Louisiana Law Review

Volume 21 | Number 2
The Work of the Louisiana Supreme Court for the 1959-1960 Term
February 1961

Civil Code and Related Subjects: Persons

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PERSONS*

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Proof of Nullity of Second Marriage

In *Lands v. Equitable Life Assurance Co.*[1] the appellant claimed the proceeds of a policy payable to the "widow" of the deceased. To establish her claim she gave proof of her marriage to the deceased in 1956. Brothers of the deceased, entitled to the proceeds in the absence of a "widow," showed the appellant had been married to another in 1940. At the trial the appellant herself admitted she had abandoned her first husband in 1944 or 1945, had never sought a divorce from him, did not know whether he had ever sought a divorce from her, and did not know, either at the time of her second marriage or at the time of the trial, whether her first husband was alive. On this record, apparently, the trial court denied the appellant's claim and gave judgment to the deceased's brothers. On appeal the Supreme Court, relying on the "majority view" as expressed in 35 American Jurisprudence, Marriage §§ 195 and 197, declared (1) that ordinarily a second marriage must be presumed valid until the person attacking it proves its invalidity, but (2) that "this presumption should [not] be available to one who has deserted or abandoned a spouse of a prior marriage . . . and subsequently . . . remarries in bad faith and without reason to believe that the first marriage has been dissolved."[2] The court then elaborated further that "where innocence or good faith is once established the burden of proof to show that the first marriage is still in existence is on the party attacking the second marriage. However . . . if bad faith is shown, the burden of proof to show that the first marriage was dissolved . . . prior to the second marriage is on the party whose marriage is under attack."[3]

*Only selected decisions are considered in this portion of the symposium.
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1. 239 La. 782, 120 So.2d 74 (1960).
2. *Id.* at 790; 120 So.2d at 77.
3. *Ibid.*

Effect of Divorce on Donation in Contemplation of Marriage

In *Roy v. Florane*[4] the wife obtained a divorce on the basis of separation in fact for two years. The husband reconvened for the return of a cash donation which he had made to her before marriage and in contemplation thereof. In disposing of his claim the court relied principally on Articles 156 and 159 of the Civil Code, under which donations by one spouse to the other "by the marriage contract or since" must be returned by the party "against whom" a separation or divorce is pronounced. Reasoning that the impact of Articles 156 and 159 was that the party at fault in a separation or divorce should lose the donation in his or her favor, and observing that a divorce on the ground of living separate and apart does not raise the issue of fault, the court concluded that the divorce did not work a revocation of the donation. Two points may be observed concerning this decison. First, Article 156 refers to donations "by marriage contract or since," and not generally to donations made in contemplation of marriage. In the Civil Code of 1808 the reference was to donations "in consideration of their marriage,"[5] but this broader language was changed in the Code of 1825[6] to read as does the present Article 156. Thus a donation in contemplation of marriage, but not in the marriage contract, may not come within the provisions of Article 156. Secondly, Articles 156 and 159 having been written at a time when neither a separation nor a divorce was obtainable by one at fault in disrupting the marriage,[7] the court properly interpreted them to mean that the party at fault should lose the donations made to him or her by the other spouse by marriage contract or since. But it is at least questionable that the revocation of the donation be made to depend on whether the separation or divorce is obtained on grounds implying or not implying fault. This kind of reasoning used to be employed to allow alimony to the wife, whether or not at fault, who obtained a divorce on the ground of separation in fact; but this reasoning seems to have been abandoned for such alimony cases in *McKnight v. Irving* (1956).[8] It would have been more consistent, and more just, to use the rationale of the *McKnight* decision in the instant case.

4. 239 La. 749, 119 So.2d 849 (1960).
5. LA. CIVIL CODE 34, art. 18 (1808).
6. LA. CIVIL CODE art. 229 (1825).
7. Divorce at the instance of the party at fault in disrupting the marriage was first allowed by Act 25 of 1898, the antecedent of the present R.S. 9:302.
8. 228 La. 1088, 85 So.2d 1 (1956). This case was discussed by the author in 17 LOUISIANA LAW REVIEW 308-309 (1957).

Retrospective Effect of Amendment to Law of Legitimation

Before 1944 marriage of the parents legitimated previously born children only if they were acknowledged by both parents formally before or at the time of the marriage. In 1944 Article 198 of the Civil Code was amended to permit legitimation by marriage if the parents acknowledged the children formally or informally, before or after the marriage. In *Henry v. Jean*[9] the court decided that this amendment operated to legitimate children born before the marriage of their parents in 1900 and informally acknowledged by both parents before 1930, the date of their father's death; and, further, because legitimation is extended even to deceased children for benefit of their issue,[10] the issue of one of the these legitimated children who had died in 1937 could participate as legitimate heirs in the succession of their grandmother who died in 1949. The decision is rigorously correct in every respect. The 1944 amendment to Article 198 did not operate to alter rights acquired prior to 1944, but did operate, under the normal rules of construction applicable to new statutes on the condition or status of persons, to change the condition of living persons so that they might acquire the rights attributable to their new condition and accruing after the effective date of the statute.

Alimony

The decision in *Bilello v. Bilello*[11] correctly concluded that under the Louisiana legislation as written the married woman who claims alimony pending suit for separation need not show she is unable to earn her living. All that Article 148 of the Civil Code requires is that she not have sufficient income for her maintenance. It may be observed, in support of this decision, that nothing in the Civil Code or other statutes indicates that a wife or legitimate relative may be denied alimony because he or she is able to earn his living. Only the illegitimate child is denied alimony if he can earn his living, and then only if he has been given sufficient training in a trade or profession to permit him or her to do so.[12] The wife or legitimate relatives need only show a lack of income or means, as the case may be, and the ability of the obligor to pay.[13]

9. 238 La. 314, 115 So.2d 363 (1959).
10. LA. CIVIL CODE art. 201 (1870).
11. 240 La. 158, 121 So.2d 728 (1960).
12. LA. CIVIL CODE art. 243 (1870).
13. See LA. CIVIL CODE arts. 148, 160, 227, 229, 232 (1870).

Under Article 160 of the Civil Code the wife whose husband has obtained a divorce on the ground of living separate and apart for two years may receive alimony if she has not been "at fault." In *Rogers v. Lasseigne*[14] the separate living of the couple began when the wife packed the husband's clothes and invited him to leave. At the trial she testified she had taken this action only after a long period of habitual intemperance on the part of her husband. The Supreme Court refused to disturb the district judge's finding that she was free from fault. Assuming that the husband's habitual intemperance was such as to make their conjugal life insupportable, and therefore to amount to a cause for separation under Article 138 of the Civil Code, no fault can be found with the decision. In such a case the wife has legal justification for leaving her husband, and there is no substantive difference between her leaving her husband and asking him to leave.[15] The decision, however, does not reproduce the evidence sufficiently to warrant any attempt here to determine whether the conjugal life of the parties had been rendered "insupportable" by the intemperance of the husband.

Custody

Dungan v. Dungan[16] was an appeal from a divorced father's suit in a district court for custody of his children, then in the custody of the mother. More than three years having elapsed since the proceedings in the lower court, the Supreme Court remanded the case for redetermination of the issue in the light of later circumstances. In the course of its opinion the court suggested that under the facts in the record it might be necessary to deny custody to both father and mother in the interest of the welfare of the children and to make some other disposition of them. It must be observed, however, that the only way in which both father and mother could be deprived of custody in an action in a district court is through a tutorship proceeding in which they would be excluded or removed from the tutorship for cause specified in the legislation. Under R.S. 9:551 the district court could place a child in the custody of third persons without reference to tutorship if the mental, moral,

14. 239 La. 877, 120 So.2d 462 (1960).

15. Spansenberg v. Carter, 151 La. 1038, 92 So. 673 (1922) was based on the same principle. There the husband was considered justified in leaving his wife when she calmly and deliberately told him she no longer loved him.

16. 239 La. 733, 119 So.2d 843 (1960).

or physical welfare of the child required it, but that statute was repealed by Act 111 of 1956. Proceedings to that effect and without reference to the tutorship of the child are possible now only in juvenile court and within the framework of the laws on neglected children. Perhaps this is not as the law should be, but it is what the legislation would indicate to be the law.[17]

PROPERTY

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Seashore

The case of *Roy v. Board of Commissioners for Pontchartrain Levee District*[1] was an action by a landowner for damages for taking property adjacent to Lake Pontchartrain used for levee purposes. Lake Pontchartrain has sometimes been considered as an arm of the sea, and under the Civil Code classification of things, seashore is a "common thing" which is not susceptible of ownership (neither private nor public) but which all men may freely use.[2] If the area in question is seashore, the adjacent landowner is not entitled to any damages when the property is used for levee purposes. In a prior litigation, the court remanded the case while equivocating about the classification of the body of water.[3] In the present suit, the levee board's defense rested largely on the proposed definition of seashore as "that land *normally* covered by the highest tides of the year."[4] (Emphasis added.) The court refused to accept this because it differs from the Civil Code boundary of seashore at "the highest water *during the winter* season."[5] (Emphasis added.) However, "conceding defendant's contention to be sound,"[6] the court was not impressed with the defendant's evidence, and affirmed an award in favor of the plaintiff.

Does this treatment of the problem mean inferentially that

17. See the author's comments on the effect of the repeal of R.S. 9:551 in 17 LOUISIANA LAW REVIEW 26-27 (1956).

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1. 238 La. 926, 117 So.2d 60 (1960).

2. LA. CIVIL CODE arts. 450, 451 (1870).

3. Roy v. Board of Commissioners for Pontchartrain Levee District, 237 La. 541, 111 So.2d 765 (1959); *The Work of the Louisiana Supreme Court for the 1958-1959 Term — Property*, 20 LOUISIANA LAW REVIEW 216 (1960).

4. 238 La. 926, 932, 117 So.2d 60, 62 (1960).

5. LA. CIVIL CODE art. 451 (1870).

6. 238 La. 926, 932, 117 So.2d 60, 62 (1960).