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Civil Code and Related Subjects

PERSONS

*Robert A. Pascal**

Paternal Authority

Under Article 353 of the Civil Code the tutor may not enter into a compromise respecting the rights of the minor without authority from the judge.¹ May the father of a child subject to paternal authority compromise the minor's claims without obtaining permission from the judge, or must he too secure that permission? The answer given in *Blades v. Southern Farm Bureau Casualty Insurance Company*² is that the father may act alone. Perhaps this is as the rule should be, but as an interpretation of the legislation this decision is questionable. The only legislative provisions on the authority of the father in the administration of the minor's property during the existence of paternal authority are Articles 221 and 222 of the Civil Code. The first merely places the administration of the child's property in the father except in the event of his interdiction or absence. The second, which the court made the basis of its decision, reads in part: "Property belonging to minors [under paternal authority] may be sold or mortgaged, *and any other step may be taken affecting their interest*, in the same manner and by pursuing the same forms as in case of minors represented by tutors, the father occupying the place and being clothed with the powers of the tutor." The court construed this article to apply to only "the sale or mortgaging and similar transactions affecting the property of a minor" and not to a compromise of a minor's claim for personal injuries. With this interpretation the writer cannot agree, for the words "and any other step may be taken affecting their interest" certainly cannot be construed to refer to the interests of *the property* of the minor and must refer to the interest of *the minor*. The word "their" is a personal pronoun and must not have been used in reference to inanimate objects.

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1. The article refers to advice of the family meeting, and therefore under the new procedure the undertutor must agree or there must be proceedings contradictorily with him. LA. R.S. 9:651-653 (1950).

2. 237 La. 1, 110 So.2d 116 (1959).

In the court's opinion the fact that Article 222 was not in the Civil Code of 1825 was relied upon as an indication that sometime between 1825 and 1870 it must have come to be felt that acts relating to property were "beyond mere administration" and therefore ought not to be made on the father's sole judgment. The writer is of the opinion that the article was inserted into the Revised Civil Code of 1870 for another reason. In the Civil Code of 1825 the article on the administration by the father during paternal authority (the present Article 221) appeared in the section on tutorship by nature.³ The section on paternal authority did not contain any provision on the subject. Evidently in 1825 it was intended that the father administer as if a tutor, following the rules on tutorship. In 1845, however, the decision in *Cleveland v. Sprowl*⁴ declared that the father need not qualify as a tutor during paternal authority and probably introduced doubts as to the manner in which the father should administer the property of the minor. But if any doubts on this score had been introduced by *Cleveland v. Sprowl*, they should have been removed by Act 324 of 1855. That act treated extensively of the administration by tutors but contained, in its Section 17, the new legislation which later was incorporated into the Revised Civil Code of 1870 as Article 222. Its position in Act 324 of 1855 and its wording indicate to this writer that the father, although not required to qualify as tutor under the decision in *Cleveland v. Sprowl*, was expected to act in the same manner as a tutor in the administration of the child's affairs; and there is nothing to indicate that the draftsmen of the Revised Civil Code of 1870 intended to give it another meaning.

In reaching its decision in the above case the court also placed some reliance on *Darlington v. Turner*.⁵ That case, it will be recalled, was similar to *Cleveland v. Sprowl* and involved no more than the question whether during paternal authority the father could accept a legacy given to his child without qualifying as tutor and posting security. The answer was given in the affirmative, consistently with the earlier decision. But in no way did that case raise the question which is raised in the instant case. Under Article 354 of the Civil Code the tutor may accept legacies for his ward acting alone and without the assistance of the undertutor or authorization of the judge; hence the father

3. LA. CIVIL CODE art. 267 (1825).

4. 12 Rob. 172 (La. 1845).

5. 202 U.S. 195 (1906).

during paternal authority would not be required to seek such assistance or authorization, for under Article 222 he is subject to the same rules as is the tutor. But under Article 353 the tutor needs authorization of court to enter into a compromise of the minor's claims; hence had the case of *Darlington v. Turner* involved such a matter the father no doubt would not have been allowed to act without the authorization of the judge.

For the several reasons given above the writer cannot agree with the decision in the *Blades* case. He can and does agree, however, that in the light of the jurisprudence a legislative clarification of the powers of the father is necessary.

Filiation

*State v. Braxton*⁶ was a prosecution for neglect of family, the neglected persons being an illegitimate child and the accused being charged as its father. Though Article 74 of the Criminal Code itself purports to impose the obligation of support and to permit the filiation of the neglected child and the accused to be established at the time of trial, previous decisions of the Supreme Court have denied the constitutionality of these provisions and require proof of a civil obligation of support at the time of the alleged neglect.⁷ Under Article 242 of the Civil Code the father who has acknowledged his illegitimate child owes it support, and under Article 203 of the Civil Code the acknowledgment may be made in an act before a notary public and two witnesses or "in the registering of the birth or baptism of the child." The accused in the instant case had signed the child's birth registration as its father and the state introduced the original act of registry into evidence as an act of acknowledgment. The accused was convicted, but on appeal the conviction was reversed. The Supreme Court did not seem to deny that the accused's signature of the birth registration constituted an acknowledgment under Article 203 of the Civil Code, but based its decision on R.S. 40:159. According to this statute, a part of the *vital statistics* legislation, the "data" in the original registry of birth "pertaining to the father of the child" is only "prima facie evidence" against the "alleged father" in any civil or criminal proceeding if he is or later becomes the husband of the mother, but "not much evidence" against an "alleged father" not then or

6. 238 La. 13, 113 So.2d 292 (1959).

7. *State v. Hubbard*, 228 La. 155, 81 So.2d 844 (1955); *State v. Mack*, 224 La. 886, 71 So.2d 315 (1954).

later the husband of the mother, his heirs, legatees, or successors in interest, "if the paternity is controverted." The majority opinion, written by the late Justice Ponder, interpreted this legislation to mean that the birth registry could not be introduced into evidence in the case if the child's paternity was controverted, and apparently considered the paternity of the child to be in dispute. Justice McCaleb dissented on the ground that the provisions of Article 74 of the Civil Code establishing the obligation of support and permitting proof of filiation at the trial ought to be given effect and, secondly, that under R.S. 40:159 the birth registry could be introduced as evidence of the filiation, though it could not be considered "prima facie" evidence.

On the proper interpretation of R.S. 14:74 the writer has said enough on a previous occasion and the discussion need not be repeated here.⁸ As to the second ground in Justice McCaleb's opinion, a reading of the statute, R.S. 40:159, is enough to convince one that he is correct. But it may be questioned whether R.S. 40:159 was applicable at all. This statute certainly did not purport to amend the laws on acknowledgment, and under Article 203 it would seem that the signature of a birth registry as parent of the child constitutes an acknowledgment. Hence it could be argued, at least, that the state had not sought to introduce a birth registry as such, but rather an act of acknowledgment which happened to be on the birth registry of the child. Besides, it might also be argued that if such a signature constitutes an acknowledgment then the filiation of the child had been established as a matter of law before the prosecution, and indeed before the neglect, and therefore could not be considered "controverted" at the time of the trial. Beyond this, however, there is at least serious doubt that R.S. 40:159 should be construed to apply to registrations of birth signed by the defendant or accused as parent of the child. Under R.S. 40:304, which also is part of the *vital statistics* legislation and which was originally part of the same act from which R.S. 40:159 was taken,⁹ the primary obligation for making reports of births falls on the physician, midwife, or other person in attendance at the birth; only if the birth is unattended is a parent obliged to register it. Thus

8. See the writer's appraisal of *State v. Hubbard*, 228 La. 155, 81 So.2d 844 (1955), in 16 LOUISIANA LAW REVIEW 224-26 (1956).

9. The pertinent part of LA. R.S. 40:159 and 40:304 (1950) were originally Sections 12 and 25 of Act 180 of 1942.

R.S. 40:159 would seem to have been written on the assumption that the birth registry would not have been signed by the father of the child. For these several reasons the writer believes the conclusion reached in *State v. Braxton* could have been avoided; and because it works a most unexpected, and, indeed, probably unwise change in the law of acknowledgment, it would seem that it should have been avoided and should be overruled at the first opportunity.

Custody

Most of the decisions on custody of children involved questions of fact only.¹⁰ The one decision which would have required comment, that in *State ex rel. Paul v. Peniston*,¹¹ appeared in time to be considered in last year's symposium article¹² and need not be discussed again.

Alimony Due to Children

Worthy of recognition is the decision in *Laiche v. Laiche*.¹³ A divorced father, whose alimentary obligation toward his children had been fixed by judgment, remarried and then claimed a reduction in the alimony payable to his children by reason of his changed circumstances. The evidence showed that even with the amounts received from the father the children were in a destitute or nearly destitute condition. The court refused to reduce the payments on the ground that one cannot be relieved of alimentary obligations simply because he has reduced his ability to pay by voluntarily incurring additional obligations. Properly understood the decision is just and wise. The court has decided before that one might not obtain a reduction in alimony if he reduces his income for the purpose of placing himself in inability to pay,¹⁴ but it has also decided that one is not prevented from changing his occupation simply because his income, and therefore his ability to pay, might be reduced.¹⁵ The principle of good faith is enough to justify the first of those decisions, and the second is perfectly understandable as long as the reduced payments are sufficient

10. *Hathorn v. Hathorn*, 237 La. 554, 111 So.2d 770 (1959); *Butler v. Hurel*, 236 La. 1039, 109 So.2d 910 (1959); *State in interest of Peters*, 236 La. 799, 109 So.2d 99 (1959); *Drouin v. Hilderbrand*, 235 La. 810, 105 So.2d 532 (1958).

11. 235 La. 579, 105 So.2d 228 (1958).

12. 19 LOUISIANA LAW REVIEW 304, 305 (1959).

13. 237 La. 298, 111 So.2d 120 (1959).

14. *Zaccaria v. Beoubay*, 213 La. 782, 35 So.2d 659 (1948).

15. *Butterworth v. Butterworth*, 203 La. 465, 14 So.2d 59 (1943).

for the maintenance and support of the dependent. But can one be considered justified in voluntarily decreasing his income (or assuming additional obligations) if his alimony payments are not sufficient to support the dependent? To maintain the affirmative would be to deny the obligation itself. Thus the decision, in the writer's opinion, should be taken to mean that one may not obtain the reduction of his alimentary obligations beyond the point of adequacy for the dependent by voluntarily reducing his ability to pay.

The decision in *White v. Morris*,¹⁶ however, is one with which the writer cannot agree. There it was declared that an alimony award in favor of children made in a judgment of separation was cancelled by a judgment of divorce between these parents which simply made no provision for alimony. The writer expressed his views on this subject in reviewing a similar case decided three years ago and they need not be repeated here.¹⁷

PROPERTY

*Joseph Dainow**

In *Roy v. Board of Commissioners*¹ a claim was made for property on Lake Pontchartrain which had been appropriated for levee purposes. The private ownership interests and limitations in riparian property depend primarily on the legal classification of the adjacent or superjacent body of water (i.e., river, lake, sea, etc.; navigable or non-navigable). While the immediate case resulted in a remand for further facts essential to final determination, the court made the statement: "It is immaterial whether the property be classified as sea shore, which, being common property, belongs to no one in particular and is insusceptible of private ownership, or as the bed of a navigable lake, ownership to which is vested in the state up to the high-water mark, since in either event plaintiff would not be entitled to compensation."²

There have been conflicting opinions concerning the classi-

16. 236 La. 767, 109 So.2d 87 (1959).

17. See the writer's remarks on the decision in *Thornton v. Floyd*, 229 La. 237, 85 So.2d 499 (1956), in 17 LOUISIANA LAW REVIEW 311-13 (1957).

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1. 237 La. 541, 111 So.2d 765 (1959).

2. *Id.* at 550, 111 So.2d at 768 (court's footnotes omitted).