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Civil Code and Related Subjects: Persons

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PERSONS

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The decisions by the Supreme Court on marriage, separation, and divorce, other than two cases dealing with the recognition of sister-state divorces and the domicile of a married woman, which are treated in this Symposium under the section on the Conflict of Laws,[1] either involved only questions of fact or applied well-recognized rules of law. These cases do not require discussion.[2] There were, however, several decisions relating to alimony, support of descendants through civil and criminal processes, adoption, and custody which are noteworthy.

Alimony after Separation or Divorce

In *Moody v. Moody*[3] the court held, as it had been decided once before,[4] that a post-separation agreement regarding alimony necessarily falls with the separation itself on the reconciliation of the parties, so that if the parties subsequently are divorced or separated the agreement does not prevent the wife from claiming alimony. The reason given was sufficient to dispose of the issue in this suit, but it may very well be asked whether any agreement limiting a future right or obligation as to alimony should be regarded as binding. For one thing, alimony laws would seem to exist in the public or social interest as well as in that of the individual dependent. For another, the relieving of one alimentary obligor for the future, regardless of the need in which the dependent may then be, can only shift the obligation to other obligors who thereby will be prejudiced at least to the extent of having to contribute more than otherwise would have been required of them. For both reasons it would

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1. See page 255 *infra*.

2. Succession of Gaines, 227 La. 318, 79 So.2d 322 (1955) (proof of marriage); Pecot v. Hill, 227 La. 131, 78 So.2d 535 (1955) and Steere v. Marston, 228 La. 94, 81 So.2d 822 (1955) (whether spouses had been separated in fact for two-year period required for divorce under LA. R.S. 9:301 [1950]); Harris v. Harris, 228 La. 19, 81 So.2d 705 (1955) (proof of adultery); Dejean v. DeBose, 226 La. 600, 76 So.2d 900 (1955) (the presence *vel non* of cruel treatment sufficient to warrant separation from bed and board).

3. 227 La. 134, 78 So.2d 536 (1955).

4. Reichert v. Lloveras, 188 La. 447, 177 So. 569 (1937).

seem that agreements limiting future alimentary obligations or rights violate article 11 of the Louisiana Civil Code.[5]

Olivier v. Abunza[6] presented a novel question. A husband sought a divorce, on the ground of two years separation in fact, from a wife separated in bed and board from him by a judgment awarded to her some time before. The wife claimed alimony, but the husband sought to prove "fault" on her part in order to deprive her of it. Justice McCaleb, in a concurring opinion, thought that inasmuch as the wife had obtained a judgment of separation for cause the fault issue could not be raised in the divorce proceedings. The majority opinion, however, seems to have assumed that the issue of the wife's fault could be raised, for it did consider the matter. But the court found the wife had not been at fault in the divorce and therefore the legal question may be considered undecided. It is true that once a wife has obtained a separation, her rights to alimony after divorce are not affected if the husband obtains the divorce on the ground of the previous judicial separation and failure of reconciliation for one year and sixty days thereafter.[7] On the other hand, it would seem that the wife should be denied alimony after divorce, in spite of the judgment of separation in her favor, if the husband thereafter obtains a divorce on the ground of adultery rather than on the ground of non-reconciliation after the separation. Separation may absolve the spouses of the obligation of common life, but it does not put an end to the other obligations of matrimony. Indeed, it could very well be the offense of the separated wife that prevents reconciliation. Should the answer be different because the husband chooses to file suit on the ground of two years separation in fact rather than on that of adultery? The writer thinks not.

The decision in *Stabler v. Stabler*[8] followed *Smith v. Smith*[9]

5. LA. CIVIL CODE art. 11 (1870): "Individuals can not by their conventions, derogate from the force of laws made for the preservation of public order or good morals.

"But in all cases in which it is not expressly or impliedly prohibited, they can renounce what the law has established in their favor, when the renunciation does not affect the rights of others, and is not contrary to the public good."

6. 226 La. 456, 76 So.2d 528 (1954).

7. LA. R.S. 9:302 (1950).

8. 226 La. 70, 75 So.2d 12 (1954).

9. 217 La. 646, 47 So.2d 32 (1950). On this case and the general problem of computing alimony after divorce, see Lazarus, *What Price Alimony*, 11 LOUISIANA LAW REVIEW 401, 418 *et seq.* (1951); *The Work of the Louisiana Supreme Court for the 1949-1950 Term — Persons*, 11 LOUISIANA LAW REVIEW 168, 172 (1951).

in holding that in considering a divorced wife's "means for her maintenance" to determine her right to alimony after divorce[10] it is necessary to consider her capital assets as well as her income. In this case the wife owned four rental houses valued at more than $20,000 and producing revenue of about $120 monthly. She was denied alimony even though her husband owned property valued at $50,000 and had an income of about $1,000 monthly, the court quoting with approval from the *Smith* case that "maintenance may be said to include primarily food, shelter, and clothing, and certainly property or means amounting to $20,000 ought to provide those necessities very readily."

The only other decision on alimony after separation involved a simple question of fact, the propriety of the amount of the award.[11]

The Alimentary Obligation Toward Descendants

In *Fazzio v. Krieger*[12] the defendant parent admitted his legally imposed obligation to pay for the support of his children, who were in the custody of his divorced wife, but asked whether it was proper to order him to pay any alimony to them inasmuch as his only income was his community share of his second wife's earnings. His specific contention was that the obligation to support the children of his first marriage was a "debt contracted" before his second marriage, and therefore a debt for which the community of the second marriage was not liable.[13] The majority opinion dismissed the contention reasoning that the defendant's obligation to support children of a previous marriage is not a debt contracted before the second marriage, "but an obligation or duty imposed by law *for which his undivided interest in the second community is responsible.*"[14] (Emphasis added.)

The court could not have meant what this language literally signifies, for there is no way to enforce a right against one spouse's share in the community before the community is dissolved. What the court must have meant to say is that only one-half of the community income should be considered in computing

10. LA. CIVIL CODE art. 160 (1870).
11. DeLoach v. DeLoach, 227 La. 930, 80 So.2d 868 (1955). The same question was also an issue in Moody v. Moody, 227 La. 134, 78 So.2d 536 (1955), discussed above in another connection.
12. 226 La. 511, 76 So.2d 713 (1954).
13. LA. CIVIL CODE art. 2403 (1870).
14. 226 La. 511, 524, 76 So.2d 713, 717 (1954).

the alimentary obligation of one of the spouses toward a descendant, but that the obligation so computed is enforceable out of the community as a whole. Understood in this way the decision offers a solution, to a problem not specifically covered by legislation, which is in splendid harmony with the general legislation on alimony and on the community. In considering only the spouse's one-half interest in the community for computing his alimentary obligation it respects both the notion that the obligation is his alone and not that of him and his spouse and honors the doctrine that each spouse has a present one-half undivided interest in the assets of the community, regardless of their source. At the same time, in concluding that the obligation thus determined is payable out of the community as a whole, it conforms to the principle evidenced by the rule in article 2403 that during marriage the obligations of each spouse are liabilities of the community.

If the writer's appreciation of *Fazzio v. Krieger* is correct, then certain implications of this decision should be noted. First, because the community itself is liable for alimony payable by either spouse, the wife's dependent should be allowed to sue the husband, as administrator of the community, to enforce his or her right. Second, because in computing the liability of any married man for alimony only one-half of the community income may be considered as his, the amounts awardable to divorced wives under article 160 of the Civil Code must now be limited to one-third of his one-half of the community income.

The other decisions involving alimony for descendants were of lesser importance. In *Roy v. Berard*[15] the court refused to find contempt of court in a father's failure to make two monthly alimony payments for a child when he had expended almost that amount during that period for clothing for the child. All other decisions dealt simply with the sufficiency or insufficiency of the awards made in the lower courts.[16]

Compelling Support Through the Criminal Process

Three decisions of 1954-55 evidence a fine appreciation for the nature of the proceedings under articles 74 and 75[17] of the

15. 227 La. 86, 78 So.2d 519 (1955).
16. Moody v. Moody, 227 La. 134, 78 So.2d 536 (1955); DeLoach v. DeLoach, 227 La. 930, 80 So.2d 868 (1955); Williams v. Barnette, 226 La. 635, 76 So.2d 912 (1954).
17. LA. R.S. 14:74-75 (1950).

Louisiana Criminal Code and of the proper limits of the use of the criminal process for the enforcement of alimentary obligations.

The decision in *State v. Robbins*[18] declared there is no incompatibility in the simultaneous existence of both a civil suit for alimony and a prosecution for the crime of criminal neglect of family under article 74 of the Louisiana Criminal Code. This is certainly correct. The civil proceedings are for the determination of the extent of one's civil alimentary obligation for the future or the enforcement of one already fixed by a civil judgment rendered in the past, whereas the object of proceedings under article 74 is punishment for crime already committed, that is to say, the past intentional failure to support one's wife or child who was then in "destitute or necessitous circumstances."

This proposition is too elementary, however, not to have been understood by the accused's attorney, who objected to the proceedings under article 74, and to the judge who upheld his objection. The explanation of their actions must be that both treated the charge under article 74 simply as a precondition to the application of article 75 of the Criminal Code, under which the judge before whom the charge is brought may order future alimony payments either before trial, with the consent of the accused, or after conviction, and either in lieu of or in addition to the sentence of fine and imprisonment imposable under article 74. Thus both attorney and judge must have regarded the proceedings more in the nature of a civil suit for alimony than a prosecution for crime. No doubt this is a popular view of such proceedings, but it is an incorrect one, for there can be no question as to the criminal nature of a prosecution under article 74.

The case would have been more interesting had it been presented specifically as an attack on the right of the judge to proceed under article 75 once a suit for alimony had been filed in civil court, for certainly an order under article 75 to pay future alimony resembles a civil judgment for alimony. The writer does not regard these different orders to pay alimony as incompatible, however, but for reasons of convenience the discussion of this question is postponed until another decision raising essentially the same issue is considered.[19]

18. 227 La. 454, 79 So.2d 737 (1955).
19. See note 22 *infra*.

The second decision involving the application of article 74 of the Louisiana Criminal Code, *State v. Breaux*,[20] goes far toward defining the proper scope of the crime of criminal neglect of family. The essence of the crime is a husband's or parent's intentional failure to support his wife or child "who is in destitute or necessitous circumstances." All depends, then, on the proper interpretation of the words "destitute or necessitous circumstances." In *State v. Breaux* a husband and father had been convicted of the criminal neglect of his wife and child, even though the latter lived in a house which formed part of the community property and the wife earned an average of fifty dollars weekly. The Supreme Court reversed the conviction and remanded the case to the trial court to determine whether the wife and child were in "destitute or necessitous circumstances" in spite of their free home and the earnings of the wife. This action must be considered eminently proper, for it is at least very doubtful that article 74 was meant to declare criminal the mere failure to fulfill a civil alimentary obligation. The criterion by which a legislature should define a crime is conduct which is so serious in its effect on an individual as a human being or on the public in general as to justify the imposition of criminal type sanctions. Husbands and parents are obliged to support their wives and children under the civil law, but hardly would it be justifiable to treat their failure so to do as warranting criminal sanction so long as the dependents do not lack the basic needs of human beings according to the standards prevailing in the society, whatever be the honest source of their means. Thus the Legislature must have intended the necessary pre-condition to conviction under article 74 to be such destitution or necessity on the part of the defendants as to make the intentional failure to support them the equivalent of a willful denial to them of the basic needs of human beings.

Probably it is not erroneous to assume that the dependent, Mrs. Breaux, was not in destitute or necessitous circumstances, and that she simply resorted to the criminal process to enforce her civil substantive right to support from her husband, her procedural right to do this in a civil suit being denied her under

20. 227 La. 417, 79 So.2d 502 (1955).

a decision of the Supreme Court of another day.[21] She was, in other words, probably seeking an order for future alimony under article 75 because none was available to her through the civil process. She must, therefore, have assumed that the amount of alimony awardable under article 75 may exceed that necessary to afford the dependent the basic needs of a human being and be computed instead on the basis of the civil obligation of support, that is, the relative need and means of the dependent and obligor. But is this so? The writer believes it is not and that any order under article 75 must be restricted to such amount as will remove the dependent from "destitute or necessitous circumstances" as above defined. This would seem to follow from the very fact that article 75 cannot be invoked unless there is at least a charge of criminal neglect under article 74. It would be incongruous indeed if an alimentary obligor could not be ordered to fulfill his civil obligation if he had not been guilty of criminal neglect, but, once guilty of criminal neglect, could be so ordered. It seems much more likely that the purpose of article 75 was to permit an order for future alimony which, if complied with, would free the obligor of future liability for criminal neglect of the dependent. The very fact that article 75 is found in a criminal rather than in a civil statute adds support to this view.[22]

The most important of the decisions dealing with article 74 is *State v. Hubbard*,[23] for it is difficult to interpret it otherwise than as a refusal to give effect to legislation which transgresses the limits of the proper use of the criminal process. In this sense the decision is jurisprudential rather than legal in character. The case involved a prosecution for criminal neglect of an illegitimate child whose filiation to the accused had not been established at the time of the neglect. Such established filiation is a pre-condition to a civil suit for alimony, but by three different acts, in

21. Carroll v. Carroll, 42 La. Ann. 1069, 8 So. 400 (1890) interpreted LA. CODE OF PRACTICE art. 105 (1870) to prohibit suits for support between husband and wife, though LA. CIVIL CODE art. 119 (1870) establishes the substantive alimentary rights and obligations between them.

22. If it is correct to conclude that an order under article 75 must be restricted to an amount sufficient for essential needs, then it would seem that the question raised in the discussion of State v. Robbins, 227 La. 454, 79 So.2d 737 (1955) (see page 222 *supra*), whether a civil suit for alimony and the application of article 75 of the Criminal Code are compatible, may be answered in the affirmative. The civil suit fixes the amount of the civil alimentary obligation, whereas the latter merely indicates the amounts which will be sufficient to safeguard the obligor from prosecution for criminal neglect.

23. 228 La. 155, 81 So.2d 844 (1955).

1950,[24] 1952,[25] and 1954,[26] the Legislature amended article 74 with the object of making it a crime for the actual parent of an illegitimate to neglect him even though his filiation had not been established. The 1950 and 1952 amendments were declared ineffective for this purpose by earlier decisions[27] and now the 1954 amendment is likewise made ineffective.

The principle point in the majority's reasoning seems to be that the establishment of paternity or maternity is fundamentally a civil process over which the juvenile courts have not been given jurisdiction and, therefore, that there can be no prosecution for criminal neglect of an illegitimate child unless his filiation already has been established. Certainly the majority opinion must have been written with tongue in cheek. It is not denied that the juvenile courts have jurisdiction over prosecutions for criminal neglect of illegitimate children, and there can be no doubt that article 74 as amended makes it a crime to neglect such children even though their filiation has not been established. To say, then, that the crime cannot be proved because the proof of filiation is fundamentally a civil process over which the juvenile court has not been given jurisdiction is simply an excuse for not giving effect to the legislative intent. The true reason for the court's action would seem to be expressed in the remarks made after the decision had been reached on the grounds above given. "It would be illogical," said the court, "and unsound to hold otherwise and, we think, might well lead to injustice, oppression, and absurd consequences. We think it would be most illogical to convict the defendant of neglect of family, which of necessity required him to be decreed to be the father of such illegitimate child who, under our substantive law, belongs to no family, and simultaneously hold that the defendant deserted a child who had never been under his custody, and intentionally failed to support a child when theretofore there had been no such liability established."[28]

Thus the court's action must be explained in terms of its conviction that the legislation amounted to a misuse of the criminal process. With this view the writer is in complete accord. It is

24. La. Acts 1950, No. 164, p. 330.
25. La. Acts 1952, No. 368, p. 920.
26. La. Acts 1954, No. 298, p. 299.
27. State v. Mack, 224 La. 886, 71 So.2d 315 (1954); State v. Jones, 220 La. 381, 56 So.2d 724 (1951).
28. 81 So.2d 844, 848 (La. 1955).

common knowledge that this amendatory legislation of 1950, 1952, and 1954 was sponsored by the State Department of Public Welfare principally for the purpose of obtaining orders for future alimony under article 75 of the Criminal Code and thereby reducing the number of illegitimate children on the child welfare rolls. It is difficult to justify the use of the criminal process for this purpose when the civil process could be used. If the real difficulty lies in the financial inability of the mothers of illegitimates to qualify as tutrixes and to establish the paternity of their children and claim alimony for them, then it would seem that the simple expedient would be legislation authorizing the state, through the district attorneys or attorneys of the State Department of Public Welfare, to file such suits on behalf of illegitimate children and without cost to the state or the dependents.

Adoption and Custody

In the case of In re *Byrd*[29] the petitioners argued that under the current legislation[30] the consent of the actual parents is not required if the adoption is in the best interest of the child. The court was able to demonstrate very easily that under the legislation the norm of the child's best interest can be brought into play only after the child has been made available for adoption, a fact which depends on the consent of the parents at the time of the adoption proceeding if the child has not been surrendered to an agency for placement in adoption or declared abandoned.[31]

The question of the custody of children, however, as distinguished from their availability for adoption, continues to be dealt with in terms of the court's appreciation of the best interest of the child rather than in the context of the legislation. Thus nothing in our legislation warrants the denial of custody to parents unless it can be shown that the child has been surrendered

29. 226 La. 194, 75 So.2d 331 (1954).

30. LA. R.S. 9:421 *et seq.* (1950), originally La. Acts 1948, No. 228, p. 564.

31. The famous issue of Green v. Paul, 212 La. 337, 31 So.2d 819 (1947), whether the parental consent once given might be withdrawn at any time before final decree of adoption, was not involved in this case for the parents had never consented to those particular proceedings. The same petitioners, however, had dismissed a previous proceeding to adopt the same child, filed under the former legislation on adoption, La. Acts 1942, No. 154, p. 523, when the mother withdrew her once given consent just before final judgment, and the majority availed themselves of the opportunity to affirm *Green v. Paul.* Justices Hamiter and Hawthorne dissented, Justice Hawthorne stating that he had ceased to agree with the decision in *Green v. Paul* and wished to say that in his opinion parental consent once given should not be revocable once adoption proceedings had been initiated.

formally for adoption, declared abandoned, criminally neglected, or its physical or moral welfare seriously endangered by its parents' vicious or immoral habits or associations,[32] yet in *State* ex rel. *Deason v. McWilliams*,[33] though none of these causes seem to have been made out under the facts, the court affirmed a judgment denying the parents the right to recover the custody of their child from persons to whom they had once entrusted it with the view to permitting its adoption. It is true that the parents' decision to recover their child probably was motivated by family indignation over their action, but the writer must agree with Justice Ponder's dissent that this is insufficient reason under the law to deny them that custody.

Other decisions on the subject of custody were of more routine character.[34]

PROPERTY

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SERVITUDES

In the combined cases of *Fontenot v. Magnolia Petroleum Co.* and *Young v. Magnolia Petroleum Co.*,[1] the court achieved a result which might well seem to be the right and equitable one in the administration of justice, but an analysis of its opinion leaves one in unavoidable confusion. The two plaintiffs, Fontenot and Young, owned adjacent properties; the defendants were petroleum and engineering companies prospecting for oil. The plaintiff Young gave oral permission to the defendants to enter upon his land and there conduct geophysical operations; the plaintiff Fontenot had refused entry on his property. As a result of defendants' sub-surface blasting explosions, certain damages were caused in the homes of the two plaintiffs. The court rendered judgment in favor of both plaintiffs covering actual damage in-

32. LA. R.S. 9:401 *et seq.* 9:551 (1950).
33. 227 La. 957, 81 So.2d 8 (1955).
34. Wyatt v. Wyatt, 228 La. 77, 81 So.2d 775 (1955), denying the availability of a suspensive appeal in custody cases; and Decker v. Landry, 227 La. 603, 80 So.2d 91 (1955) and Sharp v. Sharp, 228 La. 126, 81 So.2d 833 (1955), dealing with issues of fact rather than law in the award of custody after separation and divorce.

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1. 227 La. 866, 80 So.2d 845 (1955).