 (1950).

4. 216 La. 791, 44 So. 2d 870 (1950).

plaintiff or defendant has been domiciled in the same Louisiana parish during the two years preceding suit.

- (2) Revised Statutes 9:301 authorizes the plaintiff, if he or she be a domiciliary of Louisiana, to file suit in the parish of his or her domicile, but this venue is not exclusive, and the plaintiff, whether or not a domiciliary of Louisiana, may sue for divorce under the general rules on this subject.
- (3) The general law on divorce venue allows the plaintiff to sue
 - (a) in the parish of the defendant's domicile, or
 - (b) in the parish of the last matrimonial domicile.

That the general law on divorce venue allows the plaintiff to sue (a) in the parish of the defendant's domicile or (b) in the parish of the last matrimonial domicile is an incorrect statement of the Louisiana law on the subject. It was first so stated in *Wreyford v. Wreyford*⁵ (1950) and the incorrectness of this statement was pointed out both by the writer in the symposium article on the work of the Supreme Court during the 1949-50 term⁶ and by a Louisiana State University Law School student in a comment appearing shortly thereafter.⁷ There is no need to repeat the demonstrations here. Those who are sufficiently interested will be able to read those documents. Suffice it here to say that whereas under the general law a divorce suit may be brought in the parish of the defendant's domicile,⁸ there cannot be suit at the "last matrimonial domicile" for the simple reason there is no authorization in the legislation for any such venue.

Whether Revised Statutes 9:301, in allowing the plaintiff to sue in the parish of his "residence," establishes an exclusive or an additional venue for such divorce suits is of no importance as long as both parties are domiciliaries of the state (as in the *Wreyford* decision); in such a suit there can be no question of the judgment rendered being entitled to full faith and credit or considered invalid under the United States Constitution. Thus it was that in commenting on the *Wreyford* decision in a previous

5. 216 La. 784, 44 So. 2d 867 (1950).

6. 11 LOUISIANA LAW REVIEW 168-171 (1951).

7. Comment, 12 LOUISIANA LAW REVIEW 210, 220 (1952).

8. Art. 162, La. Code of Practice of 1870.

symposium the writer did not feel compelled to state his views on the subject and refrained from so doing.⁹ For reasons which will appear below, the writer regards the judgment in the *Davidson* case, under discussion, as neither entitled to full faith and credit nor valid, and inasmuch as the rationale of the decision is based on the interpretation of Revised Statutes 9:301, he now feels compelled to give his appraisal of that interpretation. In this matter he is completely in accord with the dissenting justices and finds the opinion of Justice McCaleb too clear and convincing to warrant further discussion here.

The real tragedy of the decision, however, is that, if the writer's conclusions in the matter are correct, the judgment rendered is neither entitled to full faith and credit nor valid under the United States Constitution. In a student comment appearing in this issue the opinion is expressed that a state may entertain a divorce suit and apply its laws *only if the plaintiff is domiciled in that state*.¹⁰ The writer believes this opinion is correct and therefore considers the judgment in the *Davidson* case not entitled to full faith and credit in other states.

Beyond that, however, the judgment must be considered invalid under the United States Constitution. Though it was once accepted generally, and indeed even now maintained by many, that the norms for recognition and validity are dissimilar and that a decision may be valid in the state where rendered and yet not entitled to recognition, that view no longer can be maintained. Very recent research has proved beyond reasonable doubt that the full faith and credit clause of the United States Constitution was meant to and does give to the federal government complete control in the field of the conflict of laws.¹¹ This being so, a state can have neither legislative jurisdiction nor judicial competence where the conflict of laws rules which might be enacted by Congress or applied by the United States Supreme Court would deny it. If, as the writer contends, the conflicts law applied by the United States Supreme Court implies that only the domicile of the plaintiff will give a state legislative and judicial competence in a divorce suit, the judgment in the *Davidson* suit is not only not entitled to full faith and credit but is also invalid under the necessary implication of the full faith and credit clause of the United States Constitution.

9. 11 LOUISIANA LAW REVIEW 168, 170 (1951).

10. See Comment, *infra* p. 257.

11. Crosskey, *Politics and the Constitution* 547-557 (1953).

Proof of Adultery

Three decisions dealt with proof of adultery as a ground for divorce. In two of these, *Feazel v. Feazel*¹² and *Arbour v. Murray*,¹³ it was said that testimony of the defendant confessing adultery is *admissible evidence*, but *insufficient without corroboration* to constitute proof of the act. Previous decisions to the same effect were cited, but it would have been well for the court to note that the same principle which is sanctioned in our legislation forbidding the granting of divorces on the face of pleadings, that is to say, the admission in the answer of the defendant,¹⁴ warrants the conclusion reached in these cases. In this way the court would have been basing its judgment on the legislation, as it should be in a civil law system, rather than on their own previous decisions. Although there is a difference between accepting at face value an admission in an answer and giving full credence to a confession in open court, in that the court has the opportunity to test the veracity of the witness in the second but not in the first, there is, nevertheless, in both instances the factor that it would be too easy to obtain a divorce by collusion and thereby prejudice the interest of society in maintaining the marital relation except where legal cause exists. Ultimately the reason for the rule is the doubtful credibility of such testimony, and the doubt is so reasonable that if such testimony is to be admitted at all it should at least be corroborated by other evidence. This is the intent and the effect of these two decisions.¹⁵

Similarly, in the third decision involving proof of adultery, *Estopinal v. Estopinal*,¹⁶ the Supreme Court quite correctly ruled admissible a paramour's testimony as to the fact of the adultery. Here again credibility is the prime consideration. If there is reason to suspect the credibility of the witness, of course the testimony should be corroborated, and it was in this case; but it does not seem to the writer that such a person's testimony should be suspected merely because he or she is the paramour.

12. 222 La. 113, 62 So. 2d 119 (1952).

13. 222 La. 684, 63 So. 2d 425 (1953).

14. La. R.S. 1950, 13:3601 (4).

15. The writer's agreement with the law as interpreted in the decisions discussed does not imply his agreement with court's findings of fact in *Feazel v. Feazel*, so far as they relate to the existence of evidence to corroborate the confession of adultery. On this point see the comments *infra* p. 125.

16. 66 So. 2d 311 (La. 1953).

In that respect the testimony of a defendant spouse properly can be treated differently from that of an accomplice. Nevertheless, it must be observed that because adultery is the only ground for immediate divorce it is open to abuse through collusion and great care must be exercised by the trial judge in evaluating the truth or falsity of the testimony offered in such cases.

SEPARATION

The appeals presented in separation cases require little discussion. In *Glorioso v. Glorioso*¹⁷ the issue was whether the acts of the plaintiff husband constituted such cruel treatment as to justify the wife's departure from the marital home. The question in *Schaneville v. Schaneville*¹⁸ was whether the conduct of the plaintiff wife was such provocation as to excuse the husband for the acts charged to him as cruelty. In *Rainwater v. Brown*¹⁹ the existence or non-existence of reconciliation and relative fault were the facts at issue. In all three cases the judgments of the lower courts were affirmed, as they should have been. It may be well to note, however, that in the last mentioned case the court used the word "condonation" rather than "reconciliation." The latter not only is correct under Article 152 of the Civil Code, which uses the word "reconciliation," but also better conveys the idea that the mere failure to sever the common life is not sufficient to constitute the operative fact which extinguishes causes for separation and divorce. "To condone" often is used in common speech as the equivalent of "to tolerate," but "to become reconciled" always implies the decision to continue or to resume the common life in spite of the existence of a cause for separation or divorce. Judging from the opinion in the case under discussion, the attorney for plaintiff-appellant apparently understood "condonation" in the sense of its everyday meaning as explained above. Perhaps the Supreme Court's use of "condonation" rather than "reconciliation" in previous decisions contributed to the difficulty in this case. If so, the reason for the court's adherence to the proper terminology is all the more important to obviate the recurrence of such incidents.

17. 223 La. 357, 65 So. 2d 794 (1953).

18. 66 So. 2d 335 (La. 1953).

19. 221 La. 1033, 61 So. 2d 730 (1952).

MARRIAGE

The decisions on the subject of marriage involved only well understood points of law and the real issues therefore were primarily fact issues. *Bloom v. Willis*,²⁰ *Succession of Fields*,²¹ and *Succession of St. Amand*²² each dealt with the correctness of the lower court's findings on the existence or non-existence of a marriage. In the second of the named cases there was also the question of the existence of a putative marriage and this was disposed of on the basis of standing interpretations of the Civil Code. These decisions do not require discussion.

ALIMONY

In *Wilmot v. Wilmot*²³ a divorced husband and father sought to be relieved of his alimentary obligations to his wife and the two children in her custody on the ground they had left the state and established a domicile in Tennessee. The court looked to Section 457 of the Restatement of the Conflict of Laws for guidance and followed it in deciding in favor of the wife and children. At the time of the suit and judgment in the trial court there was no Louisiana legislation on this subject. It may be well to note, however, that in 1952 Revised Statutes 13:1601-1609,²⁴ a variation of the Uniform Reciprocal Enforcement of Support Act,²⁵ was enacted. This legislation primarily establishes a procedure for enforcing alimentary obligations between persons in Louisiana and other states, but necessarily implies that a Louisianian can have alimentary obligations toward non-Louisiana domiciliaries.²⁶

20. 221 La. 803, 60 So. 2d 415 (1952).

21. 222 La. 310, 62 So. 2d 495 (1952).

22. 223 La. 319, 65 So. 2d 780 (1953).

23. 223 La. 221, 65 So. 2d 321 (1953) and a second suit between the same parties, 223 La. 250, 65 So. 2d 330 (1953), were consolidated for trial and the two disposed of with one opinion rendered in the first.

24. La. Act 492 of 1952.

25. 9A Uniform Laws Annotated 43-65 (1953 Supplement).

26. It may not be idle to ask what state has legislative jurisdiction (that is, what state's law is applicable) in support cases. The mere fact that the Restatement of the Conflict of Laws has its theory and that Louisiana and other states have taken stands in their jurisprudence and legislation mean nothing in themselves if, as the writer contends, the determination of the limits of the legislative jurisdiction of states is ultimately within the competency of the U. S. Congress or Supreme Court by reason of the full faith and credit clause of the United States Constitution. See this Symposium, p. 163 infra. The writer, however, is not prepared at this time to discuss this matter in relation to alimony law. It requires more careful study than he has been able to give to it.

It is necessary to state the essential facts in *Wainright v. Wainright*²⁷ to render discussion of it intelligible. A divorced wife obtained a judgment for past due and future alimony. The husband appealed. While the appeal was pending he filed another suit asking that the original judgment in the alimony proceedings be declared null on the ground the wife was now working and no longer in need. The lower court dismissed the suit, saying the same judgment was up on appeal and undisposed of. The Supreme Court affirmed this action, saying that a suit for reduction of alimony had not been filed. Clearly there is substantial injustice here, even if the husband's attorneys misunderstood the law and used the wrong procedure. It is true that once alimony payments become due under a judgment they remain collectible, no matter how much the condition of the parties may change. To the extent, therefore, that the "suit for nullity" would have sought cancellation of the obligation to pay past due alimony it was unfounded. This should have been clear to counsel in the first place. But there can be no doubt this "suit for nullity" contained a request to reduce or eliminate alimony payments for the future, as is authorized by Article 232 of the Civil Code, and it is difficult to understand why it should not have been regarded as such in spite of the improper terminology and classification of the suit by the plaintiff's attorneys. Besides, it is certainly incorrect to imply, as the trial judge and the Supreme Court did, that changes in circumstances, warranting a change in the specification of the alimentary obligation and occurring after the judgment below, may be considered on the appeal of that judgment. The appeal properly can consider only the correctness of the judgment rendered by the trial court in the light of the facts as they existed at that time. New circumstances may be considered only in a new suit to reduce or cancel alimony. In the writer's opinion, the "suit for nullity" should have been treated as such a new suit.

The remaining alimony decisions were of lesser interest. In *Leager v. Leager*²⁸ the Supreme Court once more had to declare the obvious, that under Article 148 of the Civil Code a wife is entitled to alimony pending suit for separation or di-

27. 221 La. 787, 60 So. 2d 410 (1952).

28. Two cases between the same parties, 222 La. 301, 62 So. 2d 492 (1952) and 222 La. 309, 62 So. 2d 494 (1952), were consolidated for trial and disposition.

voiced, be she at fault or not. It is inexcusable for attorneys to contend otherwise in the face of the clear language of Article 148. It is a waste of the court's time and probably often of a client's money. *Richards v. Garth*,²⁹ *Davieson v. Trapp*,³⁰ and *Breffeilh v. Breffeilh*³¹ all were concerned with what is "fault" within Article 160 of the Civil Code, limiting the divorced wife's right to alimony to instances in which she has not been at fault, and the proof of absence of fault. It was said in both of the first two mentioned cases that the wife must establish her freedom from fault, but it is not clear from the decisions that she, and not the husband, had been made to bear the burden of convincing the court.

DISAVOWAL OF PATERNITY

*Feazel v. Feazel*³² is another decision in the tradition of *Eloi v. Mader* and *Succession of Saloy*, of infamous memory.³³ A husband sought to disavow a child born to his wife eleven and a half months after they were separated in fact. The opinion states that the husband of the mother is the father of the child unless he proves that his remoteness from the wife made their cohabitation impossible (citing Article 189) or that the wife committed adultery and concealed the birth of the child from the husband (citing Article 185), then proceeds to find neither remoteness nor concealment of birth, and finally in effect declares the husband the father of the child conceived during the separation in fact of the spouses. The legislation does not support this result.

Articles 184-192 of the Civil Code, on legitimacy resulting from marriage, are not automatically applicable in every case in which the child is found to have been conceived or born of a married woman. If they were, they would be in conflict with

29. 223 La. 117, 65 So. 2d 109 (1953).

30. 66 So. 2d 804 (La. 1953).

31. 221 La. 843, 60 So. 2d 457 (1952).

In this case the Supreme Court, Justice Hamiter dissenting, permitted the wife to withdraw her reconventional demand for alimony after trial and before judgment. See the discussion of this point by McMahan in this symposium, p. 202 *infra*.

32. 222 La. 113, 62 So. 2d 119 (1952).

33. *Eloi v. Mader*, 1 Rob. 581 (La. 1841), and *Succession of Saloy*, 44 La. Ann. 433, 10 So. 872 (1892) in each of which children born to a married woman while she was living openly in adultery rather than with her husband were deemed the legitimate children of the husband because he had not disavowed them. These cases have been followed ever since without exception.

Article 197, in the chapter on proof of legitimate filiation. This article in no indefinite terms makes it clear that in some instances legitimate filiation may be disproved, *even if it is established that the child was born of a married woman, by showing that her husband is not its father.* French doctrine interpreting similar articles has long recognized that the presumption of legitimacy, resulting from the fact of conception or birth from a married woman and necessitating an action of disavowal to rebut it, exists only where the person whose legitimacy is in question has enjoyed the reputation of being a legitimate child.³⁴ What would prevent the child from enjoying this reputation? Certainly the wife's open adulterous concubinage, or rearing the children under a surname other than her husband's, or her taking pains to hide her pregnancy and the birth of a child from her acquaintances should be sufficient causes, for these are all acts which attest to the facts and lead men to attribute paternity to another than the husband. Indeed this is the clear implication of Articles 195 and 196.³⁵ In such states

34. See Comment, 13 LOUISIANA LAW REVIEW 587, 597 (1953) and also 2 Planiol et Ripert, *Traité pratique de droit civil français* n. 813-816 (2 ed. 1952). The author of the comment above cited lists as "another possible interpretation" of Article 197 that the person contesting legitimacy may prove the child "is not the child of the husband of the mother in the sense that the mother was not married to the alleged father at the time of his birth or conception." 13 LOUISIANA LAW REVIEW 587, 598. The present writer cannot accept that view. In reducing the article to a provision authorizing proof that the alleged parents were not married to each other it gives it no special role at all, for the non-existence of a marriage between parents may always be shown. That is a question of marriage, not of legitimacy, though the finding of non-marriage between parents may reduce a child to illegitimacy. Besides, it seems that if the redactors of the article had intended to say that the non-marriage of the alleged parents could be proven they could have expressed this more directly. The very wording of Article 197, on the other hand, indicates that it is concerned with biological filiation; and, inasmuch as the article is to be found in the chapter "On Legitimate Children," it must be concerned with the biological filiation between a child and persons married to each other, the indispensable conditions for legitimacy. In other words, the assumption of Article 197 must be that the "husband of the mother" referred to is her husband at the time of the child's conception.

35. Art. 195, La. Civil Code of 1870. "The being considered in this capacity is proved by a sufficient collection of facts demonstrating the connection of filiation and paternity which exists between an individual and the family to which he belongs.

"The most material of these facts are:

"That such individual has always been called by the surname of the father from whom he pretends to be born;

"That the father treated him as his child, and that he provided as such for his education, maintenance and settlement in life;

"That he has constantly been acknowledged as such in the world;

"That he has been acknowledged as such within the family."

Art. 196. "If there be neither register of birth or baptism, nor this

of affairs there is no occasion for disavowal of the child for there is no reputation of legitimacy to destroy. The child must in such instances prove his legitimacy and even if he goes so far as to prove his mother was a married woman anyone interested may prove that he was not the child of that woman's husband. This interpretation renders Articles 184-192 and Article 197 in harmony; it also is more consistent with what persons would ordinarily expect the law on this subject to be; and this harmony and this consistency indicate the correctness of this interpretation and recommend its acceptance.

Whether or not under the facts of the *Feazel* case it could have been said that the child did not enjoy a reputation of legitimacy, rendering it unnecessary for the husband of the mother to initiate an action of disavowal, need not be answered.³⁶ The fact is that the husband did initiate an action to disavow the child, *and with cause*, for in instances of the birth of a child three hundred or more days following a voluntary separation the husband may disavow paternity simply by proving that he and his wife had not cohabited at any time of possible conception. While preparing these remarks it occurred to the writer for the first time that this is the meaning of Civil Code Article 188, paragraph two, if it is to be given any effect at all. This paragraph states that "in case of voluntary separation, cohabitation is always presumed, *unless the contrary be proved.*" Why prove non-cohabitation if this has no bearing on the right to disavow? Unless this paragraph means that non-cohabitation during a period of voluntary separation is a cause for disavowal it means nothing.

The correctness of this interpretation can be demonstrated

general reputation, or if the child has been registered under a false name, or as born of unknown parents, also if the child has been exposed or abandoned, or if his condition has been suppressed, the proof of his legitimate filiation may be made either by written or oral evidence."

36. The French court of Cassation has refused to admit of the possibility of a reputation of illegitimacy in the face of a birth certificate indicating legitimacy. Civ. 26 Oct. 1927, D.1928,1,65, S.1929,1,209. In the *Feazel* case the wife had left Louisiana and gone to Missouri to have her child. There she registered it, naming her husband as the father. The husband, however, did not know of the pregnancy or birth until later. Can it be said that this registry gave the child an appearance of legitimate status sufficient to overcome other indications to the contrary? The writer would think that the wife's use of the husband's name in such instances probably resulted more from the shame of admitting her adultery than the belief her husband was the father of the child. To permit this one factor of the registration to overcome a reputation of illegitimacy, if otherwise established, would be permitting a fraud on the law.

easily in the context of the whole Article 188. The first paragraph states that "The legitimacy of the child born three hundred days after separation from bed and board . . . may be contested, unless it be proved that there had been cohabitation between the husband and wife . . ." The second paragraph adds "But in case of voluntary separation, cohabitation is always presumed, unless the contrary be proved." Thus the import of the whole article must be as if it read as follows:

The child born three hundred days after *either* a separation from bed and board *or* a separation in fact may be contested.

If the separation be one from bed and board, that in itself is cause for disavowal unless it be proved that there has been cohabitation between the spouses.

But if the separation be voluntary, then the husband must prove there has not been any cohabitation between the spouses.

In this case the two necessary elements, the birth of the child more than three hundred days after a voluntary separation and the non-cohabitation of the spouses were both proved and the judgment should have been one of disavowal.³⁷

For too long decisions in this field of legitimate filiation have been contrary to the obvious biological facts and the common sense judgment of men. They have plagued our jurisprudence and our legislation and made them objects of ridicule. Legislative reforms were not forthcoming probably not so much because of satisfaction with the decisions as because the very persons who are affected by them do not learn of the law's interpretation until they have been caught irrevocably and forever denied the possibility of having their particular situations changed. But there really is no need for a change in the legislation. It is only necessary for the Supreme Court to recognize the true meaning of the existing law at the first opportunity. It can do this by recognizing (1) that non-cohabitation during voluntary separation is itself a cause for disavowal under Article 188, (2) that Articles 184-192 are not applicable and

37. It may be noted that the French Civil Code of 1804 did not have a counterpart to Article 184 of the Louisiana Civil Code. A provision similar to paragraph one of Article 188 was added by the Law of 6 Dec. 1850, but there is even today no provision similar to paragraph two of Article 188 in the French law. Thus the failure of French courts and commentators to recognize voluntary separation and non-cohabitation as a cause for disavowal is of no significance for our law.

no disavowal is necessary if the child does not enjoy the reputation of having legitimate status, and (3) that where the child does not enjoy the reputation of legitimacy all interested persons may defend themselves against his claims, even by proving that he is not the child of the husband of his mother.

There are two other scores on which the writer cannot agree with the decision in the *Feazel* case. The husband sought to prove adultery of the wife and "concealment of the birth from him," itself a ground for disavowal even where the spouses are living together.³⁸ The court upheld the trial judge's refusal to find either adultery or concealment. On the adultery issue the trial judge apparently with reason failed to believe the testimony of the single third party witness. This left only the testimony of the defendant wife, given by way of answers to interrogatories on deposition, in which she admitted (1) she had never at any time consummated her marriage with her husband and (2) she had given birth to a child eleven and a half months after she and her husband separated in fact. The Supreme Court seemed to doubt this could be an admission of adultery, but in addition stated both (a) such testimony, if regarded as an admission, could not be considered proof of adultery because of the absence of corroborative evidence and (b) a married woman cannot be allowed to "bastardize" her child. The writer has great difficulty with both (a) and (b). It would seem that the birth of a child to a wife eleven and a half months after separation in fact would sufficiently corroborate her confession of adultery.³⁹ On the question of whether a mother may admit the illegitimacy of her child, let it be observed that the court cited only earlier precedents, none of which find the least support in our legislation. The court was merely perpetrating the errors of its predecessors, all of which stem from the misconception of Articles 184-197, as previously explained. Articles 184-192 do establish a presumption of legitimacy where indications of irregularity in the conception of

38. Art. 185, La. Civil Code of 1870.

39. It may be noted that modern French jurisprudence interpreting Article 313 of the French Civil Code, which is identical with our Article 185, does not consider the proof of adultery essential at all. When proven, adultery becomes an evidentiary fact corroborating the indication of irregularity (or adultery) in the conception of the child which itself results from the concealment of his birth from the husband. Thus in such cases proof of the concealment of the birth is sufficient in and of itself for disavowal. This seems more logical than our Louisiana view. See 2 Planiol et Ripert, *Traité pratique de droit civil français* n. 85 (2 ed. 1952).

the child are absent, but there is nothing in the articles to imply that we must shut our eyes to the obvious immorality of life in our times to such an extent as both to impose unjustly on a man the status and obligations of legitimate paternity, with all they imply in terms of alimony and succession, and to add insult to injury by stamping him officially with the mark of the cuckold. This cannot but produce a feeling of contempt for both legislation and the administration of justice.

ADOPTION

The validity of certain acts of adoption were questioned in two appeals. In *Succession of Thompson*⁴⁰ it was claimed that an act of adoption was invalid, though executed before a notary public, because not executed in authentic form. The act had been executed in 1943, and therefore under Act 169 of 1940, the legislation still in effect as Revised Statutes 9:461. This act provides only for "a notarial act signed by the adoptive parent or parents and the person to be adopted," and the opinion analyzes the history of adoption legislation in Louisiana to find that just such an act and not one in authentic form was contemplated by the Legislature.

In *Succession of Pizzillo*⁴¹ an act of adoption executed during the life of Act 31 of 1872 as amended by Act 48 of 1924 was attacked both because it had not been executed in authentic form, though before a notary, and because the blood parent had not signed the act. The court was able to point out that Section 13 of Act 46 of 1932, itself now superseded,⁴² expressly limited the attack on adoption acts on such grounds to six months after that date.

The case of *Ball v. Campbell*⁴³ was before the Supreme Court for the second and third times. In the second opinion the subject was the authority of the Supreme Court under its supervisory jurisdiction to issue writs of certiorari and prohibition to a juvenile court in an adoption proceeding, and this was affirmed. In the third opinion the court dismissed as not proved the contention of the blood mother that she had been coerced into surrendering her child for adoption. It also decided that

40. 221 La. 791, 60 So. 2d 411 (1952).

41. 223 La. 328, 65 So. 2d 783 (1953).

42. The current legislation is La. R.S. 1950, 9:461-462.

43. Two opinions, 222 La. 357, 62 So. 2d 511 (1952) and 222 La. 399, 62 So. 2d 621 (1952).

the surrender was valid under Act 91 of 1942, now superseded, though made to an agency "approved" but not "licensed" by the State Department of Public Welfare, because the act by its very language did not require more than "approval." The current legislation, however, requires licensing rather than mere approval.⁴⁴

The most interesting issue raised in any of the adoption cases was that of the possibility of revoking an adoption by mutual consent of the adopter and adopted. In *Succession of Thompson*⁴⁵ the court ruled this was impossible. The explanation given was that adoption created a status similar to that of legitimate filiation, that like legitimate filiation adoption gives rise to forced heirship, and that nothing in the law authorizes the termination of forced heirship by agreement. There being no legislation on this subject, the decision must be regarded as having been founded on Article 21 of the Civil Code, which directs the judge to resort to natural law and reason when the legislation is inadequate. The writer is not prepared to say whether the decision reflects what should be the law on this subject. It is a matter which warrants careful study. Undoubtedly the possibility of terminating an adoption might itself give rise to tensions which would weaken the relationship, just as the very possibility of divorce leads to thoughts thereof on occasion of domestic unrest and thereby itself becomes the major cause for divorce. The adoption of minors especially would seem to warrant the same treatment as legitimate filiation. Perhaps there is less reason to require this identity of treatment in the case of adoption of majors, but even here it would seem preferable to maintain the relationship to prevent adopted or adopter from seeking to terminate to the prejudice of the other a status which proves less desirable or more burdensome than he had contemplated.

TUTORSHIP AND CUSTODY

A very fundamental question was raised in *Wilmot v. Wilmot*,⁴⁶ previously considered in another connection. After a divorce the wife had been awarded custody of the children of the marriage. Sometime later she filed a motion in the same

44. By La. R.S. 1950, 9:401-405.

45. 221 La. 791, 60 So. 2d 411 (1952).

46. 223 La. 221, 65 So. 2d 321 (1953).

proceedings to have the husband show cause why she should not be permitted to remove her domicile to Tennessee and take the children there with her to live. The lower court *amended* the previous custody judgment "so as to provide that Mrs. Wilmot is given the right to remove herself and the two children to Nashville, Tennessee," and the Supreme Court affirmed this judgment and decree in similar language. Both the very fact the wife filed such a motion for a rule and the character of the language used in the decision indicate the proceedings were conducted and disposed of on the assumption that permission to move was required and that the court could have denied it. This appreciation of the law is different from that evidenced in previous cases in which the Supreme Court affirmed *the right* of a natural tutor to take a child with him when he moved out of the state.⁴⁷ It is even at variance with language used in a 1936 decision and quoted with approval by the Supreme Court.⁴⁸ To affirm the latter approach is not at all to deny that the husband and father or other interested party could have requested a redetermination of the question of custody if he believed that the removal of the children from the state would have been seriously detrimental to their welfare;⁴⁹ but this is not at all the same thing as saying that one who has been given custody of a child may not take the child with him to a new place of domicile out of the state without receiving permission so to do.

There is indeed no legislation which is applicable to this situation. The issue therefore must be disposed of on other bases consistent with natural law and reason, all as required by Article 21 of the Civil Code. The writer believes that a sound approach to this kind of problem would be to regard the award of custody as the creation of a status which then continues in effect until terminated naturally or by judicial action for cause, either in this state or in the state in which the custodian and child are then domiciled or found. Certainly it would seem

47. *Delacroix v. Boisblanc*, 4 Mart. (O.S.) 715 (La. 1817); *Robins v. Weeks*, 5 Mart. (N.S.) 379 (La. 1827); *Bailey v. Morrison*, 4 La. Ann. 523 (1849); *Nunez v. Acosta*, 184 La. 211, 165 So. 716 (1936). See also *Wheeler v. Wheeler*, 184 La. 689, 167 So. 191 (1936) and *Sanford v. Sanford*, 208 La. 1073, 24 So. 2d 145 (1945).

48. *Wheeler v. Wheeler*, 184 La. 689, 167 So. 191 (1936), quoted at 65 So. 2d 321, 327 (La. 1953).

49. This right to redetermine custody on the basis of new circumstances was affirmed in two cases decided during the 1952-53 term and cited *infra* note 53.

that an award of custody properly made would have to be given full faith and credit in other states until a new award were made for cause.⁵⁰ There could then be no question of the right of a custodian to take a child to another jurisdiction to live and therefore there would be a rule of law much more consistent with what one ordinarily would expect in such circumstances.

Other custody pronouncements followed familiar patterns. The Supreme Court continued to interpret Article 157 of the Civil Code to mean that the mother is to be preferred to the father in custody cases, except where she is morally unfit, incapable of caring for the children, or mistreats them, whether or not she has been awarded the divorce or separation.⁵¹ Perhaps the dictum on the subject in *Wilmot v. Wilmot* is the strongest statement yet made about it.⁵² In two decisions the court affirmed the possibility of redetermining the custody issue after changes in circumstances of the parents and the children.⁵³ There is no express legislation on this subject covering instances not involving serious danger to the physical or moral welfare of the children,⁵⁴ and these decisions seem to be wise applications of the authority granted judges under Article 21 of the Civil Code. Finally, in one instance, the court explained again that the juvenile courts do not have jurisdiction in custody cases unless the child is "neglected."⁵⁵

PRESCRIPTION

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The purpose and policy of liberative prescription are to remove doubt and uncertainty by fixing a time limit within which rights must be exercised. However, the exact legal na-

50. See Goodrich, *Conflict of Laws*, § 136 (3 ed. 1949).

51. *State ex rel. Mouton v. Williams*, 222 La. 457, 62 So. 2d 641 (1952); *Rainwater v. Brown*, 221 La. 1033, 61 So. 2d 730 (1952); *Liner v. Liner*, 222 La. 789, 64 So. 2d 4 (1953); *Estopinal v. Estopinal*, 66 So. 2d 311 (La. 1953); *Wilmot v. Wilmot*, 223 La. 221, 65 So. 2d 321 (1953).

52. 65 So. 2d 321, 325.

53. *Sampognaro v. Sampognaro*, 222 La. 597, 63 So. 2d 11 (1953); *Pepiton v. Pepiton*, 222 La. 784, 64 So. 2d 3 (1953).

54. La. R.S. 1950, 9:551-553, and of course the legislation on the authority of the juvenile courts, for example, La. R.S. 1950, 13:1567, 1697, and 1806.

55. *In re Pratts*, 222 La. 126, 62 So. 2d 124 (1952).

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