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Civil Code and Related Subjects: Persons

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PERSONS

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MARRIAGE

In *Succession of Verrett*[1] appellant claimed to be the putative wife of the decedent. Their marriage was null because the decedent had been validly wed before the alleged putative marriage. The children of the valid marriage opposed appellant's claim on the ground that the good faith required by Article 117[2] had not been shown; they attempted to show that the appellant knew that their father was married at the time the alleged putative marriage was performed. The court stated the well-established rule that the burden of proof rests on the party who alleges bad faith and found that the burden had not been met in this case.[3]

DIVORCE AND SEPARATION FROM BED AND BOARD

Adultery

The court in *Hayes v. Hayes*[4] held that the evidence did not warrant the district court's finding that the defendant wife had committed adultery. The only evidence was the testimony of private investigators who had been hired by the suspicious husband to "shadow" his wife. They testified that she visited the alleged corespondent at his apartment on two occasions and met him at a cocktail lounge on another. The court said that when evidence of adultery is circumstantial "the circumstantial proof . . . must be so convincing as to exclude any other reasonable hypothesis but that of guilt."[5] In *Humes v. McIntosh*[6] the defendant husband who admitted acts of adultery met the burden of proving that his wife continued marital relations with him after knowledge of those acts. Under the jurisprudence, a continuance

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1. 224 La. 461, 70 So.2d 89 (1953).

2. Art. 117, LA. CIVIL CODE of 1870: "The marriage, which has been declared null, produces nevertheless its civil effects as it relates to the parties and their children, if it has been contracted in good faith."

3. For a discussion of the requirements necessary to prove a putative marriage, see Note, 22 TULANE L. REV. 340 (1947).

4. 225 La. 374, 73 So.2d 179 (1954).

5. 73 So.2d at 180.

6. 74 So.2d 167 (La. 1954).

of the marital relation after knowledge by the injured party of the acts of infidelity is a valid defense to an action for divorce based on those acts.[7]

Recrimination and Comparative Rectitude

The doctrine of recrimination in divorce law requires the denial of relief if the complainant has been guilty of conduct which would entitle the other spouse to a divorce.[8] Some states have modified this rule in favor of the so-called "comparative rectitude" doctrine under which the relative faults of the parties are weighed and the divorce is granted to the spouse guilty of the least fault though the other has been guilty of conduct which is ground for divorce.[9] This doctrine has been recognized and adopted by the Louisiana Supreme Court both by implication[10] and expressly.[11] In *Callahan v. Callais*[12] the court noted its acceptance of the doctrine and after carefully reviewing the evidence presented, concluded that the comparative faults of the parties were equal and denied relief to both the husband, who sought separation from bed and board on grounds of abandonment, and to the wife who had reconvened on grounds of cruel treatment. It has been suggested that in cases of this nature, if the real issue is the advisability of continuing a personal relationship, mutual fault should increase rather than decrease the justification for granting a separation.[13]

Dejoie v. Dejoie[14] was decided on questions of fact, the court finding that the husband had sufficient reason for having abandoned the marital domicile, namely, the wife's cruel treatment under Article 138 of the Civil Code.

7. Adams v. Adams, 196 La. 464, 199 So. 392 (1940); Spence v. Spence, 162 La. 4, 110 So. 68 (1926); Cooper v. Cooper, 10 La. 249 (1836).

8. 1 NELSON, DIVORCE AND ANNULMENT § 10.01 (2d ed. 1945). For an extensive discussion of the doctrine of recrimination, see Bradway, *The Myth of the Innocent Spouse*, 11 TULANE L. REV. 377 (1937).

9. 1 NELSON, DIVORCE AND ANNULMENT § 10.03 (2d ed. 1945). See also Comment, *A Comparison of Recrimination and the Doctrine of Comparative Rectitude and their Incidents*, 3 BAYLOR L. REV. 55 (1950).

10. Temperance v. Herrmann, 191 La. 696, 186 So. 73 (1938); Gormley v. Gormley, 161 La. 121, 108 So. 307 (1926).

11. Callahan v. Callais, 224 La. 901, 71 So.2d 320 (1954); Eals v. Swan, 221 La. 329, 59 So.2d 409 (1952).

12. 224 La. 901, 71 So.2d 320 (1954).

13. *The Work of the Louisiana Supreme Court for the 1951-1952 Term—Persons*, 13 LOUISIANA LAW REVIEW 253, 254 (1953).

14. 224 La. 611, 70 So.2d 398 (1954).

ALIMONY

Article 232 provides that when circumstances warrant a discharge from the obligation of paying alimony or a reduction in the amount being paid, "the discharge from or reduction of the alimony may be sued for and granted." But it is well settled that an alimony judgment is the property of the person to whom granted and as to alimony past due, it cannot be altered or annulled.[15] In *Pisciotto v. Crucia*[16] the defendant stopped making the alimony payments without getting a discharge from the court. After 162 weekly payments had been missed, the plaintiff brought an action for a lump sum judgment. The defendant alleged that the payments had been waived by the plaintiff's failure to complain timely. The court followed a line of jurisprudence holding that the failure to protest periodically does not waive payment of alimony.[17] The defendant's plea of prescription based on Article 3538 was maintained as to payments due for more than three years, thus reducing the judgment to the total due for 156 weeks.

In *Hillard v. Hillard*[18] the court, reversing the district court decision, applied the well-established rule that the duty of a husband to pay ailmony pendente lite is not dependent upon the grounds for or the outcome of the suit for separation from bed and board or divorce. The judgment of the district court denying the alimony was rendered at the same time as the decree granting the husband a separation on grounds of abandonment, and on appeal Justice McCaleb dissented saying that, since Article 148 authorizes alimony only "pending the suit for separation from bed and board or for divorce," when a final judgment of separation from bed and board has already been rendered "there is no statutory sanction for the continuance of the alimony pendente lite."[19]

Only two other cases involved alimony and their decisions were based on questions of fact; one concerned the sufficiency of evidence to prove that the ex-wife had sufficient means for

15. Art. 548, LA. CODE OF PRACTICE of 1870; Williams v. Williams, 211 La. 939, 31 So.2d 170 (1947); Snow v. Snow, 188 La. 660, 177 So. 793 (1937).

16. 224 La. 802, 71 So.2d 226 (1954).

17. Gehrkin v. Gehrkin, 216 La. 950, 45 So.2d 89 (1950); Wainwright v. Wainwright, 217 La. 563, 46 So.2d 902 (1950), 25 TULANE L. REV. 264 (1951). For a discussion of the question of waiver of alimony payments, see *The Work of the Louisiana Supreme Court for the 1949-1950 Term—Persons*, 11 LOUISIANA LAW REVIEW 173, 174 (1951).

18. 225 La. 507, 73 So.2d 442 (1954).

19. 73 So.2d at 446.

her maintenance,[20] and the other the sufficiency of the evidence to prove that the ex-husband was able to pay the amount of alimony awarded by the district court.[21]

ILLEGITIMATE CHILDREN

Criminal Neglect of Family

The question of a father's liability to support his illegitimate children has caused no little difficulty in Louisiana. Article 74 of the Criminal Code imposes penal sanctions on parents for failure to support their children, both legitimate and illegitimate. The legislature's amendments to this article and the court's interpretation of these amendments have received extensive commentary in this Review.[22] Two cases decided during the last term, *State v. Lemoine*[23] and *State v. Mack*,[24] indicate that this area of our law continues to be a troublesome one.

Article 923

In *Succession of Wesley*[25] the court was required to determine whether or not a legitimate child can have "natural brothers

20. Brown v. Harris, 225 La. 320, 72 So.2d 746 (1954).

21. John v. John, 224 La. 426, 69 So.2d 737 (1953).

22. See Comment, 12 LOUISIANA LAW REVIEW 301 (1952); *Louisiana Legislation of 1952*, 13 LOUISIANA LAW REVIEW 21, 59-60 (1952); *The Work of the Louisiana Supreme Court for the 1951-1952 Term—Persons*, 13 LOUISIANA LAW REVIEW 253, 261 (1953); *Louisiana Legislation of 1954—Criminal Law and Procedure, and Penal Institutions*, 15 LOUISIANA LAW REVIEW 59 (1954); Note, 14 LOUISIANA LAW REVIEW 898 (1954).

23. 224 La. 200, 69 So.2d 15 (1953). In 1950, Article 74 of the Criminal Code, which provides that failure to support a wife or child is a crime, was extended to require support of illegitimate children. State v. Randall, 219 La. 578, 53 So.2d 689 (1951), presented the question of whether the state could introduce, in a prosecution under this article, evidence to show that the defendant was the father of a child when the mother was legally married to someone else. The court held that such evidence was not admissible because the right to contest the legitimacy of a child born of a married woman is reserved to her husband who may disavow the child only by an *action en désaveu* and within certain delay periods as prescribed by Articles 184-191 of the Civil Code. The legislature, by Act 368 of 1952, again amended Criminal Code Article 74, this time to provide that "in case of an illegitimate child" evidence is admissible to prove paternity for purposes of criminal prosecution but that "such evidence shall not be construed as establishing any civil obligation." *State v. Lemoine* presented the same problem as the *Randall* case and the state contended that the 1952 amendment permitted such evidence. The court held that the *Randall* case was controlling and that the 1952 amendment did not change its rule because those provisions applied only to the case of illegitimate children and the child in the *Lemoine* case was, by irrebutable presumption, the legitimate child of the mother's husband.

It is noteworthy that one writer had suggested that the rule of the *Randall* case had not been changed by the 1952 amendment. See *The Work of the Louisiana Supreme Court for the 1951-1952 Term—Persons*, 13 LOUISIANA LAW REVIEW 253, 262, n. 36 (1953).

24. 224 La. 886, 71 So.2d 315 (1954), 14 LOUISIANA LAW REVIEW 898.

25. 224 La. 182, 69 So.2d 8 (1953).

and sisters." The decedent was the acknowledged illegitimate son of the claimant's legitimate mother and the claimant alleged inheritance rights under Article 923 which provides:

> "If the father and mother of the natural child died before him, the estate of such natural child shall pass to his natural brothers and sisters, or to their descendants."

The court held that "natural brothers and sisters" means the *other natural children* of the same father or the same mother, thus negativing the possibility of a legitimate person acquiring that status.[26]

Proof of Paternity

Article 210 provides that the paternity of an illegitimate child may be proved by the oath of the mother if she is not a woman "of dissolute manners" and if she has never had an "unlawful connection" with any man other than the accused. In *Rousseau v. Bartell*[27] the mother testified that on one occasion she unsuccessfully attempted intercourse with another man and the court held that this did not constitute an "unlawful connection" and that her oath that the defendant was the father of the child was a proper basis for a judgment declaring him such. This case is treated fully elsewhere in this Review.[28]

CUSTODY

In *Cannon v. Cannon*[29] the district court refused to grant custody of two minor children to their mother for the reason that the home where she resided was small and inadequate as compared with the one provided by the father, which was the home of the paternal aunt of the child. The father had been granted custody with the wife's consent at the earlier divorce proceeding. The Supreme Court reversed stating "it is to the welfare and best interest of young children that the mother be awarded their custody unless she is shown to be morally unfit or otherwise unsuitable [citing authorities]."[30]

26. For a discussion of the difficulties encountered in the use of the term "natural child," see Note, 15 LOUISIANA LAW REVIEW 221 (1954).
27. 224 La. 601, 70 So.2d 394 (1954).
28. See Note, 15 LOUISIANA LAW REVIEW 218 (1954).
29. 74 So.2d 147 (La. 1954).
30. *Id.* at 148.

Three other cases involved child custody, two being litigated on questions of procedure,[31] and the third concerned a conflict of laws problem.[32]

ADOPTION

Where a person by an act of adoption acquires the status of a forced heir of the adoptive parents, is that status lost as to those parents by a subsequent adoption of the same person by different parents? The court in *Succession of Gambino*[33] answered that question in the negative. Discussing the legal rights and obligations resulting from adoption, the court said that Article 214 of the Civil Code is "the substantive law on this subject."[34] and that "this article does not provide how this relationship once created can be undone."[35] Section 13 of Act 428 of 1938, which was in effect at the time of the second act of adoption, would have, if valid, led to a different result. It provided: "Upon the entry of the final order of adoption, the said child shall cease to be heir of its parents." But the court agreed with the district court holding that the provision was violative of Article III, Section 16, of the Louisiana Constitution of 1921 in that it dealt with substantive matters not indicated in its title. The title indicated that the act dealt only with the method and procedure of adoption.

In the only other case of the term involving adoption, *Succession of Williams*,[36] the court held that a notarial act of adoption which was not in accordance with the law in effect at the time of its execution had been rendered valid by Act 46 of 1932 which "confirmed, approved, and validated" prior acts of adoption.[37]

31. Bernard v. Bernard, 224 La. 83, 68 So.2d 766 (1953); D'Antoni v. Geraci, 224 La. 818, 70 So.2d 883 (1954).

32. Francis v. Carpenter, 224 La. 916, 71 So.2d 326 (1954). See discussion of this case in the Conflict of Laws section of the symposium, page 299 *infra*.

33. 225 La. 674, 73 So.2d 800 (1954).

34. 73 So.2d at 803.

35. *Ibid.*

36. 224 La. 871, 71 So.2d 229 (1954).

37. La. Acts 1872, No. 31, p. 79, as amended by La. Acts 1924, No. 48, p. 76, was in effect at the time of the act of adoption (1928) and La. Acts 1932, No. 46, p. 239, "confirmed, approved, and validated" prior acts of adoption. The 1932 act was superseded by La. Acts 1940, No. 241, p. 992.