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Civil Code and Related Subjects: Persons

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PERSONS

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SEPARATION AND DIVORCE

Mutual Fault

In an opinion on rehearing reversing its original holding, the Supreme Court reaffirmed the doctrine that a separation from bed and board may not be granted for cause where "the faults of the husband and wife are nearly balanced and are of a similar nature."[1] By petition and reconvention the wife and husband each had sought a separation from the other on the ground of cruel treatment rendering the common life insupportable. Each was deemed to have proved the charge. The lower court nevertheless granted the separation to the plaintiff wife. In its original opinion the Supreme Court upheld this action, clearly departing from the long observed judicial custom of not allowing a separation or divorce in instances of mutual fault, but reversed itself on rehearing.

The proper application of the doctrine of mutual fault, or recrimination as it is often called, needs re-evaluation. In principle it is inconsistent with the whole trend of Louisiana divorce and separation legislation since 1898, for as of that date it became possible for one at fault in bringing about a marital difficulty to ask for and receive a divorce. Prior to 1898 a party at fault could never obtain a divorce at his own request, even if a separation had been pronounced in favor of the other spouse, no matter how long the non-reconciliation of the spouses lasted.[2] Since 1898, however, the guilty spouse has been able to demand a divorce after a certain period of time has elapsed after the judgment of separation if no reconciliation has taken place.[3] In 1916 the Legislature made it possible to obtain a divorce after a period of factual "living separate and apart," without reference to the cause, reason, or occasion for the separation so long as it

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1. Fouquier v. Fouquier, 231 La. 430, 91 So.2d 591 (1956).
2. LA. CIVIL CODE art. 139 (1870) as originally enacted.
3. La. Acts 1898, No. 25, the first antecedent of LA. R.S. 9:302 (1950).

were voluntary in its inception on the part of at least one of the parties.[4] Finally in 1956 even a separation from bed and board was made obtainable after a "voluntary separation" of one year.[5]

Hence it is that side by side with divorce and separation for fault of the defendant there is legislation permitting divorce and separation without reference to fault. Not only are the two kinds of legislation inconsistent in principle; but, because they exist side by side, suits for divorce and separation for cause serve only to lessen the time that otherwise might be required for obtaining a final judgment; and at the same time any separation or divorce suit based on cause which fails can be followed very shortly by one based on "voluntary separation" or "living separate and apart." For this reason it is to be suspected that many judges in the lower courts, on being confronted with instances of common fault in suits for divorce or separation for cause, respond actually, if not openly, as did the Supreme Court in its original opinion in the case under discussion. In such cases the doctrine of mutual fault is applied only if the defendant appeals, and by the time of decision on appeal sufficient time will have elapsed to make possible a suit for separation or divorce on the ground of voluntary separation or living separate and apart.

Yet if separation or divorce for cause in the nature of fault is inconsistent in principle with separation or divorce without regard to fault, that is to say, in our law, on the basis of "voluntary separation" or "living separate and apart," it is true that it is only for cause in the nature of fault that a separation or divorce may be obtained in less time than one year or two years respectively. Hence, unless separation and divorce without cause are to become possible in fact in less than one or two years, the regime of separation or divorce for cause in the nature of fault must be enforced as if the other did not exist. This leads us, then, to the necessity of being concerned with this doctrine of mutual fault and its proper application.

In my opinion two distinct kinds of fault must be distinguished, that which is a past fact and does not amount to a con-

4. La. Acts 1916, No. 269, the first antecedent of LA. R.S. 9:301 (1950), as interpreted by Leveque v. Borns, 174 La. 919, 142 So. 126 (1932) and Otis v. Bahan, 209 La. 1082, 26 So.2d 146 (1946).

5. LA. CIVIL CODE art. 138 (1870), as amended, La. Acts 1956, No. 303.

tinuing, present situation rendering the common life intolerable, and fault of a kind which continues to exist as of the time of suit and which makes the common life intolerable. In the first instance, mutual fault should be reason to deny a separation or divorce. If, for example, both spouses have committed adultery in the past and there is no present habitual adultery on the part of either, it would seem that a separation or divorce should not be granted. On the other hand, if, as in the case which prompted this discussion, both spouses are so habitually cruel toward each other that the conjugal life is insupportable, then it seems that the mutuality of fault should not be a reason to deny the separation. Here care would have to be taken to minimize the possibility of collusion, but a separation in cases of genuine mutual cruel treatment may be indicated to prevent even more disastrous consequences than the separation would entail. It may be noted that this is the way in which the doctrine of mutual fault seems to be applied in Canon law.[6]

Cruel Treatment

Three decisions presented questions of existence of cruel treatment of such a nature as to render the common life insupportable. In the case above discussed "constant quarrelling and bickering in private and in public" was impliedly so construed.[7] In another (in which, however, the charge of cruel treatment was coupled with another of public defamation) absenting himself from the house without explanation, abusive language, and refusal to have meals with the other or to occupy the conjugal bed, all over a period of only four months, were deemed sufficient to support the charge.[8] In the third, the firing of a gun to frighten the husband, not in attempt on his life, and on a single instance, was adjudged to render the common life insupportable.[9]

If it were not for the fact that under Louisiana law taken in its entirety separation from bed and board leads to divorce more than it affords an opportunity for reconciliation, I might join in the sentiment that separations might be allowable under such facts. The separation would then provide a means of bring-

6. The *Codex Juris Canonici*, Canon 1129, makes separation for adultery impossible if the plaintiff has committed the same offense. There is no mention of mutuality of fault in Canon 1131 dealing with the other grounds for separation.
7. Fouquier v. Fouquier, 231 La. 430, 91 So.2d 591 (1956).
8. McNeal v. McNeal, 96 So.2d 563 (La. 1957).
9. Amos v. Amos, 232 La. 178, 94 So.2d 23 (1957).

ing the erring spouse to his senses. Realizing, however, that under the impact of Louisiana law in its totality separation breeds divorce more than it provides a period of reflection for reconciliation, I think it would be well to require the highest degree of proof of *insupportability* of the common life before granting a judgment of separation. The mere fact that parties denied a separation for cause may soon thereafter file for divorce or separation on grounds of "living separate and apart" or "voluntary separation," as heretofore mentioned, ought, in my mind, be considered reason enough not to be too free in granting divorces or separations for cause.

Proof of Cause

An admission by the defendant of the existence of grounds for divorce, separation, or annulment of marriage could not be allowed to suffice in place of proof of cause in fact without opening the way for collusion of the parties and action by common consent rather than for legal cause. This indeed must be considered the reason for our long-standing rule that such suits may not be made the subject of arbitration, but must be tried in courts of justice.[10] Even more obviously, it must be the reason for the newer rule that a divorce, separation, or annulment may not be granted on the face of the pleadings, but only after proof is made of the existence of legal cause.[11] For these reasons, the language in *Williams v. Williams*[12] that "in her answer filed to the petition there was no denial of the two year separation allegation and it, therefore, is deemed admitted" must be deemed contrary to law. It is true that the Supreme Court did not rely entirely on this admission for proof of the living separate and apart, for there was some testimony to this effect by third persons.[13] It would seem, nevertheless, that the admission of the defendant should not be used even to corroborate other evidence; for either the other evidence presented is itself sufficiently probative, or in fact proof is made at least in part by means pro-

10. LA. CIVIL CODE art. 140 (1870).
11. LA. R.S. 13:3601(4) (1950).
12. 231 La. 621, 92 So.2d 387 (1957).
13. The defendant-appellant contended this testimony was "insufficient to justify judgment" on the ground that on cross examination the witnesses could not state the whereabouts of the plaintiff at all times. This contention was dismissed on the ground it related to the credibility of the witness, which the trial judge could appraise better than the Supreme Court. Perhaps credibility was an issue, but if so it was not the basis of the defendant-appellant's appeal. No matter how credible a witness, the evidence which he gives may not be probative, or, in the defendant-appellant's terms, sufficient to justify judgment.

hibited by law and certainly too easily suppliable by one who would not hesitate to work a fraud on the law.

For the proof of adultery in divorce suits the Supreme Court long has required that the evidence "lead fairly and necessarily" to the conclusion that adultery has been committed. This criterion was applied in two cases. In one of these, Justice Hamiter dissented from the finding of adultery on the ground that in his opinion the evidence did not "lead fairly and necessarily" to that conclusion.[14] It is impossible to discuss the merits of the decision and dissent, however, for the facts are not reported in the opinion. From the evidence as reported in the other case applying the same standard, however, it would seem that the court did, and very rightly, require a high degree of proof.[15]

DOMICILE

Intrastate Domicile of the Wife

Article 39 of the Louisiana Civil Code states very clearly that a married woman "has no other domicile than that of her husband." Notwithstanding this emphatically stated legislation, the Supreme Court has decided she may have.[16] Evidently the court confused two radically distinct connotations of the word domicile. One is domicile in the legal sense, the legal "home base" which is one of the principal criteria of the ties between a person and a legislative or judicial competence; the other is a house or dwelling. It is true the husband and wife may have separate homes in fact, but that does not lead necessarily to the conclusion they must have separate domiciles in the legal sense.[17]

14. Bailey v. Bailey, 96 So.2d 576 (La. 1957).
15. Kendrick v. Kendrick, 96 So.2d 12 (1957).
16. Bush v. Bush, 232 La. 747, 95 So.2d 298 (1957).
17. From the opinion it appears that the court rejected the argument that Article 39 of the Louisiana Civil Code applies only to intrastate or interparish domicile, not to interstate or international domicile, and therefore that a recognition of the strictness of Article 39 would not in any way contradict the jurisprudence on the possibility of the wife having a separate interstate or international domicile. In my opinion the argument is sound. Domicile is one of the criteria of state authority (or jurisdiction) to legislate or adjudicate as to a particular person or situation. Interstate jurisdiction is, under the Constitution of the United States, a matter of full faith and credit and for this reason the criteria of jurisdiction (or full faith and credit) must be a matter of federal law, not state law. If it were otherwise, full faith and credit would have no meaning, for each state in defining its own criteria for jurisdiction could defeat the purpose of the clause. This understanding is indeed the basis of such decisions as Alton v. Alton, 207 F.2d 667 (3rd Cir. 1953) and Granville-Smith v. Granville-Smith, 349 U.S. 1 (1955). There is no supra-state legislation like the full faith and credit

The case under discussion really concerned only the issue whether a suit for divorce against a wife must be filed in the parish in which she resides, a parish not that of the domicile of the husband. Perhaps the Legislature would agree with the Supreme Court that all divorce or separation suits should be filed in the parish of the wife's actual residence, as it has in R.S. 9:301 for the limited case of divorce on the ground of living separate and apart; but this, I suggest, is a question for legislative determination.

Interstate Domicile

In a second case involving domicile the Supreme Court very correctly noted the distinction between the acquisition of a domicile in another state and the satisfaction of requirements as to the length of time a person domiciled in a state must have resided there in order to sue for a divorce or separation under the laws of that state. The one may be obtained immediately upon the concurrence of physical presence in a state with the intention of making that state the center of one's activities. Residence requirements depend entirely on the satisfaction of local laws on that subject. Whether the court was correct in the application of these legal verities to the facts of the case, however, is a matter open to some doubt on the basis of the facts as reported in the opinion; but this is not a matter of primary concern in an article dealing with the court's enunciations on the law.[18]

clause to delineate the legislative and judicial competences of independent states and countries, and indeed different countries have enacted their own criteria of jurisdiction in the form of conflict of law rules, but the same principle must be understood to apply if there is to be any serious effort for a body of private international law or conflict of laws rules. Thus it would be beyond the power of a state of the union to enact a criterion of interstate legislative or judicial competence, and most inappropriate for it to vary the general appreciation of internationally held criteria by its own legislation.

18. The plaintiff sought a divorce on the ground of living separate and apart from his wife for two years. R.S. 9:301 as interpreted requires that a party have been domiciled in this state for two years preceding suit. Less than two years before suit in Louisiana the plaintiff, then domiciled in Louisiana, had gone to Nevada with the intention of filing suit for divorce in that jurisdicton. Whether or not he had acquired a Nevada domicile, the plaintiff returned to Louisiana before having resided there six weeks as required by Nevada laws as a precondition to the filing of divorce suits by Nevada domiciliaries. The fact that the plaintiff had gone to Nevada to file suit, however, is not, in my opinion, necessarily synonymous with intention on his part to establish a domicile there. It is well known that many persons go to Nevada to obtain divorces without ever in fact wishing to establish a domicile there; indeed, the case of Williams v. N. Carolina (I), 317 U.S. 287 (1942) amounts to a recognition of this practice. From the report of facts such as we have it in the opinion, therefore, it would seem that the court just as easily could have found that the plaintiff had never acquired a domicile outside this state.

SUPPORT

Alimony after Divorce

Two appeals[19] from judgments concerning alimony after divorce raised the issue whether the divorced wives were "in necessitous circumstances" within the meaning of Article 160 of the Civil Code. In each case the court reaffirmed its previous interpretation of that phrase.[20] It may be mentioned, however, that in each opinion the court repeated once more the statement that alimony to the wife after divorce is a "pure gratuity which the court may allow and fix at its discretion." This kind of statement can give rise to the impression the Supreme Court wishes to justify whatever it does in awarding alimony after divorce by denying that the wife, though in necessitous circumstances, has any *right* to alimony. Certainly the court cannot intend this meaning any more than it would be conceivable that the legislatures since 1827[21] intended to grant such power to the judiciary. It would seem more reasonable to recognize that Article 160 creates a *right to alimony* in favor of the divorced wife in necessitous circumstances, and gives discretion to the judge only as to the amount to be paid.

Criminal Neglect of Family

Prosecution for criminal neglect of family was adjudged not terminated by the filing of suits for annulment of the accused's marriage with his "wife" or for disavowal of the child for whose support an order had been issued pursuant to R.S. 14:75. The court very properly reasoned that if such were the case the accused could very easily and quickly rid himself of this criminal charge to the detriment of persons very possibly then his wife or child.[22] The court did not deny, of course, that a judgment of nullity of marriage would have put an end to the accusation of criminal neglect of the wife, or that a judgment of non-paternity would have terminated the proceeding for failure to support the child.

19. Jones v. Jones, 232 La. 102, 93 So.2d 917 (1957); Rabun v. Rabun, 232 La. 1004, 95 So.2d 635 (1957).

20. In Brown v. Harris, 225 La. 320, 72 So.2d 746 (1954); Smith v. Smith, 217 La. 646, 47 So.2d 32 (1950).

21. The first legislation of this kind was in the Act of March 19, 1827, § 8.

22. State v. Ponthieaux, 232 La. 121, 94 So.2d 3 (1957).

Interstate Enforcement of Support

The so-called Uniform Reciprocal Enforcement of Support Act[23] permits *inter alia* a dependent to bring a civil suit for support in his own state against a person in another state who is obliged to supply that support. Similar legislation exists in California and under it a mother initiated proceedings against her child's father for its support. Without citing the defendant in any way the California court proceeded to receive proof of the plaintiff's allegations and then sent copies of the petition and proceedings to the Louisiana court in the parish of the defendant's domicile. The defendant was served with copies of the documents, answered denying the child's need, and a hearing was held after which the Louisiana court entered an order for support solely on the basis of the evidence introduced during the California proceedings. On appeal, the Supreme Court reversed and set aside the judgment on the ground that it was founded entirely on an *ex parte statement*, a statement not admissible as evidence. This seems correct. The Uniform Enforcement of Support Act is designed to facilitate interstate support proceedings by permitting a dependent to initiate suit in his state and to elicit the assistance of public prosecutors in the state of the defendant's domicile in the actual prosecution of the cause at that place. It cannot be considered a procedure which would deny to the defendant the same opportunity to defend the suit that he would have if the proceedings were initiated at his place of domicile.

FILIATION

Proof

A person sought to set aside two *ex parte* judgments recognizing another as heir of a certain deceased by offering to prove he was the legitimate son of the deceased.[24] The defendant apparently admitted the plaintiff was the son of the deceased, but denied he was the child of her husband.[25] Inasmuch as the child had been reared by both its mother and her husband as their own it "possessed the status" or reputation of legitimacy and, having been conceived and born during their marriage and never dis-

23. LA. R.S. 13:1641-1673 (1950).
24. Succession of Rockwood, 231 La. 521, 91 So.2d 779 (1956).
25. *Apparently*, for the opinion is rather vague on this point.

avowed, his legitimacy could not be questioned.[26] The Supreme Court relied in fact on the child's having been reared as a legitimate child, citing Article 194 of the Civil Code, and also on a birth registry made by the midwife indicating his legitimate filiation, citing Article 193 of the Civil Code, but did not resort to the presumption of legitimacy resulting from marriage, though in this case it would seem to have been the strongest legal reason for adjudging the child legitimate. A birth registration made by a physician, midwife, or even the mother, after all, may properly serve as evidence of the maternity of the child, but hardly is proof of his paternity. Indeed, from the provisions of the Civil Code itself it is clear that a birth registry indicating the husband as the father of the child would not be conclusive against him unless he signed it.[27]

CUSTODY

After Separation or Divorce of Parents

After the separation from bed and board or the divorce of the parents, the custody of a child is governed by Article 157 of the Civil Code. For some years this rule has been interpreted liberally as a "best welfare of the child" rule, and two decisions of the last term applied this interpretation of the article.[28]

During Marriage

During the marriage of the parents the custody of their child belongs to them as a matter of law,[29] and even after separation from bed and board or divorce it belongs to one of them,[30] unless because of the child's delinquency, or its neglect, mistreatment, or abandonment, custody has been given another by judgment of a proper court.[31] Thus it would seem that any time the married parents, or the separated or divorced parent with right to custody, seek to recover the custody of their children from those who have it under circumstances other than a judgment of custody,

26. LA. CIVIL CODE art. 184 *et seq.* (1870).
27. LA. CIVIL CODE art. 190 (1870).
28. Bailey v. Bailey, 96 So.2d 576 (La. 1957); Fitzgerald v. Fitzgerald, 232 La. 916, 95 So.2d 497 (1957).
29. LA. CIVIL CODE art. 216 (1870).
30. LA. CIVIL CODE art. 157 (1870).
31. Until 1956 the district courts shared some of the jurisdiction with the juvenile courts under R.S. 9:511-553, but this legislation was repealed by La. Acts 1956, No. 111, leaving the juvenile courts with exclusive jurisdiction in this matter over minors under seventeen, and eliminating all legislation on this subject as to minors over seventeen.

they should be entitled to obtain it of right. The Supreme Court recognized this in the course of its opinion in a custody suit initiated, in a district court as a *habeas corpus* proceeding, by married parents,[32] but nevertheless proceeded to leave the child temporarily in the custody of the respondents because by the time of the appeal the parents had begun to live separate and apart. It is true the Supreme Court acted in accordance with what it deemed the best interest of the child in a kind of situation not specifically covered by the written law, for there is no specific legislation on the right of custody during a separation in fact; but it seems that as between awarding custody to one of the parents or to persons not parents, the decision in favor of one not a parent cannot be justified. Short of proof of delinquency, neglect, abuse, or abandonment, parents have exclusive right to the custody of their children.

ADOPTION

The decisions on adoption reflected radically different appreciations of the effect of the adoption legislation on the rest of the law relative to children. One reaffirmed the opinion in *Green v. Paul*[33] that parents may withdraw their consent to the adoption of their child by others at any time before final judgment;[34] a second interpreted the adoption legislation to require the consent of both natural parents even if the custody of the child previously had been awarded one of them;[35] and a third held that a child both of whose parents were dead could be adopted without the consent, and indeed against the opposition, of other relatives.[36] The first two decisions represent conclusions based on a strict, or limiting, interpretation of the adoption legislation to preserve parental right to children; on the theory adoption legislation is a variation or modification of long recognized rights as to children, it was given a narrow, particular meaning, reducing its effect to what must be considered authorized by its texts. Obviously, the third-mentioned decision proceeded as if upon a broad, all-embracing, policy-making conception of the adoption legislation with the result that family, as distinguished from parental, rights to children not preserved in the adoption legislation were considered repealed. Certainly Civil Code Article 213

32. State v. Miller, 232 La. 617, 94 So.2d 888 (1957).
33. 212 La. 337, 31 So.2d 819 (1947).
34. *In re* Harville, 96 So.2d 25 (La. 1957).
35. Madere v. Long, 231 La. 498, 91 So.2d 771 (1956).
36. *In re* Ryals, 231 La. 683, 92 So.2d 581 (1957).

as originally written implied *family rights* to children by recognizing the right of other relatives to claim the tutorship of children abandoned by their parents even against the persons who had cared for them. The repeal of this article in 1948[37] no doubt operates somewhat to disassociate the child from his family and to increase the wardship of impersonal state agencies. The decision presently under consideration will have a similar effect. Both, however, are to be deplored as further manifestations of a decreased appreciation for the stability and integrity of the family unit, whether or not they were conceived as such by their authors.

INTERDICTION

A single decision involving the law of interdiction presented only a question of fact, the capacity of the defendant to manage her affairs.[38]

PROPERTY

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Party Wall

According to Article 675 of the Civil Code, he who first builds in cities and towns may rest one-half of his wall on the land of his neighbor. Another phase of the same servitude is the right of the neighbor to make this a party wall and to utilize it for the support of his own building. Of course, the first builder does not have the right to encroach upon his neighbor's property unless it is within the party wall servitude. In the case of *Ciaravella v. Gillaspie*,[1] the plaintiff sought to have defendant remove the wall of his building which enroached upon plaintiff's property. The defendant pleaded the party wall servitude, but since the wall did not meet the party wall specifications of the New Orleans Building Code, the district court ordered the removal. The Supreme Court conceded "that under the facts of this case he [plaintiff] has a right to have the wall torn down,"[2] but nonetheless reversed the lower court's judgment and allowed

37. La. Acts 1948, No. 227, § 7.
38. *In re* Taliaferro, 231 La. 394, 91 So.2d 578 (1956).
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1. 96 So.2d 48 (La. 1957).
2. *Id.* at 52.