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Civil Code and Related Subject Matter

Robert A. Pascal*

Editorial Note: Many provisions of the Louisiana Civil Code and of the Louisiana Revised Statutes were repealed or amended in 1960 by legislation sponsored by the Louisiana State Law Institute with the purpose of rendering the Civil Code and the Revised Statutes consistent with the new Louisiana Code of Civil Procedure. The amendments to Articles 2103 and 2315 of the Civil Code are discussed by Professor Wex S. Malone at page 78 and following in this issue of the Review. The intent and effect of the remainder of this legislation affecting the Civil Code and related matter will be discussed in an article to be published in a later issue of the Review by Mr. Leon Sarpy, of the New Orleans Bar and Professor of Civil Procedure at Loyola University in New Orleans, and the Honorable Adrian G. Duplantier, Member of the New Orleans Bar and State Senator from the Parish of Orleans, who served as Reporter and as Research Assistant, respectively, for the Louisiana State Law Institute on many of these matters to which the legislation in question relates. The following comments by Professor Pascal are restricted, therefore, to legislation affecting the Civil Code and related matters other than that sponsored by the Louisiana State Law Institute in connection with the Code of Civil Procedure project.

CRIMINAL LEGISLATION ON MARRIAGE AND PROCREATION

The Crime of "Entering into Common Law Marriage"

Act 73 of 1960 adds a new article to the Criminal Code (R.S. 14:79.1) which makes "entering into a common law marriage" a crime. To be guilty of the crime of entering into a common law marriage a man and woman must agree "to then and there become husband and wife, without a ceremonial marriage solemnized . . . in accordance with the laws of this state . . . followed by cohabitation." Inasmuch as marriage according to the common law, or through the informal exchange of consent without ceremony, has never been recognized in Louisiana, the

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instances of attempts to contract true marriage without formal ceremony must be rare indeed. Nor must it be assumed that the new legislation makes concubinage a crime. If that was the intention of the draftsmen of the new article, it has not been realized; for the statute makes criminal, not an agreement to live together *as if* man and wife, but an "agreement . . . to then and there *become husband and wife, without a ceremonial marriage.*" To be guilty of the crime, therefore, the parties must specifically intend to contract true marriage without following the forms and solemnities prescribed by law. The many couples living in concubinage in Louisiana most certainly do not consider their unions true marriages. Indeed, they themselves, and common police and newspaper practice as well, indicate the difference between their unions and true marriages by referring to them, though inappropriately, as "common law marriages." Thus it would seem there should seldom be a proper occasion for prosecution for the crime of "common law marriage" as defined by the new legislation.

The Crime of "Conceiving and Giving Birth to Two or More Illegitimate Children"

Act 75 of 1960 adds a new article to the Criminal Code (R.S. 14:79.2) declaring "conceiving and giving birth to two or more illegitimate children" to be a crime of which the father and mother "shall be equally guilty" and which is punishable by a fine of not more than one thousand dollars, or imprisonment for not more than one year, or both. This new legislation, like that on the crime of entering into a common law marriage, is part of a legislative program ostensibly to reduce illegitimacy in Louisiana. Although the writer, like almost everyone, is against the conception of a child outside of marriage precisely because it requires a sinful act on the part of its progenitors, he cannot find words strong enough to condemn legislation such as this. It is not reasonable to expect that its enactment will have a noticeable effect in discouraging extra-marital intercourse. Thus the number of illegitimate conceptions is not likely to be reduced. On the other hand, it is reasonable to foresee that, if the article is enforced, once conception has taken place the parents may take steps to avoid prosecution. The best that can be expected is that secret deliveries, often unattended or attended by unskilled help under less than medically appropriate conditions, will be attempted, much to the prejudice of the

mother and her child. More seriously, there can be little doubt that the number of abortions will increase, not only to the prejudice of the health of the mother, but to the denial of life to the child itself. Under our law abortion is a crime, as it should be. Morally it is perhaps even more heinous than murder, for it deprives the unborn of all opportunity to live and to come to know his place in God's creation. This new legislation, therefore, because it will lead to the killing of the unborn, if it does not suggest it, is inexcusable.

Very fortunately the new article is much more limited in scope, if the ordinary canons for the interpretation of criminal legislation are to be followed, than it was generally thought to be at the time of its passage. Although the legislation probably was believed to render criminal each and every conception of an illegitimate child after the first, as written it makes it a crime only to conceive and to give birth to twins, triplets, or other multiples. It does not make criminal the conception and birth of one child at a time. Admittedly this strips the new article of any real force, and indeed may render the statute invalid as totally unreasonable, for as yet parents have not discovered the means of controlling the number of children to be born from any one act of conception; but the language of the article as enacted can scarcely be interpreted in any other way. Thus "Conceiving and giving birth to two or more illegitimate children is hereby declared to be a crime. . . . Each such birth [i.e., of two or more illegitimate children] shall be a separate violation. . . ." Unless the principle *nullum crimen sine lege* is to be ignored, it would seem that to give birth to one illegitimate child at a time, no matter how often, is not to be considered a crime.

CIVIL LEGISLATION

Birth Certificates

Act 411 of 1960 amended R.S. 40:209(c), which had been added to the Revised Statutes by Act 579 of 1954. As originally enacted in 1954 the legislation provided for the issuance of letters by the registrars of birth in lieu of new birth registry acts in instances of the adoption of children "of foreign birth." The amendment changes this phrase to "born in a foreign country." Thus whereas the legislation of 1954 applied to all adopted children born outside Louisiana, whether in other states

of the Union or in foreign countries, the amended legislation applies only to those born in foreign countries. Reading the entire section R.S. 40:209 as amended, it appears to the writer that (1) new birth records are to be made for adopted children born in Louisiana (subsections A and B) and that (2) a letter in lieu of birth certificate is to issue for adopted children born in a foreign country, but that (3) neither is a new record to be made nor is any letter in lieu thereof to issue for an adopted child born elsewhere than in Louisiana or a foreign country.

R.S. 40:332 and 40:335 as amended by Act 410 of 1960 requires that the City of New Orleans Board of Health be made a party to suits for the issuance of delayed birth records filed in that parish, that such Board be served with a copy of each such petition, that a copy of each such petition filed outside Orleans Parish be served on the State Board of Health, and that certified copies of such birth records shall be furnished by the City of New Orleans Board of Health in New Orleans and by the State Board of Health if the record is outside Orleans Parish. Under the former law the clerks of court of the various parishes were obliged to furnish such copies.

Adoption

Under R.S. 9:422.1, added by Act 501 of 1958, if the spouse of one petitioning for the adoption of a child was its legitimate parent, then the consent of the other legitimate parent was not necessary (a) if the spouse of the petitioner had been awarded custody of the child and (b) if the other parent had *refused* or *failed* to comply for three years with an order for support of the child. Act 268 of 1960 amends this section in two respects, (1) by reducing the period of refusal or failure to comply with a support order from three years to one year, and (2) by extending the rule on the non-necessity of parental consent to adoption to include the case of an adoption by a grandparent given custody of the child. It is to be noted that the amendment did not correct, but re-enacted, a most objectionable feature of the original provision, that of permitting adoption without consent of the parent not given custody if he or she failed to comply with an order to support the child without reference to the reason for his failure to do so.¹

1. See the writer's comments on R.S. 9:422.1 as enacted by La. Acts 1958, No. 501, in 19 LOUISIANA LAW REVIEW 59-60 (1958).

A number of sections of the Revised Statutes dealing with the adoption of persons under seventeen were amended. Act 250 of 1960 amended R.S. 9:432 and 440; Act 268 of 1960 amended R.S. 9:429, 431, 432, and 440. Thus two amendments of R.S. 9:432 and 440 were adopted. Presumably the act signed last, No. 268, will prevail over that signed first, 250, where their provisions are inconsistent. The amendments to R.S. 9:429 and 432 by Act 268 of 1960 do not deny to the natural parent the right to withdraw his or her consent to the adoption after the interlocutory decree has been made but do provide that such withdrawal of consent shall not be a bar to the final decree of adoption. These amendments do not, however, deprive the court of the power to deny the final decree of adoption if this would seem to be in the best interest of the child. R.S. 9:432 as enacted originally and as amended both by Act 250 and by Act 268 of 1960 allows the court to deny the final decree in the best interest of the child; and although Act 268 of 1960 amended R.S. 9:431 to provide that the "mere" withdrawal of parental consent shall not be a reason for revoking the interlocutory decree, it would seem that if the judge believes that it would be in the best interest of the child to revoke that decree and return the child to its parents he may do so. Consistent with these new provisions Act 268 of 1960 amended R.S. 9:432 to provide that the petition for final adoption shall not be served on anyone except the Department of Public Welfare. Act 250 of 1960 amended R.S. 9:432 only to provide that the petition for final decree should not be served on the parents of the child. Inasmuch as the amendment worked by Act 268 is not only that signed last but also the broader of the two amendments, it would seem to be the fuller expression of the law.

Finally, R.S. 9:440 was amended by both Act 250 and Act 268 of 1960 to provide peremption periods for attacking final decrees of adoption rendered before July 15, 1960. The first establishes a period of six months from the effective date of the act (July 27, 1960) for all bases of attack; the second establishes a period of six months from July 15, 1960, for attacks based on lack of jurisdiction *ratione personae*, procedural defect, or invalidity of the statute under which the decree was made. Inasmuch as the basis of peremption under Act 250 of 1960 is narrower than that stated in Act 268, and inasmuch as its period is shorter than that given in Act 268, without it being clear that

Act 250 is superseded completely by Act 268, it is conceivable that a difficult problem of interpretation might arise.

Servitudes

Act 448 of 1960 amended R.S. 9:5622, which provides a two-year prescriptive period against actions to enjoin or obtain damages for violation of building restrictions, to provide a mode for terminating building restrictions established "in pursuance of a general subdivision plan devised by a common ancestor in title." Now such restrictions may be terminated by the agreement of "the owners of a majority of the square footage of land in said subdivision" to take effect on a date specified, but not less than fifteen years from the establishment of the restrictions, and recorded in the conveyance *and* mortgage records. It is expressly provided that such agreements may not terminate or modify subdivision plans for utilities services. It may be noted that to introduce this legislation as an amendment to a provision on prescription was quite inappropriate. It would have been better to insert it under the title on servitudes.

Successions

Act 497 of 1960 amends R.S. 9:1581-89 on public administrators for successions and also adds a new section R.S. 9:1590. In general the new legislation is similar to the old but (1) it applies to all parishes with populations of more than one hundred thousand inhabitants, other than Caddo, Ouachita, and Calcasieu, rather than to Orleans Parish only; (2) authorizes the governor to fix the administrator's bond at a figure between ten and fifty thousand dollars at his discretion; (3) requires advertising of the administrator's application for appointment to administer particular successions; and (4) by omission repeals R.S. 9:1587 relative to deposits in banks belonging to persons who have not been heard from for ten years or more.

Act 464 of 1960 replaces R.S. 6:789.1, added by Act 328 of 1958, with R.S. 6:789.1-789.3, which prescribe in greater detail the procedure according to which building and loan associations may pay to executors and administrators the value of shares or other credits belonging to the decedent.

Act 362 of 1960 adds R.S. 9:2431-2438 detailing the manner in which (1) the federal estate tax and (2) the Louisiana estate transfer tax shall be apportioned among the persons interested in

the estate in the absence of apportionment by the testator himself.

Immovables Donated To Religious Entities

By Act 462 of 1952, R.S. 9:2321 and 2322 were added to our legislation to permit immovables donated to religious entities for religious purposes to be disposed of in full ownership or in any way encumbered after possession and use for the purpose intended by the donor for sixty years. Act 226 of 1960 amends R.S. 9:2321 and 2322 to reduce the period to thirty years and to clarify their language. In effect the act limits to thirty years the period for which conditions might be imposed in donations of immovables to religious entities. Because the act discriminates between religious and non-religious donees it may be open to the objection that it violates the equal protection clause of the fourteenth amendment.

Private Express Trusts

R.S. 9:1873 has been amended by Act 96 of 1960 to permit employers to be trustees of trusts established by them for the benefit of their employees.

R.S. 9:2063, which detailed the law on "joint investment funds," has been amended by Act 378 of 1960. The amended section uses the term "common trust fund" in place of "joint investment fund," but is substantively similar to the original section except in the following particulars:

(1) It is expressly provided that a common trust fund may be established by one of several co-trustees and investments made therein with the consent of the other co-trustees;

(2) Investments of a common trust fund are no longer limited to the legal list, though a trustee restricted to legal list investments may invest only in common trust funds invested according to the legal list;

(3) The value of cash or marketable investments required before additions to a common fund are permissible has been reduced from sixty to forty percent of that of the whole fund.

Majority Rule of "Local Beneficiaries" for Certain "Trusts for Educational, Charitable or Religious Purposes"

Under Act 346 of 1960, adding Sections 9:2281 and 2282 to the Revised Statutes, whenever the "local beneficiaries" of any

"express or implied trust for educational, charitable or religious purposes," or their predecessors, have contributed a "substantial part" of the "trust" property, and two-thirds of the adult local beneficiaries residing in Louisiana "determine that there exists a deep-seated and irreconcilable hostility or tension between them and any or all of the trustees or others in authority exercising control over the administration of such Trust," the local beneficiaries may petition for the discharge of the then trustees and the appointment of others. The act expressly excludes "Roman Catholic educational, charitable, and religious trusts" from its operation, and hence, if otherwise valid, would seem to violate the fourteenth amendment by denying equal protection of the laws to certain groups on the basis of religion. Beyond this, however, the effective scope and validity of the legislation would seem extremely questionable. The act purports to regulate "express or implied trusts for educational, charitable or religious purposes." Actually this is the first juridical recognition of "implied" trusts of that character, and it is only an oblique one. Furthermore, the language of the act is too specifically that of trusts to permit its application to educational, charitable, and religious institutions established on a non-trust basis. Thus it can hardly be said that the act can apply to any but express trusts for the purposes mentioned.

Viewed as legislation permitting the recipients of the benefit of a trust for educational, charitable, or religious purposes to demand a change in the trustees the act is strange indeed, for traditionally an educational, charitable, or religious trust is established for a *purpose* specified by the will of the settlor and administered by trustees either appointed by the settlors, or pursuant to a procedure specified by the settlors, or by the Governor. Never before have persons availing themselves of the benefit of the trust, whether they have contributed materially to it or not, been permitted to demand the discharge of the trustees and the appointment of others. Indeed, it seems that to apply the act to trusts for educational, charitable, or religious purposes settled before the effective date of the 1960 legislation might be considered an interference with the essentially contractual obligations accepted by the trustees on the establishment of the trust.

Conventional Obligations

Act 84 of 1960 amends R.S. 9:2771, enacted by Act 183 of 1958, to limit further the liability of contractors on works con-

structed according to plans furnished by others. The amendment specifically excludes liability for destruction, deterioration, or defects pending construction as well as after its completion and also provides that the provisions of the section shall not be waivable by the contractor.

Act 460 of 1960 amends R.S. 9:2961 declaring bulk sales void as against creditors of the transferor unless made in conformity with the Bulk Sales Law. The amendment limits application of the act to bulk sales affecting credits against the transferor existing as of the time of the transfer. Under the amendment, therefore, one may not avail himself of the provisions of the Bulk Sales Law in order to protect a credit arising after the irregular bulk sale.

Act 490 of 1960 adds R.S. 9:3601 to require persons "engaged in the newspaper business" to pay interest to its distributors or dealers on deposits as security for the price of newspapers furnished them.

The Uniform Fiduciaries Law was enacted by Act 226 of 1924 and is presently designated R.S. 9:3801-3814. Act 444 of 1960 repeals the one section of that law dealing with the transfer of stocks, bonds, and other securities (R.S. 9:3803) and replaces it with the Uniform Law for simplification of fiduciary security transfers. The new act has been designated R.S. 9:3831-3840. The new Uniform Act is one recently prepared by the National Commissioners on Uniform State Laws and between January and November of 1959 it had been adopted by eleven states.² Presumably more have adopted it since then. Under the repealed R.S. 9:3803 corporations and transfer agents were liable for a wrongful transfer of securities by a fiduciary only if they had actual knowledge of the irregularity or knowledge of such facts as would put them in bad faith. Under this legislation corporations and transfer agents continued to demand proof of authority to sell and hence security transfers by fiduciaries continued to be difficult. The principal purpose of the new act is to so relieve corporations and their agents of responsibility that they should no longer feel the need to demand proof of authority to sell. Under its provisions corporations and transfer agents are liable only where they have received notice in writing of the lack of authority or of an adverse claim of interest. The same exonera-

2. 9C ULA 43 (1959 Pocket Part).

tion of liability is made to apply to third persons involved in the transfer of securities by fiduciaries.³

Expropriation

Articles 2634 and 2636 of the Civil Code have been amended by Act 92 of 1960 to strengthen the statement in the first sentence of Article 2634, forbidding suspensive appeals in expropriation cases. The new amendment clearly precludes suspensive appeals from any facet of an expropriation proceeding.

Security Devices

Under R.S. 32:706 and 710, portions of the Vehicle Certificate of Title Law, as they stood before amendment in 1960, chattel mortgages were effective against third persons only from the date of notation thereof by the commissioner of vehicle registration on the document of title, or, in the case of floor plan mortgages, in the register of such mortgages. Amendments to the above mentioned sections by Act 265 of 1960 render the mortgages effective against third persons (1) from the date of execution if notation is made by the commissioner in the proper place within fifteen days from that date or (2) from the date of such notation if the notation is made more than fifteen days from the date of execution. "Period of grace" registration provisions like that provided for in the amendment may make it unnecessary for a mortgagee to race to the registry office for his protection, but they also of necessity introduce a delay equivalent to the period of grace into all transactions as to the property in question. As a result of this legislation it would not be unreasonable for a lender or purchaser to insist on paying only after the period of grace (here 15 days) had run so that he might be certain that an as yet unrecorded mortgage to another might not prime that given to him or encumber his title. This new legislation therefore should at least be amended to reduce the period of grace to a shorter term.

The law on privileges for labor and materials furnished in connection with "private works" was amended in several respects. Act 60 of 1960 amended R.S. 9:4801 apparently only for clarification of language and Act 111 of 1960 amended R.S.

3. See the comment on the Uniform Act for the Simplification of Fiduciary Security Transfers in 9C ULA 43-47 (1959 Pocket Part).

9:4803, 4806, and 4814 to provide special conditions for the enforcement of claims by a creditor of a sub-contractor against the contractor or his surety. Act 456 of 1960 adds a subsection (b) to R.S. 9:4816 under which an affidavit by the owner and contractor as to the date of the completion and acceptance of work done shall be considered conclusive evidence of the same when filed in the mortgage records. Act 366 of 1960 made an addition to R.S. 9:4817 under which it is expressly stipulated that the manner and method of creating and preserving the privilege for labor and materials furnished for private works shall not be altered by the furnishing of promissory notes, a provision for time payments, "or any other similar stipulation."

R.S. 9:4841, originally enacted as Act 246 of 1926, authorizes contractors to bond claims made against them for labor or materials furnished in connection with a private work. Now Act 359 of 1960 has added R.S. 9:4842 under which owners of immovables are specifically recognized as having a similar right to bond all claims "filed or recorded against . . . work" on their property. Neither the older R.S. 9:4841 nor the similarly worded new R.S. 9:4842 provide in any way for the cancellation of privileges recorded against the property or the recordation of the bond and hence it may be asked whether these sections give either the contractor or the property owner a right which he would not have had without their enactment. One may, after all, always enter into a surety contract.

Act 217 of 1960, which has been designated R.S. 9:4961, limits to five hundred dollars the amount which may be recovered in reimbursement of an attorney's fee to enforce a privilege for work or materials furnished when the attorney's services have been limited to the recordation of the privilege.

Prescription

Several statutes pertaining to prescription in civil matters were passed. Acts 367 and 407 of 1960 contain provisions which are overlapping and somewhat inconsistent with each other. Act 407 amends Article 3543 of the Civil Code, which specifies the general period of liberative prescription applicable to claims based on informalities of legal procedure in sales pursuant to order of court, to include specifically private sales as well as sales by public auction. The period of prescription according to

Articles 3543 is two years, except where the interests of minors or interdicts are involved, in which cases it is stated to be five years. Act 367, enacted as an addition to the Revised Statutes with the designation R.S. 9:1454.1, specifies a two-year prescriptive period against claims based on informalities of legal procedure in court-ordered *private sales of succession property only* and does not specify a different period where the interests of minors and interdicts are involved. On the basis that R.S. 9:1454.1 as amended applies only to sales of succession property it is arguable that it establishes a special prescriptive period for such sales only, and that the more general rule of Article 3543 as amended by Act 407 is applicable to sales other than of succession property. On the other hand it may be argued that Act 407, amending Article 3543, was intended to apply to all sales pursuant to order of court and, being the later expression of the law, should be deemed to supersede the new section R.S. 9:1454.1 of limited scope.

Act 584 introduced new sections R.S. 9:5682-5684 to provide a new prescription against claims by unrecognized heirs or legatees against third persons in possession of "property" acquired from or through one recognized as an heir or legatee of the deceased. Under the legislation the action may not be brought if the third person (i.e., one not himself an heir or legatee) "or his ancestors in title" have been in continuous, uninterrupted, peaceable, public, and unequivocal possession for ten years after the registry of the judgment of possession in the conveyance records of the parish where the property is situated. The new prescription is not available to persons recognized as heirs or legatees in the succession proceedings. The act evidently was intended to relate to immovable property only, but does not say so specifically. Inasmuch as a period of possession is required, the prescription is acquisitive rather than liberative in nature. It may be noted that nothing in the legislation indicates that the possession of the third person must be in good faith, but it would seem that unless the legislation is interpreted to require good faith acquisition by third party possessors claiming prescription the door to fraud will be open, especially if the possession of the heir or legatee ancestor in title can be counted; and on this latter score the language of the legislation is quite ambiguous.

R.S. 9:5806, on the imprescriptibility of mineral rights reserved by private persons in transfers to governmental agencies,

has been amended by Act 528 of 1960 to include reservations in transfers to "any political subdivision authorized to incur debt and issue bonds under the provisions of the Constitution and statutes of the state of Louisiana" among those covered by this section.