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NOTES

CRIMINAL LAW — CRIMINAL NEGLECT OF AN ILLEGITIMATE CHILD — PROOF OF PATERNITY IN A CRIMINAL PROCEEDING

Defendant was prosecuted in the Juvenile Court for the Parish of Orleans under article 74 of the Louisiana Criminal Code¹ for failure to support his illegitimate child. The court held that it was without jurisdiction under the State Constitution² to fix responsibility for support of illegitimate children; and, until the obligation of support was established by a judgment of a civil district court or by a formal acknowledgment by the parent, a juvenile court could not inquire into the matter of criminal responsibility. On appeal, the Louisiana Supreme Court, with three justices dissenting, *held*, affirmed. Since the determination of paternity is a civil function, the legislative enactments which permit proof of paternity of an illegitimate child in a prosecution brought in the Juvenile Court for the Parish of Orleans for criminal neglect of children³ are inconsistent with the constitutional provision that grants to the District Court

1. LA. R.S. 14:74 (1950) provides: "Criminal neglect of family is the desertion or intentional non-support:

"(1) By a husband of his wife who is in destitute or necessitous circumstances; or

"(2) By either parent of his minor child, whether legitimate or illegitimate, who is in destitute or necessitous circumstances, there being a duty established by this article for either parent to support his child. The parent shall have this duty without regard to his reasons and irrespective of the causes of his living separate from the other parent. The duty established by this article shall apply retroactively to all children, legitimate or illegitimate, born prior to the effective date of this article.

"In the case of an illegitimate child, evidence may be introduced in the proceedings hereunder to prove paternity or maternity. This proof shall be made in accordance with the rules established by the REVISED CIVIL CODE of 1870, as amended, as for proof of paternity or maternity for civil purposes. Such proof, however, shall be used solely as the basis for the duty to support an illegitimate child established by this article, and shall not be construed as establishing any civil obligation.

"Whenever a husband has left his wife or minor child in destitute or necessitous circumstances and has not provided them with means of support within sixty days thereafter, his failure to so provide shall be presumptive evidence for the purpose of determining the substantive elements of this offense that at the time of leaving he intended desertion and non-support.

"Whoever commits the offense of criminal neglect of family shall be fined not more than five hundred dollars, or imprisoned for not more than one year, or both; and if a fine should be imposed, the court may direct it to be paid in whole or in part to the wife, or to the tutor or custodian of the minor child or children, or to an organization or individual approved by the courts as fiduciary for such wife or child. As amended Acts 1952, No. 368, § 1."

2. LA. CONST. art. VII, § 96.

3. LA. R.S. 14:74, 14:74.1 (1950).

for the Parish of Orleans its exclusive original civil jurisdiction.⁴ *State v. Hubbard*, 228 La. 155, 81 So.2d 844 (1955).

The definition of the crime of criminal neglect of family was enlarged by the Legislature in 1950 to include illegitimate children⁵ so that the Louisiana Department of Public Welfare could be relieved of the burden of supporting a child whose father's identity could be determined. A total of 21,424 illegitimate children⁶ were then the responsibility of the welfare agency. In enacting the amendment, the Legislature apparently intended to permit an illegitimate child to prove his paternal descent in the same proceeding in which the alleged father was prosecuted for non-support;⁷ however, that intention was not expressly indicated in the amendment. During the two years following the enactment, the Supreme Court held⁸ that as a prerequisite to the commission of the crime of non-support of an illegitimate child, paternity must be established by a legal acknowledgment or by a judgment in a civil suit, as provided by article 242 of the Civil Code.⁹ In 1952, the Legislature amended the criminal neglect statute to provide specifically that proof of paternity should be allowed as a part of the criminal prosecution.¹⁰ However, in a 1954 case,¹¹ the Supreme Court rendered the change in the statute ineffective by reaffirming its earlier decisions. The Legislature then reasserted its position by passing act 289 of 1954¹² which

4. LA. CONST. art. VII, § 81.

5. LA. Acts 1950, No. 164, p. 330, now LA. R.S. 14:74 (1950).

6. LA. DEPARTMENT OF PUBLIC WELFARE, A STUDY OF THE CHARACTERISTICS OF AID TO DEPENDENT CHILDREN CASELOAD RECEIVING ASSISTANCE IN LOUISIANA IN JANUARY 1950, table 17, p. 18 (1950).

7. For a more detailed history of this statute see: Bennett, *Survey of 1954 Louisiana Legislation — Criminal Law and Procedure, and Penal Institutions*, 15 LOUISIANA LAW REVIEW 1, 55 (1954); *The Work of the Louisiana Supreme Court for the 1951-1952 Term — Persons*, 13 LOUISIANA LAW REVIEW 230, 261 (1953); *The Work of the Louisiana Supreme Court for the 1951-1952 Term — Criminal Law*, 13 LOUISIANA LAW REVIEW 230, 247 (1953); *Louisiana Legislation of 1952*, 13 LOUISIANA LAW REVIEW 21, 59 (1952); Comment, *Criminal Liability for Non-Support of an Illegitimate Child*, 12 LOUISIANA LAW REVIEW 301 (1952).

8. *State v. Sims*, 220 La. 532, 57 So.2d 177 (1952); *State v. Jones*, 220 La. 381, 56 So.2d 724 (1951); *State v. Randall*, 219 La. 578, 53 So.2d 689 (1951).

9. LA. CIVIL CODE art. 242 (1870).

10. LA. Acts 1952, No. 368, p. 920, amended LA. R.S. 14:74 (1950) to provide in part: "In the case of an illegitimate child, evidence may be introduced in the proceedings hereunder to prove paternity or maternity. This proof shall be made in accordance with the rules established by the Revised Civil Code of 1870, as amended, as for proof of paternity or maternity for civil purposes. Such proof, however, shall be used solely as the basis for the duty to support an illegitimate child established by this article, and shall not be construed as establishing any civil obligation."

11. *State v. Mack*, 224 La. 886, 71 So.2d 315 (1954).

12. LA. R.S. 14:74.1 (1950): "The provisions of Art. 242 of the Louisiana

unequivocally provided that a prosecution under Criminal Code article 74 for the criminal neglect of an illegitimate child is not dependent upon a previous formal acknowledgment or civil adjudication establishing paternity.

In the instant case, the Supreme Court found that the Juvenile Court for the Parish of Orleans does not have jurisdiction to "entertain a case to establish the paternity of the subject child and fix responsibility for his support."¹³ Its decision is based on an interpretation of section 81 of article 7 of the Louisiana Constitution, which states in part: "The Civil District Court of the Parish of Orleans is hereby vested with the same exclusive original civil jurisdiction as that of District Courts throughout the State, as fixed by this Constitution at the time of its adoption, *except such as may be vested by it in other courts in the City of New Orleans.*" (Emphasis added.)¹⁴ Since this section provides for an exception to the exclusive civil jurisdiction of the District Court for the Parish of Orleans, the provision of the Constitution which establishes jurisdiction of the Juvenile Court for the Parish of Orleans¹⁵ had to be interpreted. The court concluded: "With the exception of the amendment of 1938 giving jurisdiction to the Juvenile Court for the Parish of Orleans of adoption proceedings, the article of the Constitution as originally enacted, and the several amendments thereto, clearly show that *the Court has no jurisdiction over civil matters.*" (Emphasis added.)¹⁶ Less than a year prior to the instant decision the court unanimously interpreted this section differently when it declared in *Freeman v. Freeman*:¹⁷ "We also find no substance in the plea to the jurisdiction of the Juvenile Court for the Parish of Orleans which is grounded on the contention that the Court's jurisdiction '* * * of all cases of desertion or non-support of children by either parent, * * *' (see Section 96 of Article 7 of the Constitution) is limited to criminal proceedings brought under LSA—R.S. 14.74. *Obviously, the grant of jurisdiction 'of all cases of desertion or non-support' includes civil as well as criminal.*" (Emphasis added.) Although the Supreme Court did not mention specifically the *Freeman* case in

Revised Civil Code of 1870 shall not apply to any proceeding brought under the provisions of R.S. 14:74."

13. *State v. Hubbard*, 228 La. 155, 81 So.2d 844, 847 (1955).

14. LA. CONST. art. VII, § 81.

15. LA. CONST. art. VII, § 96.

16. *State v. Hubbard*, 228 La. 155, 81 So.2d 844, 847 (1955).

17. 226 La. 410, 415, 76 So.2d 414, 416 (1954).

the instant decision, it evidently intends to abandon the interpretation of section 96 of article 7 of the Constitution announced in that case. The present case appears to be one of those instances in which a state statute is construed as conflicting with the State Constitution because the majority of the court disagrees with the policy expressed in the statute.¹⁸ This conclusion becomes evident by the following statement made by the court: "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."¹⁹

The effect of the present case is to leave a needy illegitimate child without a practical method of obtaining alimony from his father; therefore, the child remains the burden of the state. Since a civil action is still required to establish the paternal descent of an illegitimate child, some practical civil procedure should be considered to implement the result desired by the Legislature. Legal aid bureaus and *forma pauperis* proceedings are presently available, but only a negligible number of paternity cases can be handled in this manner due to the limited number of legal aid bureaus and the small percentage of lawyers who have sufficient time to try cases without remuneration. A statute permitting the state to initiate suit for proof of paternity would be effective, but costly. The state would be forced to employ additional attorneys to dispose of the large number of cases involving unacknowledged illegitimate children who are now receiving aid through the state's public assistance program. Although the expense incurred would be more than justified by the eventual tremendous reduction of the amount currently expended by the Department of Public Welfare in supporting these children,²⁰ this additional expense should not be incurred if there

18. Other state supreme courts have exercised similar power in other fields of legislation. See Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

19. *State v. Hubbard*, 228 La. 155, 81 So.2d 844, 848 (1955).

20. During the period beginning on July 26, 1950, the date LA. R.S. 14:74 (1950) was extended to include illegitimates, and ending on June 30, 1955, the date of the instant decision, the sum of \$74,276,569.30 was expended by the Louisiana Department of Public Welfare in aid to dependent children. 14 LA. DEP'T PUB. WELFARE ANN. REP. table 6, at 20 (1950-1951), 15 LA. DEP'T PUB. WELFARE ANN. REP. table 6, at 22 (1951-1952), 16 LA. DEP'T PUB. WELFARE ANN. REP.

are other methods by which the same results can be obtained. For example, one means of avoiding this expense would be to allow the district attorneys to represent the state in these civil proceedings as they do in certain other civil matters.

It may well be, the Supreme Court based its instant decision on a belief that the convicted person in a prosecution for criminal neglect of children should not be placed in jail for failing to support a child that had not been legally declared his own. If so, the court's objection could be met by amending the penalty clause of R.S. 14:74 to provide that if there has been no prior formal acknowledgment or adjudication of paternity, the sentence must be suspended on condition that the parent provide alimony for his "discovered" child. In effect, this would codify and make mandatory what can presently be done by a trial court if it applies R.S. 14:75²¹ and R.S. 15:530²² in connection with R.S. 14:74.²³ Since the Juvenile Court for the Parish of

table 6, at 20 (1952-1953), 17 LA. DEP'T PUB. WELFARE ANN. REP. table 3, at 28 (1953-1954), 18 LA. DEP'T PUB. WELFARE ANN. REP. table 3, at 26 (1954-1955). Approximately 27.4% of the total expenditures went to illegitimates. LA. DEP'T PUB. WELFARE, A STUDY OF RESOURCES, INCOMES AND SOCIAL CHARACTERISTICS OF RECIPIENTS OF AID TO DEPENDENT CHILDREN IN LOUISIANA — 1954 table 15, at 21 (1954). Each month, additional expenditures are made to dependent children by the Department of Public Welfare thereby steadily increasing the sum paid to illegitimate children. If even a small percentage of the payments to illegitimate children could be stopped *now*, by forcing those children's fathers to support them, the long run saving would be a very sizable figure.

21. LA. R.S. 14:75 (1950) states in part: "Before the trial for criminal neglect of family (with the consent of the defendant), or after conviction, instead of imposing the punishment hereinbefore provided, or in addition thereto, the court, in its discretion, having regard to the circumstances and financial ability of the defendant, shall have the power to issue an order directing the defendant to pay a certain sum weekly or at such periods as the court may direct, to the wife, or to the tutor or custodian of the minor child, or to an organization or individual approved by the court as fiduciary for such wife or child, which sum may be increased or decreased by the court from time to time, as the circumstances may require; and with authority to require the defendant to enter into a recognizance, with or without surety, as the court shall direct, in order to insure the payment of the alimony. The condition of the recognizance shall be such that if the defendant shall make his or her personal appearance at court whenever ordered to do so, and shall further comply with the terms of the order or of any subsequent modification thereof, then the recognizance shall be void, otherwise of full force and effect."

22. LA. R.S. 15:530 (1950) states in part: "While on probation, . . . [an offender] may be required by the court to provide for support of any persons for whose support he is legally responsible"

"In placing an offender . . . on probation, the court in its discretion may direct that such offender be under the supervision of the state department of welfare"

23. The Supreme Court also indicated in the instant decision that the presumptions of paternity contained in the Louisiana Civil Code of 1870 might be destroyed if prosecutions were allowed under R.S. 14:74. To alleviate this concern, R.S. 14:74 could be amended to expressly preclude contraventions of those presumptions of paternity.

Orleans is denied constitutional jurisdiction to establish paternity in civil cases as well as in prosecutions under R.S. 14:74 by the present decision, a constitutional amendment will be necessary if it is desired that the juvenile court exercise jurisdiction over such cases.²⁴ Regardless of whether an adequate civil remedy is provided or the criminal procedure is revised to meet the Supreme Court's objection, it is important that some procedure be made available to impose the burden of supporting the illegitimate offspring of known fathers on those parents rather than on a welfare agency of the state.

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CRIMINAL LAW — FELONY-MURDER — KILLING OF CO-FELON

In the retreat from a store at which they had committed armed robbery, two felons were pursued by the proprietor, who fatally shot one of them. The surviving felon was indicted under the felony-murder statute. The lower court sustained the defendant's demurrer to the evidence, and the Commonwealth appealed. *Held*, reversed.¹ "The killing of the co-felon is the natural foreseeable result of the initial act. The robbery was the proximate cause of the death."² *Commonwealth v. Thomas*, 382 Pa. 639, 117 A.2d 204 (1955).

The felony-murder doctrine is a fiction developed in the common law of England to charge with murder those engaged in a dangerous felony from which any death results.³ The requirement of malice for common law murder is fulfilled under the felony-murder doctrine by ascribing to the felon who only incidentally kills the malice of the lesser felony.⁴ Historically the felony-murder doctrine seems to have been limited at first solely to the acts committed by the felon himself.⁵ This was the original and long-standing interpretation of the doctrine in the United States.⁶ Thus, when the instigators of a riot were on

24. In order to insure all juvenile courts equal jurisdiction over these cases, LA. CONST. art. VII, §§ 52, 53, 96, should also be amended.

1. Three of the seven justices dissented.

2. *Commonwealth v. Thomas*, 382 Pa. 639, 645, 117 A.2d 204, 206 (1955).

3. A discussion of the origin and reason for the doctrine can be found in Hitchler, *The Killer and His Victim in Felony-Murder Cases*, 53 DICK. L. REV. 3 (1948).

4. *Ibid.*

5. 3 COKE, INSTITUTES 56 (1797); 4 BLACKSTONE, COMMENTARIES 192 (1769).

6. *Commonwealth v. Moore*, 121 Ky. 97, 88 S.W. 1085 (1905); *Commonwealth v. Campbell*, 89 Mass. 541, 83 Am. Dec. 705 (1863); *Commonwealth v. Thompson*, 321 Pa. 327, 184 Atl. 97 (1936); Annot., 12 A.L.R.2d 210 (1950).