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Legislation Affecting the Civil Code and Related Subjects

*Robert A. Pascal**

CIVIL CODE AMENDMENTS

Absentees

Amendments to articles 78¹ and 79² clarify the rights of an heir whose existence was unknown at the time others were placed in possession of property rightfully his. The amended article 78 extinguishes the heir's right to recover anything after the lapse of thirty years³ from the rendition of the judgment placing others in possession, implies that prior to that time he may recover the property specifically unless it has been sold by those placed in possession, and provides that in the latter event he may recover only the net proceeds of the sale. This amended article may need interpretation for other situations, for example, one in which the persons placed in possession have donated the property and the donees have sold it, but of course this should not be difficult if the principle implied in the amendment is considered. The amendment to article 79 merely makes it clear that those possessing the unknown heir's property under judgment and in good faith shall not be made to account for the fruits received by them before his appearance. It will be recognized that both these amendments must have been inspired by the interpretations placed on the original articles in *Bierhorst v. Kelly*.⁴

Marriage

Act 289 of 1956 amended article 92 to shift the power to authorize the marriage of underage persons in East Baton Rouge Parish from the district judges to the judge of the Family Court. The amendment to article 92 by Act 398 of 1954 had already transferred this power in Orleans Parish from the district judges

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1. La. Acts 1956, No. 533.

2. La. Acts 1956, No. 532.

3. Presumably this language indicates a period of peremption rather than of prescription.

4. 225 La. 934, 74 So.2d 168 (1954).

to the judges of the First City Court.⁵ In all other parishes the power remains in the district judges.⁶

Separation from Bed and Board

A ninth cause of separation from bed and board has been added to article 138:

“Whenever the husband and wife have voluntarily lived separate and apart for one year and no reconciliation has taken place during that time.”⁷

Probably there can be very little doubt that those responsible for the drafting and enactment of this legislation intended to make possible a separation from bed and board after the running of half the period of “living separate and apart” presently required for a divorce under R.S. 9:301.⁸ This divorce legislation and its antecedents⁹ have never made provision for the possibility of terminating the marital property regime, awarding alimony, or terminating parental authority over children of the marriage and determining their tutorship before the divorce action itself. Hence even though the principal purpose of R.S. 9:301 and its antecedents seems to have been the elimination of the fault issue in divorce cases, these sometimes necessary changes in the family personal and property relationships could not be made before filing suit for divorce unless one of the spouses had cause and sought a separation from bed and board on one of the grounds listed in article 138 of the Civil Code. An attempt to remedy this situation had been made in 1948 by the introduction of Senate Bill No. 314, under which the filing of written notice by one of the spouses of their living separate and apart with intention of claiming a divorce at the end of the required period would itself have given rise to the effects of a judgment of separation from bed and board, but this bill was not enacted into

5. For a commentary on this legislation see Hebert & Lazarus, *Legislation Affecting the Civil Code*, 15 LOUISIANA LAW REVIEW 9-11 (1954).

6. The amending act traced the existing text of article 92 even to the retention of a grammatical error (“if any of them are”) and language inappropriate to our institutions (“guardians” for “tutors”; “marriage certificate” for “act of marriage”).

7. La. Acts 1956, No. 303, § 1.

8. “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.”

9. La. Acts 1916, No. 269, and amendments.

law. The writer believes the principal motive behind the legislation under discussion must have been the easing of this situation and therefore that its drafters and enactors must have intended the new cause of separation to be any living separate and apart for one year of a kind which, if continued for two years, would entitle either spouse to a divorce under R.S. 9:301.

The ordinary meaning of the language of the new cause for separation from bed and board, however, does not support this interpretation. The important words in the statement of the new cause for separation are "when the husband and wife have *voluntarily* lived separate and apart." (Emphasis added). Grammatically and lexicographically this legislation requires that the separate living be mutually voluntary. R.S. 9:301 does not have the word "voluntarily" in its text¹⁰ and the judicial interpretation has been that the separate living must be the result of a voluntary or intentional act on the part of at least one of the parties, but not necessarily of both, to terminate the conjugal life.¹¹ Thus the living separate and apart required by the new legislation, if construed according to the normal meaning of words in the English language, is more limited than that required by R.S. 9:301 as interpreted.¹²

Forced Heirship

Article 1494 has been amended¹³ by the addition of a proviso which in effect limits the legitimate or forced inheritance of a

10. See note 8 *supra*.

11. *Leveque v. Borns*, 174 La. 919, 142 So. 126 (1932); *Otis v. Bahan*, 209 La. 1082, 26 So.2d 146 (1946).

12. The writer does not ignore but does not purport to discuss here the applications of the laws concerning the effects of separation from bed and board to separations obtained under this amendment. Nevertheless it may be mentioned that the rules on the loss or retention of the advantages and donations by one spouse to the other (Civil Code art. 156) and the primary rule on the tutorship and custody of the children (Civil Code art. 157) are phrased in terms which presuppose that the party against whom the separation judgment has been pronounced has been guilty of fault (i.e., a violation of a marital obligation legislatively defined as a cause for separation), whereas "voluntarily living separate and apart" ignores the fault issue entirely. Thus an application of these rules to separations obtained under the new "cause" could result in a miscarriage of justice if the party cast actually has not been at any fault. Similarly, after divorce based on article 139 of the Civil Code and R.S. 9:302 (non-reconciliation for a stated period following a separation judgment) the innocent wife cast in the judgment of separation may lose all right to alimony, and the innocent husband cast in the separation judgment may be compelled to pay alimony to the wife actually at fault. These problems sufficiently illustrate that it would be well for legislators introducing and acting on bills affecting so highly integrated legislation as the Civil Code to obtain the advice of persons learned in its plan and intricacies.

13. La. Acts 1956, No. 313.

surviving parent to one-third of the property of the deceased or his intestate share, whichever is less. This amendment gives legislative sanction to the principle of the decision in the *Succession of Greenlaw*¹⁴ and thereby eliminates the conflict between article 1494 and articles 904 and 911 of the Civil Code.

REVISED STATUTES AMENDMENTS AND ADDITIONS

Absentees

R.S. 9:171-178 authorized partition by private sale of property of which a *record owner* was either an absentee unrepresented of record or a person whose whereabouts were unknown, and prescribed the procedure therefor. The pertinent parts of this legislation have been amended (1) to broaden its application to instances in which "any co-owner, or possible claimant of any interest in the property, cannot be found or is an absentee, or it is not known if he be alive or dead,"¹⁵ and (2) to cause the judgment authorizing the partition by private sale itself to constitute authority to the curator ad hoc of the absent or unknown parties of interest to execute the act of partition.¹⁶ In other respects the import of the original legislation seems unchanged.¹⁷

Marriage

R.S. 9:204-206, which state the conditions under which a marriage may be celebrated in less than seventy-two hours after the issuance of a license, were amended¹⁸ to shift the authority to grant dispensations from the basic law, so far as East Baton Rouge Parish only is concerned, from the district judges to the Family Court. The authority for Orleans Parish had been transferred to the First City Court in 1954.¹⁹ These amendments are similar to that made to article 92 of the Civil Code.²⁰

Abandonment and Adoption

The legislation on matters relating to abandonment has been amended in several respects.

14. 148 La. 255, 86 So. 786 (1920).

15. La. Acts 1956, No. 534.

16. *Ibid.*

17. La. Acts 1928, No. 96, as amended by La. Acts 1948, No. 457.

18. La. Acts 1956, No. 288, §§ 1-3.

19. La. Acts 1954, No. 399.

20. See page 22 *supra*.

(1) R.S. 9:403(A), which defines abandonment by a parent, contained a clause under which a parent denied custody by judicial action would not be deemed to have abandoned the child by reason of his not having taken "physical care" of it. This clause has been amended in fact by the addition of R.S. 9:403(D),²¹ which limits its application to parents who have been denied custody in proceedings "incidental to an action for divorce or separation from bed and board." The amendment goes too far. Certainly a parent who has been denied custody, whatever the reason, can hardly be expected to give it "physical care."

(2) An amendment to R.S. 9:403(C)²² seems designed in part to permit the court decreeing a child abandoned to place it in the custody of private persons or an adoption agency, as its "best interest" might indicate. Formerly the child could be placed with an adoption agency only. The same amendment also deletes a provision of the original section under which even after the facts constituting abandonment had been proved, a parent could assume responsibility for the child or show good reasons for his failure to do so and thereby put an end to the abandonment proceeding.

(3) The new section R.S. 9:406²³ places a limitation of sixty days from the effective date of the enacting statute on suits to annul decrees of abandonment rendered prior to the effective date of the statute.

(4) A new section R.S. 9:407²⁴ permits an agency having custody of an abandoned child either to place it for adoption or to provide it with other care, as its best interest might indicate. This new section corresponds to section 5 of Act 227 of 1948, left out of the Revised Statutes of 1950 apparently in the belief that the termination of parental rights by a decree of abandonment provided for by R.S. 9:404 was sufficient.

Custody

R.S. 9:551-9:553 carried into the Revised Statutes the provisions of Act 79 of 1894, the first legislation separating the

21. La. Acts 1956, No. 185.

22. La. Acts 1956, No. 176.

23. La. Acts 1956, No. 181.

24. La. Acts 1956, No. 183.

custody of children from their tutorship and permitting the award of their custody to persons other than those entitled to their tutorship when their physical or moral welfare was seriously endangered by those in whose actual custody they were. This legislation vested the then new power in the district courts. Subsequently juvenile and family courts were given similar power and now Act 111 of 1956 has repealed R.S. 9:551-9:553, with the result that such matters are now in the hands of the juvenile and family courts exclusively.

Successions

R.S. 9:1492, which details the requirements for the publication of notice of an executor's or administrator's application for authorization to execute a mineral lease, has been amended²⁵ to specify that the published notice shall contain (1) a description of the property to be leased, (2) mention of the bonus to be received by the executor or administrator, (3) an indication of the minimum royalty on oil (no mention is made of other minerals) to be reserved to the succession, and (4) such other information as the court may require.

R.S. 9:1513 before amendment authorized banks and other depositaries to pay *widows* up to five hundred dollars out of deposits in her name, her deceased husband's, that of the community between them, or "otherwise," without judicial authorization and before determination of the inheritance tax due, without subjecting them to liability for inheritance taxes or in any other way. The amendment by Act 559 of 1956 (1) extends the act to cover payment to widowers as well as to widows and (2) specifically adds "joint" deposits to the list of those from which the payments may be made.

R.S. 9:1521, added by Act 387 of 1956, authorizes the public sale of movable and immovable succession assets for any purpose, and without priority between movables and immovables except where the sale is made to pay debts or legacies, provided such sale be in the best interest of the "succession, heirs, and succession creditors." This legislation parallels R.S. 9:1451-9:1454 on the private sale of succession assets.

25. La. Acts 1956, No. 474.

Sale of Land on Rights of Way

Under the new sections 9:2971-9:2793²⁶ all future transactions with regard to land fronting on a right of way of any kind shall be presumed, in the absence of stipulation to the contrary, to include the contractor's or transferor's interest "under" the right of way. The statute is also specifically retroactive and applies to all transfers before its effective date unless the transferor asserts his interest within a year by suit or by recording an appropriate declaration made before a notary public.²⁷

Privileges and Mortgages

R.S. 9:4861-9:4862, specifying privileges for labor, services, or supplies furnished in the drilling of oil, gas, and water wells, are discussed elsewhere in the Symposium.²⁸

R.S. 9:5351, on chattel mortgages, was amended²⁹ to correct two typographical errors in the amendment by Act 50 of 1952. The word "or" in the phrase "articles disposed by the mortgagor or up to the time of foreclosure" was deleted, and the word "ordinarily" in the phrase "other things in bulk *ordinarily* mortgaged to secure the debt" was changed to read "originally."

R.S. 9:5356 was amended³⁰ to reduce the period after which the recorder of mortgages may destroy chattel mortgage records from ten to six years after the last inscription of the mortgage.

Prescription

The new section R.S. 9:5625³¹ provides for the prescription of actions to enforce zoning and other land use restrictions. The statute bears the scar of a proviso clause apparently added after the original drafting of the bill and as a result thereof the act does not read as clearly as one might wish. The following, however, appears to be its substance: (1) The normal prescriptive period is two years from the first act constituting the violation. (2) In the case of a *use restriction* enforceable by a local government unit the period does not begin to run until the government

26. La. Acts 1956, No. 555.

27. The language of Act 555 of 1956 is often improper for our law, e.g., "conveyance," "grant," "fee."

28. See page 96 *infra*.

29. La. Acts 1956, No. 90.

30. La. Acts 1956, No. 203.

31. La. Acts 1956, No. 455.

unit or its instrumentality has knowledge of the violation. (3) The act applies to violations which occurred before its effective date, but in the event the prescriptive period would run in less than one year from the effective date of the act, the enforcement suit may be brought within a year of that date.