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Civil Code and Related Subjects: Persons

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PERSONS

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SEPARATION AND DIVORCE[1]

The Supreme Court has always treated voluntary intercourse between estranged spouses as conclusive of their reconciliation. In *Blanchard v. Blanchard*[2] the court was confronted with proven acts of intercourse and a statement alleging reconciliation signed by both parties, but found as fact that the wife had been forced into the acts and signature, and thus judged that a reconciliation had not taken place. Indirectly this decision recognizes that reconciliation is in essence an intentional act, one of decision to resume the common life. It does not in any way abridge or modify the accepted doctrine that voluntary intercourse shall be taken as conclusive evidence of reconciliation, or intention to resume the common life.[3]

FILIATION[4]

Succession of Baragona[5] is worthy of note in that the opinion

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1. Cases decided on the basis of well understood law or constant jurisprudence and therefore not discussed here are (1) *on proof of adultery*, Wall v. Wall, 234 La. 712, 101 So.2d 211 (1958); Pilgrim v. Pilgrim, 235 La. 112, 102 So.2d 864 (1958); and Fontenot v. Fontenot, 235 La. 116, 102 So.2d 866 (1958); (2) *on date of dissolution of the marital regime by judgment of separation or divorce*, Abraham v. Abraham, 233 La. 808, 98 So.2d 197 (1957) and Ruffino v. Hunt, 234 La. 91, 99 So.2d 34 (1958); and *on alimony after separation and after divorce*, Andrews v. LaLumia, 234 La. 39, 99 So.2d 15 (1958) and Boucvalt v. Boucvalt, 104 So.2d 197 (La. 1958).

2. 234 La. 79, 101 So.2d 67 (1958).

3. The single headnote to the report of the decision is very misleading, it reading in part that "evidence of isolated acts of intercourse between the parties . . . was insufficient to show that parties had become voluntarily reconciled."

4. An interesting decision involving issues of filiation, but outside the scope of this Symposium because it was decided by the Court of Appeal, is Texas Co. v. Stewart, 101 So.2d 222 (La. App. Orl. 1958). *W*, whose marriage with *H*(1) had never been dissolved, married *H*(2) and bore a child, *C*, who was known generally as the child of *H*(2). Article 184 of the Civil Code was pleaded in the effort to have *C* adjudged the child of *H*(1), but the court avoided considering the applicability of this article by ruling that the marriage of *W* and *H*(2) must be presumed putative as to *H*(2) and that accordingly, under Article 118 of the Civil Code, *C* should be considered the child of *H*(2). *Quaere* what the court would have decided had *H*(2) been proved to have been in bad faith. Would the court have applied Article 184 in spite of the child's reputation of being that of *H*(2), following the Succession of Saloy, or would it have adjudged the child to be that of *H*(2) through application of the principles underlying Articles 197 and 209(3) of the Civil Code?

5. 233 La. 637, 97 So.2d 215 (1957).

rather clearly recognizes the "informal acknowledgment" of a child to have been a construction of the jurisprudence not really implied by the written law. Today, of course, it is possible to argue that there is implicit recognition of the "informal acknowledgment" in the text of Article 198 (on legitimation by subsequent marriage of the parents) as amended in 1944 and 1948.[6] Whatever its foundation, the "informal acknowledgment" seems well established in our legal system.

TUTORSHIP

The opinions in *State* ex rel. *Brode v. Hatcher*[7] reflect very nicely two opposing views on the right of the natural tutor to custody of the child. The suit itself was a habeas corpus proceeding in which an aged father sought custody of his ten-year old girl from her maternal uncle and aunt, to whom she had been entrusted temporarily and who then refused to surrender her. In defense to the tutor-father's demand, the uncle and aunt alleged that both he and his sister, with whom he lived and to whom much of the child's care would fall, were unfit because of their advanced years and for other non-moral reasons. The trial court had decided to leave the child with the uncle and aunt. The Supreme Court remanded the case for more evidence as to the conditions under which the child would live in her father's home, relying on the court's own previous decisions alleging a greater right in the state than in parents to the custody of their children. Justice McCaleb dissented on the ground he believed the record failed to show anything which would entitle the court to deny the tutor-father the custody which is his of right under Article 250 of the Civil Code. He emphasized that the right of the father-tutor ceases only "in those cases in which there is a clear and foreseeable danger to the child in returning to its parental home." The writer, having only the opinions of the Justices before him, cannot judge the facts in this case, but strongly sympathizes with Justice McCaleb in his dissent to the overly strong statements of the majority concerning the judiciary's right to deny custody of a child to its parent and natural tutor. In a more recent decision of the Supreme Court,[8] not among those commented on in this symposium, Judge Tate, in the capacity of Justice *ad hoc,* was even more direct and more

6. By Acts 50 of 1944 and 482 of 1948: ". . . whenever the latter have formally or informally acknowledged them. . . ."

7. 233 La. 636, 97 So.2d 422 (1957).

8. State *ex rel.* Paul v. Peniston, 105 So.2d 228 (La. 1958).

articulate than was Justice McCaleb in explaining his objections to the Supreme Court's statements affirming the "superior right of the state" against parents in the matter of the custody of children. Although the writer himself contends there are instances in which parents must be denied custody of their children — much of the juvenile court authority is on this foundation — he, with Justice McCaleb and Judge Tate, believe the habitual statements of the court on this subject to have been much too strong and far-reaching.[9]

O'Quinn v. Hampton[10] presented, the writer believes, a case of first impression. Under Article 264 of the Civil Code, in the appointment of a legal tutor the male is to be preferred to the female of the same degree of relationship to the minor. R.S. 9:51, one of the acts relating to the "emancipation" of women, specifies that women shall have the same privileges, rights, and obligations as men in the election and appointment to civil offices, including that of tutor. Alleging the repeal of Article 264 by the later legislation, a maternal grandmother attacked an *ex parte* appointment of the paternal grandfather to the tutorship of their minor grandchild. The Supreme Court ruled that the statute emancipating women did not in any way repeal the laws on preference of the male as in Article 264. On the basis of the words of R.S. 9:51 and the title of the original statute, Act 34 of 1921 E.S., used by the court to arrive at its decision, this writer would have been more inclined to accept the argument of the maternal grandmother.[11]

9. In another tutorship-custody decision, Boatner v. Boatner, 235 La. 1, 102 So.2d 472 (1958), the Supreme Court applied Article 157 of the Civil Code, bolstered with its well-known interpretation of that article, to award the custody of young children to their mother rather than to their father after divorce. In a third decision involving custody, Thornton v. Thornton, 234 La. 108, 99 So.2d 43 (1958) the Supreme Court reasoned that a custody issue not raised before judgment in a divorce suit cannot thereafter be raised by motion and rule in the same numbered proceeding, but must be presented in a new suit. The writer considers this opinion correct.

10. 234 La. 500, 100 So.2d 485 (1958). In a companion case, Hampton, Tutor v. O'Quinn, Under-tutrix, 234 La. 491, 100 So.2d 482 (1958), the court refused to approve of a compromise of a tort claim for less than one half of its value according to the estimate of the court. This, of course, was a decision on fact and did not involve a question of law, for clearly judicial approval of proposed compromises by the tutor must be obtained (Article 353 of the Louisiana Civil Code) and there the court must use its sound discretion.

11. Also of considerable interest is the decision by the Court of Appeal (1st Circuit) in Sun Oil Company v. Guidry, 99 So.2d 424 (1957). There the court ruled that the ten-year liberative prescription applied to mineral interests began to run against a minor domiciled outside this state from the day of his emancipation at his domicile. The opinion, therefore, affirms that a persons' capacity or incapacity resulting from age is governed by the law of his domicile.