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PRIVATE LAW

PERSONS

Robert A. Pascal*

CAUSES FOR SEPARATION AND DIVORCE¹

The opinion in *Gilbert v. Hutchinson*² is deserving of note for its very wholesome attitude toward marriage. Sued for separation from bed and board because of his cruelty, the defendant husband alleged the cruelty of the wife had provoked his actions and sought the application of the mutual fault doctrine. The court refused to apply the doctrine because the wife's actions were attributable to her mental illness. Furthermore, it seems that the court considered the husband's actions all the more grave because of his failure to show sufficient "compassion and understanding" for the condition of his wife.³ Indeed, compassion and understanding are not only essential ingredients for a working marriage, but they are part of the "assistance" each spouse is required to render the other under the terms of Article 119 of the Civil Code.⁴

ALIMONY AND SUPPORT⁵

Perhaps the most significant decision of the year on a matter of alimony was that in *Elchinger v. Elchinger*,⁶ noted in a

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1. Three decisions, not discussed herein, merely reviewed lower court findings of fact regarding alleged acts of adultery: *Bassen v. Bassen*, 133 So. 2d 908 (La. App. 2d Cir. 1961); *Pardue v. Pardue*, 135 So. 2d 116 (La. App. 1st Cir. 1961); and *Gilbert v. Hutchinson*, 135 So. 2d 283 (La. App. 3d Cir. 1961).

2. 135 So. 2d 283 (La. App. 3d Cir. 1961).

3. The mutual fault and forbearance rules were involved in three other cases which need no special comment: *Smith v. Smith*, 139 So. 2d 813 (La. App. 2d Cir. 1962); *Seeling v. Seeling*, 133 So. 2d 161 (La. App. 4th Cir. 1961); *Magliolo v. Magliolo*, 135 So. 2d 616 (La. App. 1st Cir. 1961).

4. The French understand this well. See 1 *PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE)* nos. 917, 918 (1959).

5. Decisions on this subject which are consistent with well-understood interpretations of the law and which do not otherwise elicit special discussion are *Shapiro v. Shapiro*, 242 La. 903, 139 So. 2d 762 (1962); *Gilbert v. Hutchinson*, 135 So. 2d 283 (La. App. 3d Cir. 1961); *Allen v. Allen*, 136 So. 2d 168 (La. App. 4th Cir. 1962); *Viser v. Viser*, 138 So. 2d 223 (La. App. 2d Cir. 1962); *Laiche v. Laiche*, 138 So. 2d 257 (La. App. 1st Cir. 1962); *Calloway v. Calloway*, 139 So. 2d 55 (La. App. 2d Cir. 1962).

6. 135 So. 2d 347 (La. App. 4th Cir. 1963).

previous issue of this *Review*.⁷ No more than the situation and its solution need be mentioned here. Briefly, the question involved was the extent of the parent's obligation to support a major child. A major son sued his father for alimony in the amount of \$1,750 monthly, he being in need of expensive mental hospitalization for an indefinite period. The court of appeal allowed alimony in the amount of \$450 monthly because the father was willing to pay it, but refused to award alimony in an amount to pay which the father "would have to liquidate his business and place himself in a hopeless financial condition."

Another decision of considerable importance is *Romero v. Leger*,⁸ in which the court ruled that the husband could not be obliged to make an advance to the wife of an amount sufficient to pay her attorneys' fees in a separation or divorce case. The majority reasoned that this kind of advance was not provided for specifically in our legislation, that it might serve to encourage litigation, and further that, the attorneys' fees of the wife being determinable by the court alone after service rendered and not by agreement between the wife and her attorneys, it would be difficult to compute the amount of the advance required. Judge Tate agreed with the majority's conclusion because of an ancient Supreme Court decision to the same effect,⁹ but argued that the wife's attorneys' fees were part of her "support" for which the husband must provide by way of alimony *pendente lite*, and that, therefore, the ancient decision should be overruled.¹⁰

The conclusion in *Wilmot v. Wilmot*¹¹ may be assumed to be correct, but the facts and the opinion in the case raise some questions as to the propriety of making unit sum alimony awards to separated and divorced wives for support of themselves and the children in their custody. Here the divorced wife had been made such an award and when the child married

7. Note, 22 LA. L. REV. 848 (1962).

8. 133 So.2d 897 (La. App. 3d Cir. 1961).

9. *Malady v. Judge*, 22 La. Ann. 264 (1870).

10. The writer respectfully suggests that Judge Tate should have dissented rather than concurred. If a judge is honestly of the conviction, as Judge Tate was here, that the old "precedent" is erroneous in its statement of the law *and that the Supreme Court might very well overrule it*, then the party in the right as the judge sees it is entitled to a *decision* in his favor. It is not enough that the aggrieved party might ask for certiorari on the basis of a decision reluctantly concurring on the basis of precedent. Of course, there is no sense in an appellate judge deciding contrary to precedent if he is convinced the Supreme Court will not overrule that precedent, but this was not Judge Tate's opinion here.

11. 136 So.2d 806 (La. App. 4th Cir. 1962).

(thereby, presumably, ceasing to be in need) the father sued for reduction of the unit sum award by an amount corresponding to what had been included in it for support of the child. He was granted a reduction, but it was necessary for the court to inquire into the record to determine how much had been included in the award for support of the child. Had the original judgment specified the amount awarded for the support of the child, at least some judicial effort might have been spared. Moreover, it may be suggested that a clear specification in the original alimony judgment that the liability of obligor shall cease on the marriage or majority of the child might eliminate the need for such suits or rules to reduce or discontinue alimony or support payments. The child who later arrives at majority or marries may then, if he is in need, prosecute his own suit for alimony under Article 229 of the Civil Code.

Several cases presented interesting questions of fact or law on the computation of alimentary and support obligations. One decision containing language, perhaps dictum, with which the writer respectfully disagrees is *Quistgaard-Petersen v. Quistgaard-Petersen*.¹² This was an acton, presumably by rule, to reduce alimony payable to a divorced wife for support of children in her custody. The plaintiff husband alleged a "change in the needs of the minors in that the defendant, the mother of the children . . . has a large income and is equally responsible for their support." Whether or not there was a change in the mother's ability to contribute to the support of the children is not clear from the opinion, but the court did say rather clearly that an award of alimony previously rendered against the father would not be reduced merely because the mother's income had increased. According to the court, only if the children's needs had lessened, or the father's ability to pay had decreased, could the award be diminished. In support of this opinion the court cited *Holman v. Holman*,¹³ a decision of 1951, which the writer submits is not authority for that proposition. There the Supreme Court specifically stated it was not considering the question because it found as fact that the mother of the child did not have sufficient income to contribute more to its support. It is submitted that the opinion in the instant case should not be considered more than dictum for it does not appear that the court found as fact that the mother's ability to pay had increased since

12. 135 So. 2d 669 (La. App. 2d Cir. 1961).

13. 219 La. 138, 62 So. 2d 524 (1951).

the original award. Speaking of the substance of the matter, it is true that even though there are several possible alimentary obligors the court can take into consideration only the ability of those who are before it in fixing the extent of the obligation. If the ability of the relatives to contribute is to be considered then they must be brought before the court. But here, in *Quistgaard-Petersen v. Quistgaard-Petersen*, the other obligor under the law was before the court. Moreover, under Article 227 of the Civil Code the husband and wife have reciprocal substantive rights against each other for the support of the children, they being presumed to have contracted these obligations by the very fact of marriage, and the obligation weighs upon each parent according to his or her means.¹⁴ Hence an increase in the mother's ability to support the child should be considered a factor justifying the re-determination of the extent of the father's liability.

Mention may be made of other decisions in which were raised questions pertaining to the computation of the amount of alimony due. In *McNeill v. McNeill*¹⁵ voluntary contributions of \$112 monthly to a retirement fund were considered "a necessary expense" of the husband and therefore to be deducted from his monthly salary of \$858.33 in computing his "ability to pay." The wife's assets and income were such in this case that the court could well conclude her needs were not so great as to compel the husband to abandon or reduce his contributions to the retirement fund in order to provide her with more money. Nevertheless, the statement that the husband's contributions to the retirement fund were "necessary expenses" perhaps goes too far. Certainly excessive payments should not be permitted to prejudice dependents in need, and in extreme cases it would be necessary to recognize that one's present obligations to dependents outweigh the obligor's interest in such things as a retirement fund.

In *Wagner v. Wagner*¹⁶ the court refused to permit a husband to deduct, from past-due alimony installments, one-half the rental value of the house owned in indivision by the husband and divorced wife and occupied solely by her. The court based its decision on the ground that one co-owner does not owe the other rent for an immovable occupied by him alone, and also

14. 1 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE STATE LAW INSTITUTE) nos. 1682, 1683 (1959).

15. 139 So. 2d 583 (La. App. 4th Cir. 1962).

16. 134 So. 2d 670 (La. App. 4th Cir. 1961).

observed that at the time the amount of alimony was fixed the husband had not claimed that the rental value of his interest in the house should be taken into consideration. The judgment in this case would seem to be correct, for it should be presumed that the alimony payable to the wife was computed originally with due consideration being given to the factor that she would be allowed to occupy the premises rent free. Certainly this factor should not be ignored in fixing the amount of alimony payable, for the husband could demand a partition and thereby escape the application of the free-occupancy rule applied in favor of co-owners. Besides that, it may very well be argued that the free-occupancy rule should be considered inapplicable in instances in which, as here, the parties can hardly be expected to use the property simultaneously; but this is hardly the place to continue this discussion.¹⁷

*Shapiro v. Shapiro*¹⁸ relied on Supreme Court jurisprudence to decide that the amount of alimony awardable after separation from bed and board should be based on the criteria of Article 148 of the Civil Code and not on those of Article 160. The opinion, however, by way of dictum, also stated that under the principle underlying the interpretation of Article 160 of the Civil Code in *Smith v. Smith*¹⁹ a wife with \$3,000 cash should be considered with "means" and therefore not entitled to alimony. It may be noted in the same context that the facts in *McNeill v. McNeill*,²⁰ a case previously discussed in another connection, showed that the wife owned assets totalling at least \$23,000 and that no question was raised as to her eligibility for alimony. The interpretation of Article 160 by *Smith v. Smith* certainly has proved to be difficult to administer and some attention should be given to changing the formula of Article 160. Perhaps the total revenues which the wife can reasonably expect from her capital, rather than the capital itself, should be the consideration.

RIGHTS OF SPOUSES PENDENTE LITE

*Seeling v. Seeling*²¹ presented the question whether the hus-

17. It would be interesting to discover the extent to which the "free occupancy" rule had its origin in a form of co-ownership applicable to situations in which the several co-owners were expected to be able to share in the use of the property simultaneously without conflict.

18. 141 So. 2d 448 (La. App. 4th Cir. 1962).

19. 217 La. 646, 47 So. 2d 32 (1950).

20. 130 So. 2d 583 (La. App. 4th Cir. 1962).

21. 139 So. 2d 168 (La. App. 4th Cir. 1962).

band could sue the wife (here for eviction from his separate immovable) after a separation from bed and board, and the issue was decided in the affirmative. A statement in the opinion, however, indicates that the wife, who had filed the suit which resulted in their separation,²² had at that time asked for and been denied judicial permission to continue *pendente lite* to occupy this same separate immovable of the husband, which had been the family home and which the husband — not the wife — had ceased to occupy. It may very well be that the wife was at fault in the separation, as the court found, but the issue of fault cannot be prejudged in separation and divorce suits, and it does seem that a spouse occupying the family home, regardless of its ownership, should not be required to depart from it *pendente lite* when the other already has left it of his or her own accord. There is nothing about this in our legislation and hence the court's decision cannot be said to be contrary to any specific provision of law, but certainly it would be well to provide for it either by appropriate legislation or by judicial action under Article 21 of the Civil Code.

DISAVOWAL OF PATERNITY

*Singley v. Singley*²³ was the only decision on disavowal of paternity reported during the period covered by this symposium.²⁴ This case involved no more than a simple application of Articles 187, 188, and 191 of the Civil Code. The husband of the mother was declared not to be the father of the child born to her more than 299 days after a judgment of separation from bed and board, and simply on his having filed the action of disavowal at the proper time. This being a case of a child born 300 or more days after the judgment of separation, it was not even

22. *Seeling v. Seeling*, 133 So.2d 161 (La. App. 4th Cir. 1961).

23. 140 So.2d 546 (La. App. 1st Cir. 1962).

24. Two other decisions of considerable interest have been reported in the subsequent period and they will be noted in a coming issue of this *Review*. *Trahan v. Trahan*, 142 So.2d 571 (La. App. 3d Cir. 1962) deals with a child conceived and born during the voluntary separation of the spouses and registered as that of a father unknown. *Gillies v. Gillies*, 144 So.2d 893 (La. App. 4th Cir. 1962) raises two main issues. The first is whether a child born more than 299 days after the date of the filing of a divorce suit, but less than 300 days after the final judgment therein, is born 300 or more days "after the sentence" of a divorce, especially where the divorce was rendered on the basis of living separate and apart for two years. The second issue in the *Gillies* decision is whether "remoteness" of the husband and wife may include remoteness by reason of the antipathy of the separated spouses to each other. This case has been remanded to the court of appeal for proceedings consistent with a negative ruling on the first issue and an affirmative ruling on the second.

necessary for the husband to prove that he and his wife had not cohabited thereafter.

ADOPTION

Two adoption cases involved questions concerning the operation of subsequent statutes on earlier adoption acts and proceedings. In *Crumpacker v. Spalding*,²⁵ Mr. Crumpacker, a widower with custody in fact of a child not his own, entered into a notarial act with Mr. and Mrs. Spalding under which the latter purported to adopt the child. This act was not valid under the adoption legislation then in force for lack of parental signatures. Two years later, however, the same parties executed another act under which Mr. Crumpacker adopted the child. Thereafter Section 13 of Act 46 of 1932 ratified all previously executed adoptions which were irregular in that "all necessary parties did not sign the act of adoption." Apparently relying on *Succession of Gambino*,²⁶ the adoptee claimed the rights of a forced heir of Mr. and Mrs. Spalding, alleging that the act by which they attempted to adopt him had been ratified by Act 46 of 1932. The Supreme Court ruled that the 1932 statute did not apply to an act of adoption disregarded by the parties prior to its passage. In deciding this case the court relied on the decision in *Owles v. Jackson*.²⁷ The second case on a similar problem was *In re Adoption of Gordon*.²⁸ There a mother had consented in the proceedings themselves to her child's adoption. At that time a parent could withdraw his or her consent at any time before the final decree. Thereafter R.S. 9:432 was amended to provide that the withdrawal of parental consent once given would not of itself bar the adoption of the child. The court ruled that the amendment could not be applied to parental consent given before its passage. The mother's withdrawal of consent before the final decree therefore made impossible the adoption of the child. The judgment seems very reasonable, for R.S. 9:432 as amended did not give a parent who had already given his consent to the adoption of his child a specific delay in which to withdraw it.

25. 241 La. 1001, 132 So. 2d 875 (1961).

26. 225 La. 674, 73 So. 2d 800 (1954) which decided that a child remained the forced heir of adoptive parents who had later consented to his adoption by others.

27. 199 La. 940, 7 So. 2d 192 (1942).

28. 135 So. 2d 673 (La. App. 4th Cir. 1961).

Something should be said of a third adoption decision, *State ex rel. Cockerham v. Jordan*,²⁹ because it is susceptible of misconstruction on two scores. First, the opinion states that a mother who has given consent to an adoption may withdraw it "prior to culmination of proceedings legally effecting such adoption." This statement was correct under the law as it was prior to the amendment of R.S. 9:432 in 1960, and the facts of the case had occurred prior to that amendment. The statement would not be true today, as should be evident from the discussion, in the preceding paragraph, of the case of *In re Adoption of Gordon*.³⁰ Secondly, the opinion leaves the impression that a formal act of surrender for adoption under R.S. 9:401-405 may be revoked by the parent. This is not so, as is evident from R.S. 9:404, according to which the formal surrender "terminates all parental rights" of the surrendering parents. The surrender involved in the instant case, however, was not a formal surrender under R.S. 9:401-405, it having been made to individual would-be adoptive parents and not to an agency as defined by R.S. 9:401.

CUSTODY³¹

Of special interest among the custody decisions is that of *State v. Knight*.³² The mother brought habeas corpus proceedings to regain custody of her child from foster parents. The district court returned the child to the custody of her mother. Under the new Code of Civil Procedure, Article 3943, a devolutive, but not a suspensive appeal, may be had in custody cases. The court then granted suspensory writs "because writs were the only remedy available to defendants considering Article 3943, Louisiana Code of Civil Procedure." The case illustrates that, although suspensive appeals are not proper in custody cases, a speedier review than that available through devolutive appeal is desirable. Perhaps specific amendatory legislation

29. 134 So. 2d 81 (La. App. 2d Cir. 1961).

30. 135 So. 2d 673 (La. App. 4th Cir. 1961).

31. Custody decisions applying well-settled principles and not discussed herein were: *Hartwell v. Hartwell*, 136 So. 2d 81 (La. App. 4th Cir. 1962); *Hanks v. Hanks*, 138 So. 2d 19 (La. App. 1st Cir. 1962); *Lyckburg v. Lyckburg*, 140 So. 2d 487 (La. App. 1st Cir. 1962); *Carlson v. Carlson*, 140 So. 2d 801 (La. App. 4th Cir. 1962); *Tullier v. Tullier*, 140 So. 2d 916 (La. App. 4th Cir. 1962); *Smith v. Smith*, 141 So. 2d 84 (La. App. 1st Cir. 1962); *Bassen v. Bassen*, 133 So. 2d 908 (La. App. 2d Cir. 1961); *Gilbert v. Hutchinson*, 135 So. 2d 283 (La. App. 3d Cir. 1961); *Ballard v. Ballard*, 135 So. 2d 322 (La. App. 1st Cir. 1961); *Gentry v. Gentry*, 136 So. 2d 418 (La. App. 1st Cir. 1961).

32. 135 So. 2d 126 (La. App. 1st Cir. 1961).

would be advisable, but until then the practice here inaugurated probably will prove satisfactory.

A second issue raised in the *Knight* case was the admissibility of a report prepared by the Department of Public Welfare and admitted over the mother's objection. The court relied on *In re Caronna*³³ as authority for the admission of such evidence in custody cases. A similar, though not identical, question was presented in *Smith v. Smith*,³⁴ a decision of the same court of appeal. There the question was whether a report in a custody case by the family court's probation officer was admissible, but the court was able to avoid the issue because the parties had stipulated they would consent to the utilization of such a report by the judge. It would seem to the writer that whereas such "social reports," as they seem to be called in the decisions, can be of much aid to the court, the parties who supply the evidence to the social workers or probation officers should be subject to oath and cross examination by the interested parties.

The third point of interest in the *Knight* case is its very clear statement that the feelings of foster parents must yield to the natural rights of parents to the custody of their children unless the latter have forfeited their rights by reason of culpable failure to fulfill their responsibilities to them, or unless the welfare of the children necessarily requires their being placed in the care of others. The interpretation which the court places on *State ex rel. Paul v. Peniston*³⁵ by reading the somewhat extreme opinion of the majority in the light of Judge (then Justice *ad hoc*) Tate's concurring opinion should serve as a useful guide in future cases of the same kind. In *Knight*, as mentioned before, the mother was permitted to regain custody of her child. The decision on this score might be contrasted with that in *State ex rel. Hampton v. McElroy*,³⁶ another First Circuit case, in which a mother who had left her child with its aunt and uncle for eight years without previous effort to regain its custody was denied it.

INTERDICTION PROCEDURE

In *Interdiction of Polmer*³⁷ an interdict petitioned for re-

33. 197 La. 494, 2 So. 2d 1 (1941).

34. 141 So. 2d 84 (La. App. 1st Cir. 1962).

35. 235 La. 579, 105 So. 2d 228 (1958).

36. 141 So. 2d 666 (La. App. 1st Cir. 1962).

37. 141 So. 2d 696 (La. App. 1st Cir. 1963).

moval of his interdiction. By his answer the curator of the interdict admitted the allegations in the latter's petition and asked that the interdiction be removed. The undercuratrix then filed an opposition to the removal of interdiction and this opposition was dismissed by the district court. Following trial on the merits and a judgment removing the interdiction the undercuratrix appealed devolutively from the judgment. The court of appeal ruled that the undercuratrix had the right to intervene in the suit and, further, that she could appeal from the final judgment in the proceedings even though she had not appealed from the order dismissing her opposition. The court cited, among others, Article 275 of the Civil Code as establishing the substantive right of the undercuratrix, Article 1091 of the Code of Civil Procedure as establishing her procedural right to intervene, and Article 2083 of the same Code as settling her right to appeal as she did. This last article permits appeals from interlocutory judgments only when irreparable injury would result, and the court reasoned that irreparable injury could not result here from the undercuratrix's failure to appeal from the interlocutory judgment inasmuch as the parties could be placed in the same position in which they were at the time the opposition was filed. The reasoning appears to be sound.

TORTS OF THE MINOR

Two cases from different appellate circuits considered the liability of a minor and of his parents for the minor's wrongful acts. In *Ohio Casualty Insurance Co. v. Nunez*³⁸ a minor damaged an aircraft rented by him (?) and in *Boston Insurance Co. v. Simoneaux*³⁹ a fifteen-year-old damaged an automobile which he had washed for compensation and which he was returning to the owner, though perhaps (and this is not clear from the opinion) by an unnecessarily long route. In each case the insurer had paid the insured owner and was seeking compensation. In each case the court denied recovery, relying on previous jurisprudence to the effect that where the wrong of the minor is also a breach of contract the parent is not liable for the harm done, the wrong being "inseparably interwoven" with the contract breach, and parents being liable for only the torts, and not the breaches of contract, by their minor children.

38. 134 So. 2d 309 (La. App. 3d Cir. 1961).

39. 135 So. 2d 376 (La. App. 4th Cir. 1961).

It is submitted that such conclusions are the product of a false logic. Indeed, there is, first of all, no more reason for saying the parent is not liable in case the minor's wrong is both tortious and in breach of contract than there is for saying that he is liable. Is a harm less a tort because the wrongdoer caused it while under contract — unless the contract absolves him of liability — or because contract law quite independently of tort law would also make him liable for it? Let it be assumed that the contract is invalid — as the courts said it was in *Simoneaux* and may have considered it to be in *Nunez* — would there not be, even under the logic employed by the decisions, even more reason to recognize the liability in tort?

What has been said above does not deny that in particular cases liability may not exist because of other reasons. Thus, in *Simoneaux* the court found the insured "himself at fault" in allowing the minor to drive his automobile after the minor's father had told the insured he did not wish his son to do so. So, too, though this does not appear in the opinion, the insured in *Nunez* may have rented the airplane to the minor knowing him to be such and not to have the authorization of his father. In such a case, perhaps non-liability of the father might be based on an assumption of risk by the insured. But, regardless of the merit of such possible defenses, it can hardly be said that one is not liable in tort simply because he was in contractual relationship with the one wronged.

PROPERTY

*Alvin B. Rubin** and *Harry R. Sachse***

NAVIGABLE WATERWAYS

*State v. Cenac*¹ involved a state claim to ownership of the bed of a navigable lake which had been patented to the defendants' author in title. The defense was the six-year liberative prescrip-

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1. 132 So. 2d 897 (La. App. 1st Cir. 1961), writ refused, 241 La. 1055, 132 So. 2d 928 (1961). *Accord*, *Olin Gas Transmission Corp. v. Harrison*, 132 So. 2d 721 (La. App. 1st Cir. 1961), cert. denied Nov. 6, 1961.