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ered in chronological order. The appellate court's first decision[48] denying enforcement of a board order because the court found the examiner to be biased was reversed and remanded.[49] In its second opinion[50] the appellate court considered the evidence pro and con on the record as a whole, and again refused to enforce the board's order—this time on the ground that there was not substantial evidence to support the board's conclusions. The Supreme Court in its second opinion[51] approvingly recognized the appellate court's review of the whole record and affirmed the decision.

Speaking of the circuit court's review the Supreme Court said, "The court painstakingly reviewed the record and unanimously concluded that the inferences on which the Board's findings were based were so overborne by evidence calling for contrary inferences that the findings of the Board could not, on the consideration of the whole record, be deemed to be supported by 'substantial' evidence." [52] Thus the circuit court's second decision of *National Labor Relations Board v. Pittsburg Steamship Company*[53] stands as an approved example of a review of the record as a whole, in which it was found that opposing evidence detracted so much from the weight of the evidence upon which the board relied that the evidence for the board's conclusion was less than substantial.

Thomas J. Poché

Criminal Liability for Nonsupport of an Illegitimate Child

With the passage of Act 164 of 1950, Article 74 of the Criminal Code, which establishes criminal liability for the nonsupport of a wife or child, was broadened to cover illegitimate children. A provision was inserted to the effect that "Solely for the purpose of determining the obligation to support the court

[1951]) handed down the same day the Court decided the *Universal Camera* case, it was held that this case was controlled by the *Universal Camera* decision. Therefore the case is discussed as being subsequent to the *Universal Camera* case.

48. 167 F. 2d 126 (6th Cir. 1948).
49. 337 U.S. 656 (1949).
50. 180 F. 2d 731 (6th Cir. 1950).
51. 340 U.S. 498 (1951).
52. Id. at 502.
53. 180 F. 2d 731 (6th Cir. 1950).

shall admit proof of paternity or maternity or both."[1] The 1950 amendments have given rise to considerable controversy regarding the manner and extent of their application.

It was contended by the prosecution in *State v. Randall*[2] that the statute, as amended, worked an implied repeal of the provisions of the Civil Code which set out the rules on presumption of paternity. It was the state's contention that evidence could be introduced to show that the child of a married woman was fathered by the defendant and not by the woman's husband, who had failed to disavow the child within the prescribed time.[3] The court held that there was no express repeal of the codal articles in the statute and, implied repeals being frowned upon, the two provisions would be read so as to give effect to both of them. The articles on presumption of paternity were held to be unaffected by the 1950 act, the court offering another explanation of the provision in the statute allowing the introduction of proof of paternity. In the case of a legitimate child, it said, this part of the statute would allow proof of the marriage of the accused to the child's mother and his failure to disavow. In the case of an illegitimate child, proof could be introduced under the statute to show that the child's mother was unmarried and that the accused was its father.[4] The court pointed out that as the statute furnished no definition of a legitimate or illegitimate child those found in the code would apply and the child here involved would be the legitimate offspring of its mother's husband under the provisions on presumption of paternity. Thus, in its first encounter with the judicial process the statute was restricted in its application, the court desiring that a man continue to be the judge of his own honor.[5]

1. In addition to the inclusion of illegitimates and the addition of the above quoted provision on proof, there was also added to the statute a paragraph drafted so as to make a person leaving a wife or child in necessitous circumstances guilty of the crime at the time and place of his departure, if he later fails to support them. This was accomplished by virtue of a presumption of his intent to desert them at the time of his departure, which is effectuated by his later failure to support. Its purpose is, of course, to give venue to the parish in which the deserted family resides, which parish has greater interest in prosecuting the offender.

2. 219 La. 578, 53 So. 2d 689 (1951).

3. Under Art. 184 et seq., La. Civil Code of 1870, the husband of the wife is presumed to be the father of children born during the marriage. He may disavow them under certain conditions set out in that section, but this privilege must be exercised timely under Articles 191, 192, La. Civil Code of 1870.

4. 219 La. 578, 53 So. 2d 689, 691 (1951).

5. The court quoted from Succession of Saloy, 44 La. Ann. 433, 443, 10 So. 872, 876 (1892) on this point: "When, aware of the circumstances under

A further examination of the statute was necessitated by the cases of *State v. Jones*[6] and *State v. Sims*,[7] which raised the important issue of whether or not paternity could be proved in the same proceeding in which the criminal liability was sought to be enforced. The court held that the statute was intended to enforce a legal obligation already existing by virtue of a civil liability on the part of the father to support his illegitimate children and that there was no such obligation on the father unless he had either acknowledged the child or had been declared its parent in a previous court action.[8] It concluded that because neither of these conditions had been met, criminal liability did not attach.[9] Referring to the court's reasoning in these decisions to the effect that there could be no criminal penalty for failure to perform a duty which did not exist under the civil law,[10] Justice Hawthorne, dissenting in the *Sims* case, contended that the statute itself was the source of the duty in that it establishes an obligation to support illegitimate children, which is independent of any civil obligation to do so. The dissenting justice also differed with the majority statement that the provision allowing proof of paternity (or maternity) was evidence of the fact that there could be no criminal liability without civil liability.[11] The reason for this section, he said, was not to require compliance with an existing liability under the code, but to allow proof of paternity (or maternity) for the purpose of the criminal suit

which he might have exercised the right of repudiation, the husband, who is the sovereign arbiter of his own honor, fails to do so, the door is forever closed and no one can afterward assert a right strictly personal to him."

6. 56 So. 2d 724 (La. 1952).

7. 57 So. 2d 177 (La. 1952).

8. Compare this holding with Art. 242, La. Civil Code of 1870, which deals with the right of illegitimates to sue for alimony: "But in order that they may have a right to sue for this alimony, they must: (1) Have been legally acknowledged by both their father and mother, or by either of them from whom they claim alimony; or they must have been declared to be their children by a judgment duly pronounced, in cases in which they may be admitted to prove their paternal or maternal descent; (2) They must prove in a satisfactory manner that they stand absolutely in need of such alimony for their support." This article would seem to provide the civil liability which the court referred to in its opinion.

9. The child involved in the *Sims* case was an adulterous bastard (Art. 182, La. Civil Code of 1870) and could not be lawfully acknowledged (Art. 202, La. Civil Code of 1870).

10. In support of this idea, the majority opinion in *State v. Jones* and Chief Justice Fournet's concurring opinion in *State v. Sims* cited State v. Clark, 208 La. 1047, 1053, 24 So. 2d 72, 74 (1945), wherein the court said, in allowing evidence as to the cause of the accused's leaving his wife: ". . . there can never be an intentional nonsupport of a wife or child if there is no legal duty or obligation on the part of the husband and father to support them."

11. 57 So. 2d 177 (La. 1952).

while limiting the purpose and effect of the proof to that particular action.[12]

It would seem, then, in the light of the three recent cases, two of which reviewed the subject at some length, that the question of whether or not a duty under the Civil Code must be found as a condition precedent to a criminal prosecution under Article 74 of the Criminal Code has been answered in the affirmative. The nature of the civil obligation and the manner of its proof, however, are still to be considered. It should be noted at this point that under the dictum of the *Randall* case[13] the proof submitted in the *Jones*, *Love* and *Sims* cases might well have been permitted had the court seen fit to give the statute a broader interpretation than that which it chose. Whether or not the statute will be further restricted in its application remains to be seen.

The court's test of alternative prerequisites raises a number of interesting questions.

ACKNOWLEDGMENT

Presumably a formal acknowledgment under Civil Code Article 203 would suffice under the above standard as a basis for the criminal action, but what of the informal acknowledgment? At one time our court took the view that, while an acknowledgment by the mother of the child would be sufficient if made informally,[14] the father's acknowledgment, to be effective, had to be in accordance with Article 203 of the code.[15] Later cases have

12. Several interesting ideas are set out in the two cases on the technique to be employed in interpreting the code. The majority in *State v. Jones* took the view that criminal statutes were to be strictly construed, while Justice Hawthorne, in a concurring opinion, contended that under the rule of construction set out in Art. 3, La. Crim. Code of 1942 (now La. R.S. [1950] 14:3) the words of the provisions are to be given the fair import according to their meaning. There was also a difference of opinion on how the criminal code should be construed in *State v. Sims*. The majority of the court held that the rule of Art. 18, La. Crim. Code of 1942, to the effect that conduct was justifiable if authorized by law, was applicable here. Justice Hawthorne argued, this time in a dissenting opinion, that such reasoning would lead to the conclusion that no activity would be criminal unless also a violation of a civil obligation.

13. "But by the phrase 'admit proof of paternity' the Legislature might well have intended only the introduction of evidence in the case . . . an illegitimate child to establish that the child's mother was unmarried and that the accused was responsible for its birth." State v. Randall, 219 La. 578, 53 So. 2d 689, 691 (1951).

14. Jobert v. Pitot, 4 La. Ann. 305 (1849); Succession of Hebert, 33 La. Ann. 1099 (1881).

15. Dupre v. Caruthers, 6 La. Ann. 156 (1851); Jobert v. Pitot, 4 La. Ann. 305 (1849).

established the principle that either parent may acknowledge informally.[16] Whether or not such an informal acknowledgment will suffice under the court's test as a basis for a criminal action and, if so, whether or not such an acknowledgment may be proved in the same suit in which the criminal liability is sought to be fixed, are open questions. In any event, there are certain kinds of illegitimates who cannot be acknowledged under the code;[17] thus it may readily be seen that if acknowledgment were the only condition upon which a criminal action could be predicated there would be instances in which prosecution under the statute would be impossible. The court, however, has provided us with a second condition, the existence of which will allow the criminal action: that instance in which the paternity of the child has been established in an earlier suit.

PRIOR JUDICIAL DETERMINATION

It is noteworthy that the alternative prerequisites in the court's test seem to track Article 242 of the Civil Code, which sets out conditions precedent in an illegitimate's suit for alimony. If this were consciously chosen as a guiding principle, will the prior determination of paternity be limited, as in the article, to cases brought by the children to prove their paternal or maternal descent? It is obvious that paternity or maternity could be judicially established in actions of other types.[18] In view of the seeming tendency of the court to restrict the application of the statute, it might well be subjected to this further limitation.

As our court has indicated,[19] there is substantial authority in other states favoring the requirement of a civil duty of support before entry into a criminal court,[20] and equally strong

16. Hart v. Hoss and Elder, 26 La. Ann. 90 (1874); Bourriaque v. Charles, 107 La. 217, 31 So. 757 (1902); Taylor v. Allen, 151 La. 82, 91 So. 635 (1922); Murdock v. Potter, 155 La. 145, 99 So. 18 (1924); Succession of Corsey, 171 La. 663, 131 So. 841 (1931); Succession of Tyson, 186 La. 516, 172 So. 772 (1937); State v. DeLavallade, 215 La. 123, 39 So. 2d 845 (1949); Damman v. Viada, 216 La. 1087, 45 So. 2d 632 (1950), Comment, 6 Tulane L. Rev. 120 (1931), Oppenheim, Acknowledgment and Legitimation in Louisiana—Louisiana Act 50 of 1944, 19 Tulane L. Rev. 325 (1945).

17. See Art. 204, La. Civil Code of 1870.

18. Such a determination could be made, for example, in a succession proceeding. The code itself provides another illustration in Article 211, under which a rape victim may have it judicially established that her attacker is the father of her child under certain circumstances.

19. State v. Sims, 57 So. 2d 177 (La. 1952).

20. Coan v. State, 224 Ala. 584, 141 So. 263 (1932); Morgan v. State, 28 Ala. App. 241, 182 So. 466 (1938), cert. denied 236 Ala. 381, 182 So. 468 (1938); State v. Byron, 79 N.H. 39, 104 Atl. 401 (1918); Porter v. Wainwright, 104 N.J.L. 51, 139 Atl. 394 (1927). The rule in West Virginia, shown in State v.

arguments have been made for the other view.[21] There are also variations on the two approaches. The rule in West Virginia is, for example, that in the absence of an admission of paternity by the accused or a previous adjudication declaring him to be the father of the child, a criminal action may be brought against him for nonsupport of his illegitimate child and the paternity of the child proved in that suit *if* the child is not yet three years of age.[22] Another state supreme court requires as a prerequisite to the criminal action either a judgment under the bastardy act of the state or an acknowledgment of the child by the accused. It has been held, however, that this acknowledgment needs no particular form but suffices so long as the accused "should make his purpose known to the public." [23]

Other questions will arise under the new statute. The court will probably be asked, in the not too distant future, whether or not the provision on illegitimates will require the support of a child born before the enactment of the section (the failure to support having occurred after the act). A tendency is seen in the jurisprudence of other states to apply statutes providing for the support of illegitimates to all children in that category, regardless of whether they were born before the passage of the statute or after it, so long as the act of omission (failure to support) took place while the statute was in effect. This has been

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Bennett, 90 W. Va. 477, 111 S.E. 146 (1922); State v. Reed, 107 W. Va. 563, 149 S.E. 669 (1929); State v. Hoult, 113 W. Va. 587, 169 S.E. 241 (1933); Holmes v. Clegg, 131 W. Va. 449, 48 S.E. 2d 438 (1948), is only partial support for the court's view as will be explained later. While the Missouri rule would seem to favor the court in the cases of State ex rel. Canfield v. Porterfield, 222 Mo. App. 553, 292 S.W. 85 (1927) and State v. Barcikowsky, 143 S.W. 2d 341 (Mo. App. 1940), these were seriously shaken by State v. Williams, 224 S.W. 2d 844 (Mo. App. 1949).

21. People v. Stanley, 33 Calif. App. 624, 166 Pac. 596 (1917); People v. Hamil, 73 Calif. App. 649, 238 Pac. 1075 (1925); Wamsley v. People, 64 Colo. 521, 173 Pac. 425 (1918); State v. Richardson, 31 Del. 14, 110 Atl. 660 (1920); Commonwealth v. Gross, 324 Mass. 123, 85 N.E. 2d 249 (1949); State v. Spillman, 210 N.C. 271, 186 S.E. 322 (1936).

22. State v. Bennett, 90 W. Va. 477, 111 S.E. 146 (1922); State v. Reed, 107 W. Va. 563, 149 S.E. 669 (1929); State v. Hoult, 113 W. Va. 587, 169 S.E. 241 (1933); Holmes v. Clegg, 131 W. Va. 449, 48 S.E. 2d 438 (1948). The case of *Holmes v. Clegg* sets out the test this way: A prosecution for nonsupport of an illegitimate child cannot be maintained unless: (1) the child is under the age of three years; or (2) the paternity is admitted by the defendant; or (3) the defendant admitted the paternity of the child before it reached the age of three years; or (4) the paternity has been judicially determined in a bastardy prosecution commenced within three years after the birth of the child.

23. Law v. State, 238 Ala. 428, 191 So. 801 (1939).

held where the statute was criminal,[24] civil,[25] and criminal in form but civil in substance and effect.[26] This may well be the application given to the amended Article 74.

Whether or not the court will require demand on the part of an interested party for the support of the child before allowing a criminal action is also an open question. The court had held, before the statute was amended to cover illegitimates, that no demand was necessary by the mother for the support of a minor child in order that a criminal action be commenced against the father.[27] The rationale in those cases was to the effect that the father was aware of his duty toward the child and of his failure to fulfill it. It is likely that this reasoning may be held inapplicable in a suit involving an illegitimate, wherein the accused might, with some degree of credulity, deny knowledge of the child's existence.

The position taken by the court—requiring acknowledgment or a previous adjudication in order to sue for the support of an illegitimate—has serious social consequences. The purpose of the statute was obviously to alleviate, to some degree at any rate, the burden upon the state and its various agencies of caring for those illegitimate children who are fathered by individuals uninhibited by conscience or sense of duty. That the decisions discussed above will thwart this aim considerably cannot be denied.[28] Contrary rulings in those cases would, however, have raised another practical problem, equally difficult of solution. A criminal action in which a person could be accused of failing to support an illegitimate, found to be its father, and convicted, would be an extremely useful blackmail tool in the hands of an unscrupulous woman.[29]

24. Wamsley v. People, 64 Colo. 521, 173 Pac. 425 (1918); Bradfield v. State, 28 Del. 262, 92 Atl. 988 (1914); Richardson v. State, 30 Del. 534, 109 Atl. 124 (1920); Commonwealth v. Callaghan, 223 Mass. 150, 111 N.E. 773 (1916).

25. State ex rel. Woolems v. Davis, 178 Ark. 692, 111 S.W. 2d 479 (1928); McLain v. Meadows, 44 Calif. App. 402, 186 Pac. 411 (1919).

26. Cummings v. Church, 50 R.I. 71, 145 Atl. 102 (1929).

27. State v. Clark, 144 La. 328, 80 So. 578 (1919); State v. Clark, 146 La. 421, 83 So. 696 (1920).

28. This was pointed out by Justice Hawthorne in his dissent in State v. Sims, 57 So. 2d 177 (La. 1952).

29. In the case of State v. Williams, 224 S.W. 2d 844, 849 (Mo. App. 1949), the court answered this argument, saying, "If it be said that the 1947 statute, supra, opens the way for designing persons to bring the pressure of public prosecution to compel the alleged father to support an illegitimate child where the question of his parentage of the child is clouded with doubt, the only answer is that the enactment of such a statute was and is a matter within the province of the Legislature. . . . It goes without saying, however, that in view of the forward step taken by the Legislature in making an

It may well be that the legislature, in passing the statute in question, was willing to permit this latter problem, considering it the lesser of two evils. If so, in light of the court's clear and firm stand on the matter, our lawmaking body will have to legislate still further in order to accomplish the desired result. In this case it would be necessary to amend Article 74 of the Criminal Code so that it will clearly encompass those situations in which the court has thus far held the statute inapplicable. The following is a suggested remedy.

Subsection (2) of Article 74 would have to be amended so that the provision would read in part as follows:

> "Criminal neglect of family is the desertion or intentional nonsupport: . . . (2) By either parent of his minor child, whether legitimate or illegitimate, who is in destitute or necessitous circumstances, *there being a duty under this act upon the parent of any illegitimate minor child for the support and maintenance of such illegitimate child; the question of paternity or maternity to be determined in proceedings hereunder.*" [30]

It might be well to insert an express provision to the effect that the presumption of paternity established under the Civil Code be retained in order to insure that the new legislation will not overthrow the *Randall* case, the result of which seems legally and socially correct.

CONCLUSION

In light of the evident attitude of our highest tribunal on the subject of criminal liability for the nonsupport of illegitimates it is not illogical to assume that that body will, when

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illegitimate child an object of State protection, trial courts and appellate courts should exercise care in sustaining convictions under present day statutes and should require substantial proof of all the necessary elements before permitting any such conviction to stand."

30. The italicized portions of the above suggested statute have been added; at present, the statute reads as follows, the parts omitted above being shown in brackets: "Criminal neglect of family is the desertion or intentional non-support: . . . (2) By either parent of his minor child, whether legitimate or illegitimate, who is in destitute or necessitous circumstances. [Solely for the purpose of determining the obligation to support, the court shall admit proof of paternity or maternity or both.]

The two clauses added were taken partly from two existing statutes: Del. Rev. Code 1935, § 3527, provides: "It is made the duty of the parent of any illegitimate child or children, under the age of sixteen years, to provide for the support and maintenance of such illegitimate child or children." In Mass. Stat. Ann. 1933, c. 273, § 15, there is a provision to the effect that "the question of paternity shall be determined in proceedings herewith."

dealing with legislation on this subject, continue to restrict its application by means of strict construction and a reading in of older provisions. As the statute which has been so restricted seems to be drafted with a view toward broader application than it is presently being given, it is not unlikely that it will undergo a revision in the near future, such change providing a tool which should prove useful in the solution of a vexing social and economic problem in our state.

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Creditors' Remedies Against Holders of Watered Stock

Watered stock has been traditionally defined as "stock which is issued by a corporation as fully paid-up stock, when in fact the whole amount of the par value thereof has not been paid in." [1] The term includes "bonus shares," "discount shares," shares issued for over-valued services or property, and other forms of shares issued for a fictitious consideration. It should be kept in mind that in the watered stock situation there is no outstanding promise to pay as in the case of an unpaid subscription.[2] Hence, any action against the stockholder must be ex delicto or based on statutory liability.

Since the passage of the corporation act in 1928[3] there have been no reported Louisiana cases on the liability of holders of watered stock to creditors. Necessarily, our subject will be limited to a discussion of the different theories of liability in other jurisdictions, the basis for liability in Louisiana before 1928, and the writer's views on which theory should be used by our courts today.

I. Theories of Liability in Other Jurisdictions

A. The Trust Fund Theory

The leading case of *Scovill v. Thayer*[4] involved an agreement between a shareholder and a corporation whereby the latter issued fully paid stock at a discount with a provision that

1. Black, Law Dictionary (3 ed. 1933).
2. Gray Construction Co. v. Fantle, 62 S.D. 345, 253 N.W. 464 (1934); 13 Am. Jur., Corporations § 563 (1934). See La. R.S. (1950) 12:15.
3. La. Act 250 of 1928, now La. R.S. (1950) 12:1-71.
4. 105 U.S. 143 (1881).