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Private Law: Persons

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THE WORK OF THE LOUISIANA APPELLATE COURTS FOR THE 1965-1966 TERM

A Faculty Symposium

PRIVATE LAW

PERSONS

*Robert A. Pascal**

Over sixty appellate decisions involving the law of persons were rendered in the 1964-65 term. Most of these were consistent with prior acceptable interpretations and applications or otherwise do not require comment here. Accordingly, the remarks below will be restricted to decisions which demand comment.

ALIMONY

In *Walker v. Walker*[1] the wife had been receiving alimony *pendente lite* in the amount of $200 monthly for herself and the children when the court rendered judgment (1) awarding a separation from bed and board to the husband, (2) awarding *the wife* alimony in the amount of $100 *for the children*, and (3) discontinuing alimony in favor of the wife herself. The wife appealed from the judgment of separation, but made no mention of appealing from the judgment so far as it pertained to alimony. The court of appeal ruled the appeal from the judgment of separation had the effect of suspending the judgment discontinuing alimony in favor of the wife; the Supreme Court, however, reasoned that the award of alimony *pendente lite* had been superseded by a new judgment denying the wife alimony, that this judgment alone could be appealed, and that appeal

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1. 246 La. 407, 165 So. 2d 5 (1964).

from a judgment denying alimony does not entitle the petitioner to alimony pending the appeal.

It is true that if one sues for alimony and is awarded none, the judgment denying alimony may be appealed, but the appeal itself does not give the appellant a right to alimony pending its outcome. Thus, if the wife in *Walker* is to be regarded as having sued for and been denied alimony, it is correct to conclude that she could not be entitled to alimony during the appeal. The writer submits, however, that this was not the situation in *Walker*. The wife had been receiving $100 each month for herself as alimony *pendente lite*. Under the jurisprudence a judgment for alimony *pendente lite* continues after a judgment of separation from bed and board unless it is superseded by another judgment on the subject. If the original judgment is replaced by a second, the second operates a change in the first judgment which is itself the subject of an appeal, devolutive or suspensive at the election of the party entitled under the original judgment. The situation is not different from that in which a husband sues for reduction or termination of alimony previously awarded and the wife appeals suspensively from the judgment reducing or terminating her previous award.[2] Hence the writer concludes that the wife in *Walker* should have had *the right to appeal*, either devolutively or suspensively, from the new judgment terminating her payments *pendente lite*.

There is a question, however, a procedural one, whether the wife in *Walker* did appeal suspensively from the alimony judgment simply by appealing from the judgment on the issue of separation from bed and board. The writer is inclined to the view that in a case of this kind the mere fact of appeal on the issue of separation should not be regarded as an appeal on that of alimony. The two are separable issues and as such the subject of two judgments rather than one. Indeed, a wife similarly situated may be dissatisfied with the separation judgment, but content with that relating to alimony. Thus the husband should be entitled to know whether the wife appeals from both judgments or only one of them, and he can be assured best of this information if the wife is required to appeal expressly on each of the issues.

Article 160 of the Civil Code as amended in 1964 allows ali-

2. See, for example, Derussy v. Derussy, 173 So. 2d 544 (La. App. 4th Cir. 1965).

mony to the wife after divorce in certain circumstances if she has not been at fault. The wife at fault, to use other words, is not entitled to alimony. *Randle v. Gallagher*[3] presents a most important question in this respect. The wife had obtained a separation from bed and board from the husband on the ground of cruel treatment. Thereafter the parties were divorced on the ground of living separate and apart for two years or more, a ground which excludes the issue of fault for purposes of the divorce itself. The wife contended that the separation judgment indicated her lack of fault and her entitlement to alimony after divorce. The court of appeal, however, noting that the wife could have been at fault to some degree and yet have obtained the separation because of the greater fault of her husband, decided that alimony could not be given in such a case until the wife proved she had been free from fault. The writer believes this decision goes too far and suggests that the wife whose fault has not been sufficient to prevent her from obtaining the separation should be entitled to alimony after divorce unless the husband can show additional substantial fault on her part subsequent to the separation judgment. If the wife's fault was such that the husband was awarded the separation, she should be denied alimony after divorce even if the husband subsequently is at substantial fault, for then her fault was substantial in the first place. Similarly, if a separation suit ends in a denial of separation from bed and board because of the mutual fault of the parties the wife should be denied alimony after divorce, for here again her fault has been substantial.

FILIATION

Succession of Jene[4] decided that a child born fifteen minutes after the putative marriage of its parents was to be considered legitimate. In reaching this conclusion the court of appeal reasoned that (1) a child born within one hundred and eighty days of a valid marriage would be legitimate under (article 190 of) the Louisiana Civil Code, that (2) such a child would be a child "born of" that marriage, that (3) a child born in the same time after a putative marriage should be considered "born of" the putative marriage within the meaning of article 118 of the Civil Code, and therefore (4) legitimate. The writer submits that the conclusion appeals to the emotions but violates the texts of the

3. 169 So. 2d 224 (La. App. 4th Cir. 1964).
4. 173 So. 2d 857 (La. App. 4th Cir. 1965).

Civil Code for two reasons. First, the child born less than one hundred and eighty days after a valid marriage is legitimate, not because it is "born of" the marriage, but because it is born *during* marriage, as is specified in article 179 of the Civil Code; indeed, under article 954 of the Civil Code this child is "legitimated by a marriage posterior to its conception." Thus, a child is not "born of" a marriage unless it is conceived or presumed conceived during marriage. Secondly, article 118 limits the effects of marriage to children "born of," that is to say, conceived during, the putative marriage. The rule of article 118 is aimed at preventing a child conceived by a person believing himself or herself to be married from being considered illegitimate; it is not aimed at the legitimation of children who are illegitimate for a reason other than that the marriage during which they were conceived is declared null. In this case the child was not rendered illegitimate by the nullity of the marriage of its parents; the cause of its illegitimacy was its conception outside of marriage, and it remained illegitimate because the marriage of its parents, which if valid would have provided it with legitimate status, was null.

Although *Dorsey v. Williamston*[5] is consistent with a long line of decisions, the writer would feel negligent in his duty as a professor of law if he did not reaffirm his conviction that the interpretation of the law applied therein is both inconsistent with the texts properly construed and productive of most grave injustice. A child was conceived and born to a married woman while living in open concubinage with a man not her husband. Indeed, the child was conceived and born during a period of living separate and apart which formed the basis of a divorce judgment. Thereafter the wife and her paramour married and presumably the child lived with them. The first husband, nevertheless, was considered its father and obliged to support it. And, it may be added, at the husband's death the child will be deemed entitled to a legitime. Once more the writer submits that (1) articles 184-192 of the Louisiana Civil Code do not apply when the child does not possess the appearance or reputation of being conceived by the husband of the mother, for otherwise the provision in article 197 of the Civil Code would be meaningless; that (2) there is no appearance or reputation of conception by the husband of the mother when the mother

5. 170 So. 2d 773 (La. App. 1st Cir. 1964).

is living in open concubinage with a man not her husband; and that (3) in this instance the presumption in article 209(3) of the Civil Code, that the paramour is the father of the child, should be applied.[6] No doubt the long line of decisions to the contrary[7] has been prompted by concern for the child; but this concern is not enough to warrant imposing on a husband a child very obviously not his, with all that entails by way of support, possible delictual responsibility, and forced heirship, when the texts of the legislation do not require it.

A second contention of the first husband of the mother was that the marriage of the child's mother to the paramour, who he alleged had informally acknowledged the child as his own, legitimated him as the child of the paramour under the provisions of article 198 of the Civil Code. This contention was plausible, at least, but the court of appeal dismissed it rather summarily. Under the interpretation implicit in this action, article 198 would operate to legitimate only children born of a single woman and a married man. It is submitted that more consideration should have been given to the first husband's argument, for it would certainly have led to more substantial justice than the court's construction of article 198.

PATERNAL AUTHORITY, TUTORSHIP, AND CUSTODY

In the writer's opinion, the appellate decisions continue to show a marked and increasing divergence from the spirit and letter of the legislation on paternal authority, tutorship, and the relationship of the child to relatives more remote than his parents. The comments below will show how decisions of the 1964-65 term manifested this divergence from the legislative norm.

The Civil Code provides for awarding the custody of a child to one of the parties pending a suit for separation from bed and board, but it does not provide for the termination of paternal authority unless and until there is a judgment of separation from bed and board. Thus, unless and until a separation judg-

6. See Pascal, comments on Feazel v. Feazel, 222 La. 113, 62 So. 2d 119 (1952), in 14 LA. L. REV. 121-23 (1953) and Pascal, *Who Is the Papa?* 18 LA. L. REV. 685 (1958). See also the summary remarks of Lloyd on Trahan v. Trahan, 142 So. 2d 571 (La. App. 3d Cir. 1962), in 24 LA. L. REV. 171 (1964).

7. See particularly Succession of Saloy, 44 La. Ann. 433, 10 So. 872 (1892); Feazel v. Feazel, 222 La. 113, 62 So. 2d 119 (1952); Trahan v. Trahan, 142 So. 2d 571 (La. App. 3d Cir. 1962).

ment is rendered, the father's will should prevail over that of the mother, as article 216 of the Civil Code specifies. For this reason the decision in *Webber v. Webber*,[8] through which a father was deprived of the right to name his child born while a suit for separation from bed and board was pending, must be considered in violation of that article. It should not matter that the estranged mother would have been annoyed at the father's giving the child his own name. It is his right to do so.

Bond v. Bond[9] involved a controversy between a legitimate father and the child's stepmother pending suit for separation from bed and board. This matter should have been settled on the basis that the child was not subject to paternal authority but to tutorship; that within the framework of our legislation custody is normally an adjunct of tutorship; that a stepmother, not being a blood relative of the child, is not even in the order of call to the tutorship; and that the father can be excluded or removed from the tutorship only for causes specified by law. The stepmother's contention was completely without basis in the legislation.

State v. Toole[10] illustrates what the writer regards as an abuse of the legislation under which a child might be declared abandoned by a parent so as to deprive even those entitled to his tutorship from obtaining his custody. A mother and her child had been abandoned in fact by the husband and father. On the mother's death, one of her sisters took the child to her home. Within a few days, however, the Department of Public Welfare initiated proceedings to have the child declared abandoned by his sole surviving parent, a judgment to that effect was rendered, and the child given into the custody of the Department against the opposition of the aunt with actual custody. Thereafter a second sister of the deceased mother sought to obtain custody of the child, but she too was denied it, and denied visitation privileges as well. Aunts by blood are high on the order of call — and obligation to accept — the tutorship of children. Here two aunts by blood wished to assume responsibility for the child and were denied it on the ground that the welfare of the child would be served better by allowing the child to be disposed of — presumably eventually by way of

8. 167 So. 2d 519 (La. App. 4th Cir. 1964).
9. 167 So. 2d 388 (La. App. 4th Cir. 1964).
10. 173 So. 2d 872 (La. App. 4th Cir. 1965).

adoption — to other persons. This is too much of a "Big Brother" attitude and a violation of the notion of family which should be held as sacred as possible for the good of society. It is especially heinous when it appears that "undercover" police officers are engaged to test the moral fiber of the home of the party seeking custody. The writer submits too that the child should not have been considered an abandoned child within the legislation permitting the custody, care, and legal filiation of a child declared abandoned to be disposed of by the juvenile judge. The child was being cared for by a relative entitled to claim the tutorship of the child, and therefore not abandoned by its relatives, even though its father had abandoned it.

Similarly alarming is the decision in *State ex rel. Paul v. Department of Public Welfare*[11] in which an illegitimate mother actually caring for her child and most desirous of doing so was deprived of its custody on the ground that her mental level was such that she might not be able to care for it adequately in emergencies. Expert evidence certainly was not unanimous or absolutely clear on her inability to care for the child. Judge Tate, who noted this in what was in fact a dissenting opinion, concurred in the result on the ground that the child had been out of its mother's custody so long by the time of the judgment on appeal that it was better to leave it where it was. The writer submits that this attitude will only serve to encourage further inroads on paternal and tutorial authority.

ADOPTION

The decision in *Succession of D'Asaro*[12] declared null an act of adoption of a person over seventeen years of age because it had been recorded in the parish in which the adopter and adoptee were domiciled rather than in the parish in which it had been executed. There can be no doubt that R.S. 9:461 requires the act to be registered in the parish of execution; what may be doubted is the necessity of concluding that the failure to adhere to this requirement is a cause of nullity of the act itself between persons not at all prejudiced by the failure of the registry. The writer sees two purposes which might be served by registry of an act of adoption. The first is that evidence of the act itself will be less easy to ignore, deny, or destroy if there is a change

11. 170 So. 2d 549 (La. App. 3d Cir. 1965).
12. 167 So. 2d 391 (La. App. 4th Cir. 1964).

of mind by either party. The second is that persons at interest will be able to acquire knowledge of the existence *vel non* of an act of adoption by or of a person. The first purpose, if to be considered important at all between the persons involved, is satisfied by registry, even if in a parish other than that specified by law. As to the second purpose, notice, it may be observed that the failure of registry should hardly be opposable by one who is not prejudiced by the lack of registry itself, and under the facts of the case it could not be said that any prejudice had resulted to the party opposing by reason of the lack of registry. What may be said about the decision, however, is that the legislation did not clearly require the result reached and, there being no prejudice to anyone by the failure of registry, the refusal to recognize the efficacy of the act needlessly destroyed the just expectations of those involved. Of the legislation itself it may be observed that, so far as notice is concerned, it would be much more sensible to require an act of adoption to be recorded in the parishes in which the adopter and adoptee live, rather than in the parish of accidental place of execution.

PROPERTY

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SERVITUDES

Among the servitudes imposed by law, Civil Code article 667 places a limitation upon a person's use of his property in that "he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him." Sometimes the remedy is an injunction,[1] or if the harm is already completed the claim is for damages.[2]

Pile-driving operations can cause serious damage to nearby properties, and article 667 has been applied in such situations.[3]

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1. City of New Orleans v. Degelos Bros. Grain Corp., 175 So. 2d 351 (La. App. 4th Cir. 1965) (emission of obnoxious and nauseous odors by a dehydrating plant). Injunction denied for failure to discharge burden of proof, in Woods v. Turbeville, 168 So. 2d 915 (La. App. 2d Cir. 1964).

2. Gulf Ins. Co. v. Employers Liab. Assur. Corp., 170 So. 2d 125 (La. App. 4th Cir. 1965).

3. Hauck v. Brunet, 50 So. 2d 495 (La. App. Orl. Cir. 1951); Bruno v. Employers Liab. Assur. Corp., 67 So. 2d 920 (La. App. Orl. Cir. 1953).