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## Private Law: Persons

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# The Work Of The Louisiana Appellate Courts For The 1965-1966 Term

*A Symposium\**

## PRIVATE LAW

### PERSONS

*Robert A. Pascal\*\**

#### SEPARATION FROM BED AND BOARD

##### *Reconciliation*

Unnecessarily broad statements in judicial opinions prove troublesome for those who must contend with them later. This is true even in jurisdictions of unwritten law, for there the necessary must be separated from the unnecessary in order to find the *ratio decidendi*, which alone becomes part of the judge-made law. They are especially disturbing in Louisiana, however, for here the tendency to find the law in the judicial gloss rather than in the authoritative legislation has been encouraged by the seeming reluctance of lower court judges to question the accuracy of previous opinions of higher court judges, and by the impression that appellate judges are reluctant to re-examine their own pronouncements in prior decisions. Thus it is particularly disturbing to read an opinion like that in *Stewart v. Stewart*.<sup>1</sup> The facts were as follows. The last of a series of acts considered cruelty occurred on Sunday. The petitioner testified she then and there decided to sue for separation, but could not make arrangements to leave her husband's home until Tuesday, and slept

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\*The *Symposium* covers work in the appellate courts from July 1, 1965. to

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June 30, 1963, as published in the advance sheets of the *Southern Reporter*.  
1. 175 So.2d 692 (La. App. 1st Cir. 1965).

with him on Monday night. Without discussing further the circumstances of this one act of intercourse the court of appeal declared that even one "voluntary" act of intercourse after cause for separation from bed and board had arisen "could serve no purpose other than to condone the prior acts of cruelty" on the part of the other spouse. This language is much too strong. In a particular instance, in the light of particular surrounding circumstances, especially if the parties had already separated in fact, a single act of intercourse *might* indeed evidence that the wronged spouse and the spouse at fault had become reconciled. But a single act of intercourse, or even repeated acts especially but not necessarily only where a separation in fact had not already occurred, do not necessarily indicate a reconciliation. It or they may indicate no more than an effort to bring about a reconciliation, an effort to prepare the mood in which a decision might be reached to resume the common life on a permanent basis. To hold otherwise might indeed encourage attorneys with clients who believe they have cause for separation or divorce to advise them to refrain from the very situations which might prepare the way for reconciliations, and thus increase the possibility of permanent estrangements.

In this connection it may be fitting to observe that historically our law must not have thought of intercourse as constituting reconciliation in and of itself. Canon law, through the Spanish law once in force in Louisiana, forms the background of our law on marriage; and even today under Canon law neither spouse may, except for adultery or unless there is danger in delay, deny the other matrimonial rights until a separation has been declared by proper authority.<sup>2</sup> Article 147 of the Civil

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2. CODEX JURIS CANONICI (as translated in BOUSCAREN, ELLIS, AND KORTH, CANON LAW, 4th rev. ed. 1963) canons 1129, § 1, and 1131, § 1 [hereinafter cited as C.J.C.):

"Canon 1129. § 1. Either party to the marriage, by reason of adultery on the part of the other, has the right, though the marriage bond remains intact, to terminate the community of life even permanently, unless he consented to the crime, or was the cause of it, or condoned it expressly or tacitly, or himself committed the same crime."

"Canon 1131. § 1. If one of the parties has joined a non-Catholic sect; or educated the children as non-Catholics; or is living a criminal and ignominious life; or is causing grave spiritual or corporal danger to the other; or makes the common life too hard by cruelty—these and other things of the kind are so many lawful reasons for the other party to depart, on the authority of the Ordinary of the place, and even on his own authority if the grievances are certain and there is danger in delay."

It is to be noted too that whereas voluntary intercourse with certain knowledge of the fact constitutes condonation of an act of adultery under canon law (C.J.C. 1129, § 2), it cannot of itself constitute condonation of other causes for separa-

Code, now repealed by Act 65 of 1928, contemplated an award of alimony to the wife *pendente lite* only if she "has left or declared her intention to leave the dwelling of her husband." In all probability, therefore, our legislation as distinguished from our jurisprudence contemplated that the spouses might live together as man and wife until the judgment of separation from bed and board.

### *Proof of Abandonment*

In 1958 article 145 of the Civil Code was amended to change the mode of proving abandonment from necessary issue of summons to return and failure to do so to proof "as any other fact in a civil suit." Article 143 of the Civil Code, both as it stood before and as amended in 1958, states "abandonment . . . can be admitted only . . . when he or she has withdrawn himself or herself from the common dwelling, without a lawful cause, has constantly refused to return to live with the other, and when such refusal is made to appear in the manner hereafter directed." (Emphasis added.) Very clearly proof the defendant has left the common dwelling without lawful cause will not of itself suffice to prove abandonment. There must be proof of a constant refusal to return, though this proof may be made "as any other fact" and no longer need depend on a failure to obey a summons to return. *Sciortino v. Sciortino*<sup>3</sup> very correctly decided in this fashion.

### *"Voluntarily Living Separate and Apart for One Year"*

Article 138 of the Civil Code was amended in 1956 to add voluntarily living separate and apart for one year without reconciliation as a cause for separation from bed and board. In the same *Sciortino* case discussed above,<sup>4</sup> husband and wife separated pursuant to mutual agreement and with a view toward separation from bed and board. The husband returned, however, and thereupon the wife left. Her contention was that the husband's return did not end the voluntary living separate and apart, for she had not become reconciled to him and the separation remained voluntary as to her. Judge Barnette distinguished "living separate and apart" under R.S. 9:301, the two-year di-

tion if the parties have not yet separated in fact, for they have no right to refuse each other cohabitation until a separation is authorized (See C.J.C. 1131, § 1, above quoted).

3. 188 So.2d 224 (La. App. 4th Cir. 1966).

4. *Ibid.*

voiced law, from "voluntarily living separate and apart" sufficient for separation from bed and board under article 138 of the Civil Code, and held that whereas the former need be voluntary only on the part of one spouse, the second must continue mutually voluntary for the whole period. In this opinion Judge Barnette followed the construction placed on article 138 by the writer in 1956.<sup>5</sup>

### ALIMONY

#### *Alimony Pending Suit*

Article 148 of the Civil Code allows alimony *pending suit* (1) if the wife has insufficient *income* for her maintenance, which alimony must be "proportioned to her *needs* and the *means* of her husband." "Means" certainly refers to total actual economic resources and not simply to income as such; but it may be asked whether it may be taken to refer to *potential* as well as *actual* resources. Yet in *Viser v. Viser*<sup>6</sup> the Court of Appeal for the Second Circuit based its award more on the husband's earning potential than on his income or means, for although the husband was conceded to have neither income nor assets with which to pay, the court awarded alimony because "the record does reveal, however, that he possesses the capacity to earn perhaps substantial income." The jurisprudence has gone so far as to say a husband may not deliberately reduce his means with the motive of avoiding liability for alimony;<sup>7</sup> and if this was the actual situation in *Viser*, then the decision has at least the basis of prior constructions of the alimony laws. From the opinion, however, it cannot be said that the husband in fact had sufficient *present* economic resources to pay.

#### *Alimony After Separation*

Another related decision was rendered by the same court of appeal that rendered *Viser*. In *Smith v. Smith*<sup>8</sup> alimony *after separation*, rather than alimony *pending suit*, was involved. The court admitted the husband's present inability to pay the amount awarded by the lower court, but observed "the record reflects

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5. Pascal, in *Legislation Affecting the Civil Code and Related Subjects*, 17 LA. L. REV. 22, 23 (1956).

6. 179 So. 2d 673 (La. App. 2d Cir. 1965).

7. See, for example, *Zaccaria v. Beoubay*, 213 La. 782, 35 So. 2d 659 (1948).

8. 185 So. 2d 830 (La. App. 2d Cir. 1966).

the husband is able to work and that he owns . . . a considerable amount of property" and affirmed the award. This decision is much more defensible than *Viser* in that the husband had assets or "means" within the meaning of article 148 of the Civil Code, which article judicial opinion has applied as the norm for alimony after separation from bed and board as well as pending suit. What may be questioned is whether the long-standing practice of applying article 148 of the Civil Code, rather than article 160, in determining alimony after separation from bed and board is the most equitable way of filling the lacuna left by the absence of a particular legislative text on alimony after separation. The writer believes article 160, on alimony after divorce, would be the better to apply by analogy to this situation. Article 136 of the Civil Code states, separation "puts an end . . . to the common concerns" which existed between the parties, just as does divorce, and the liability thereafter should not exceed that after divorce.

### *Alimony After Divorce*

*Lloveras v. Reichert*,<sup>9</sup> decided in 1941, held that after divorce based on living separate and apart for two years the wife who would claim alimony must show she has not been at fault, and that she may not consider as conclusive of absence of fault on her part a prior judgment of separation from bed and board in her favor based on a cause in the nature of fault on the part of her husband. *Barr v. Freeman*<sup>10</sup> presented the same situation and followed *Lloveras*. This subject must be discussed in some detail.

Before 1898, article 160 of the Civil Code allowed alimony only to the wife "who has obtained the divorce." At this time, however, the wife could not have obtained a divorce unless she either (1) proved her husband's adultery or sentence to an infamous punishment or (2) showed *she* had obtained a separation from bed and board from him and had not become reconciled to him after a year. Recalling that all causes for separation at this time were in the nature of fault on the part of the other spouse<sup>11</sup> and that a plaintiff spouse might succeed in a separation or divorce suit even if he or she were *somewhat* at fault

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9. 197 La. 49, 200 So. 817 (1941).

10. 175 So.2d 649 (La. App. 1st Cir. 1965).

11. LA. CIVIL CODE arts. 138, 139.

as long as his or her fault were not such as to call into play the exception of substantial mutuality of fault,<sup>12</sup> it may be said that the "wife who has obtained the divorce" within the meaning of article 160 was one who in the separation or divorce proceeding had not been proved *substantially at fault*.

Divorce law structure changed radically in 1898. Act 25 of that year, now represented by R.S. 9:302, allowed the spouse *cast* in the separation judgment to claim a divorce without proof of more than non-reconciliation in a certain period following the separation judgment. To permit the wife who had obtained the separation to claim alimony even though her husband obtained the divorce under the new legislation, a provision thereof permitted the wife in such an instance to claim alimony "as if she had obtained the divorce." No express provision was made to deny the wife alimony if the husband had obtained the separation and later she obtained the divorce for non-reconciliation, but there is nothing in the reported decisions to indicate she was ever allowed alimony in this instance. Thus even after 1898 the separation suit decided the wife's right to alimony after a divorce granted to either spouse on the basis of legislation now represented by R.S. 9:302.

With the advent of divorce on the basis of living separate and apart without reference to fault, now provided for in R.S. 9:301, the jurisprudence began to award or deny the wife alimony on the basis of her or the husband's "obtaining" the divorce without inquiring into the wife's fault or absence of fault.<sup>13</sup> Act 27 of 1934 (2 E.S.) corrected this in part by amending article 160 to provide that where the husband obtained the divorce on the basis of living separate and apart the wife could demand the alimony by showing she was not at fault; but the jurisprudence continued to give alimony to the wife who *obtained* the divorce, regardless of her fault, until the Supreme Court indicated it recognized this practice to be in conflict with the actual *meaning* of article 160 as opposed to its words<sup>14</sup> and one court

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12. The exception of mutuality of fault is not provided for by any legislative text. For representative decisions applying the exception, see 1 PASCAL, READINGS IN LOUISIANA FAMILY LAW 124-27 (1962). The French, also without a legislative text on mutual fault, do not admit of the exception. See PLOSCOWE AND FREED, FAMILY LAW 227-28 (1963).

13. See, for example, *North v. North*, 164 La. 293, 113 So. 852 (1927) in which the wife was denied alimony simply because the husband had "obtained" the divorce.

14. *McKnight v. Irving*, 228 La. 1088, 85 So. 2d 1 (1956).

of appeal applied the true meaning of article 160 in a well-reasoned judgment.<sup>15</sup> Shortly thereafter article 160 itself was amended to say what it had always been meant to say, that after divorce the "wife not at fault" would be entitled to alimony after divorce.

The "wife not at fault" within the meaning of article 160 as it now appears, therefore, should be construed in the light of this history. So construing these words, the conclusion must be that the wife *cast* in a judgment of divorce or separation based on a cause implying her fault is certainly "at fault" within the meaning of article 160.<sup>16</sup> Thus if the wife is cast in a separation judgment on such a cause, it should not matter that the divorce has been obtained on the basis of non-reconciliation (R.S. 9:302) or living separate and apart (R.S. 9:301). She is doubtlessly "at fault" within the meaning of article 160 of the Civil Code.

If, however, it is the wife who obtains the separation for a cause in the nature of fault on the part of the husband, and later a divorce is rendered on the basis of either non-reconciliation (R.S. 9:302) or living separate and apart (R.S. 9:301), is she to be deemed "not at fault" within the meaning of article 160 even if thereafter she becomes guilty of action which amounts to a cause for separation or divorce in the nature of fault? She may, for example, be guilty of adultery, or of such defamation of her husband as ordinarily would have entitled him to a separation from bed and board. Should it not be possible for the husband to show such fault if the divorce is obtained on the basis of R.S. 9:301 or R.S. 9:302? Admittedly the very language of R.S. 9:302, that the wife obtaining the separation shall be entitled to alimony after the husband obtains a divorce under that legislation, would indicate that the post-separation fault of the wife is not to be considered in such a case. For two reasons, nevertheless, such an application of R.S. 9:302 would not be correct. First, the alimony provision of R.S. 9:302 should be considered repealed to the extent it is inconsistent with article 160

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15. *Sachse v. Sachse*, 150 So.2d 772 (La. App. 1st Cir. 1963).

16. LA. CIVIL CODE art. 138, as amended in 1956, provides for separation from bed and board after "husband and wife have voluntarily lived separate and apart for one year." Is the wife at fault if she agrees with the husband to live separately and apart with a view toward obtaining a separation from bed and board? It is possible to argue that neither husband nor wife is at fault in that case, but it is equally possible to say both are at fault, for neither is attempting to maintain the common life. The writer is inclined to favor the second solution, but does not express a firm opinion here.



of the Civil Code as amended in 1964. Secondly, even if not considered repealed by article 160 as amended, R.S. 9:302 should not be applied mechanically without regard for its history and spirit.

That article 160 as amended does exclude an award of alimony to the wife obtaining the separation if post-separation fault on her part can be shown even if the divorce action is based on 9:302 is evident from the wording of the article. The text indicates that the wife not at fault is entitled to alimony (1) if she has obtained the divorce or (2) if her husband obtained the divorce either on the basis of living separate and apart (R.S. 9:301) or non-reconciliation (R.S. 9:302). Thus article 160 as amended treats equally and without distinction the wife divorced by the husband under R.S. 9:301 or under R.S. 9:302, *and in either case she is entitled to alimony only if she is not at fault*. Nothing in article 160 as now amended indicates that the wife obtaining a prior separation from bed and board need not prove freedom from fault or may not be shown to have been at fault. Article 160, as amended, therefore, is inconsistent with R.S. 9:302 so far as it speaks of the wife's entitlement to alimony and must be considered to repeal it to that extent.

Even if article 160 as amended were not deemed to repeal R.S. 9:302 in the manner mentioned, the latter could not be applied mechanically without violating its history and spirit in certain kinds of circumstances. Thus the language of R.S. 9:302 does not prevent the husband against whom the wife has obtained a separation from obtaining a divorce from her for post-separation adultery and thereby making it impossible for her to claim alimony; on the other hand our practice would not permit the husband whose wife had already obtained a separation from him to sue her for a separation for post-separation fault on her part, and under a strict application of the words of R.S. 9:302 she would be entitled to alimony after divorce. To avoid such inequity R.S. 9:302 would have to be interpreted to mean the wife who obtains the separation is entitled to alimony after divorce *unless she has been guilty of post-separation fault amounting to cause for separation or divorce*.

For all the above reasons, therefore, it is to be concluded that the wife obtaining a separation against her husband for cause in the nature of fault on his part is not entitled to alimony after

divorce on the basis of R.S. 9:301 or 9:302 unless she has not been guilty of post-separation fault amounting to cause for divorce or separation. It is submitted, however, that the wife who has obtained the separation should not be required to carry the burden of proving non-fault in the post-separation period, and that the burden of proving fault should then rest on the husband, whether the divorce action is based on R.S. 9:301 or R.S. 9:302.

In summary, therefore, the writer concludes that

- (1) If a divorce is rendered either for non-reconciliation (R.S. 9:302) or living separate and apart (R.S. 9:301) after the husband has obtained a separation from bed and board for cause in the nature of fault on the part of the wife, the wife is conclusively "at fault" and not entitled to alimony after divorce; but
- (2) If the wife has obtained a separation for cause in the nature of fault on the part of the husband, and thereafter a divorce is rendered on the basis of either R.S. 9:301 or 9:302, the separation judgment should be considered *prima facie* evidence of non-fault on the part of the wife; but the husband should be allowed to show *post-separation* fault on her part which would have been sufficient cause for separation or divorce and thereby show her to be at fault within the meaning of article 160 of the Civil Code and therefore not entitled to alimony after divorce.

The technical bases of *Lloveras v. Reichert*<sup>17</sup> and therefore of *Barr v. Freeman*<sup>18</sup> must, nevertheless, be considered. It was that the fault issue as determined in the separation suit could not, under article 2286 of the Civil Code, form the basis of the exception of *res judicata* in the suit for alimony after divorce. Thus in *Lloveras* the court observed:

"While . . . the parties are the same as those in the [separation suit], yet neither the cause of action nor the object of the demand in the present [divorce] suit is identical with the cause of action and the object demanded in the former [separation] suit."

Be that as it may, the issue of *res judicata* is not involved if

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17. 197 La. 49, 200 So. 817 (1941).

18. 175 So. 2d 649 (La. App. 1st Cir. 1965).

one approaches the subject in the manner in which it has been discussed above. The fault or non-fault of the wife in relation to the question of alimony after divorce is not finally settled by the prior separation judgment, but that judgment, because it necessarily determines the fault or non-fault of the wife at the time of the separation, is merely to be regarded as *prima facie* proof of her lack of fault as of the time of the divorce unless the husband comes forward with evidence of post-separation fault on her part. Fault or non-fault at the time of divorce, in other words, is decided only at the time of the demand for alimony after divorce.

### TUTORSHIP (CUSTODY AND REPRESENTATION)

#### *Venue Is Jurisdictional*

The new Code of Civil Procedure has made venue jurisdictional in a number of instances and the harshness of the rule is being made manifest. Thus, because article 44 of the Code of Civil Procedure renders absolutely null all tutorship proceedings brought outside the parish of proper venue as declared in article 4031, *Succession of Delesdernier*<sup>19</sup> decided that acts of a tutor appointed in proceedings outside the parish of venue were not binding on the minor. Similarly, in *Hammond v. Gibbs*<sup>20</sup> minors were allowed to revendicate immovables sold pursuant to court order in tutorship proceedings on the theory that the proceedings had been brought in a parish other than that of proper venue, even though the innocent purchaser could not have discovered the difficulty from the face of the records. Clearly the rule as to venue being jurisdictional ought to be reconsidered.

#### *Custody Separate from Tutorship*

Tutorship, under article 337 of the Civil Code, now repealed, and under its "replacement," article 4261 of the Code of Civil Procedure, includes two functions: custody of the minor and his representation in all civil acts. The only legislative texts which permit the separation of these two functions of tutorship are very limited. First, through juvenile court action the custody of the minor who is *abandoned, neglected, or delinquent* may be taken from his tutor and placed in the care of others without

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19. 184 So. 2d 37 (La. App. 4th Cir. 1966).

20. 176 So. 2d 465 (La. App. 2d Cir. 1965).

reference to tutorship proceedings.<sup>21</sup> Secondly, under article 4069 of the Code of Civil Procedure, tutorship may be divided between (1) a natural person who will have custody as "tutor of the person" of the minor and (2) a bank which will be "tutor of the property of the minor." Even in this second instance custody is identified with tutorship, even if only with "tutorship of the person." Moreover, it is only apparently and not actually true that custody may be considered independently of tutorship proceedings when the issue of custody after separation or divorce is raised in a yet pending separation or divorce suit, for under article 157 of the Civil Code the parent then awarded custody is *in reality appointed tutor or tutrix*.<sup>22</sup> Indeed this parent is tutor or tutrix *without* qualifying as other tutors must, for under article 4232 of the Code of Civil Procedure the parent who is tutor may not be removed for failure to qualify. Only if the parent-tutor wishes to represent the minor need he qualify as any other tutor.<sup>23</sup> Finally, even the use of habeas corpus proceedings to determine whether one already "awarded custody" in judicial proceedings should retain it is improper, for habeas corpus is used properly only to test one's right to custody,<sup>24</sup> and an award of custody constitutes the custodian's authority.

The above observations permit the evaluation of several decisions of the year under review and the practices they represent. Thus *State ex rel. McClary v. Stacy*<sup>25</sup> is clearly in error, for there habeas corpus proceedings were used to determine whether custody should be taken from the parent who had been awarded custody in prior judicial proceedings. *State ex rel. Lott v. Courtney*<sup>26</sup> is subject to the same criticism, for there the court permitted use of habeas corpus to re-evaluate a prior "award of custody" to the respondent. This case also shows, however, that the lower court had awarded custody to a *stepmother* and in a suit contested by the *natural mother* outside of tutorship proceedings. Clearly this too was error, for tutorship proceedings as such are necessary except where the award of custody, and

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21. LA. R.S. 13:1569, 1570, 1580; 9:407 (1950).

22. LA. CIVIL CODE art. 157 (1870): ". . . The party under whose care a child or children is placed, or to whose care a child or children has been entrusted, shall of right become natural tutor or tutrix of said child or children to the same extent and with the same effect as if the other party had died."

23. LA. CODE OF CIVIL PROCEDURE art. 4171 (1960), must be read in connection with article 4232.

24. LA. CODE OF CIVIL PROCEDURE art. 3821 (1960).

25. 182 So. 2d 119 (La. App. 3d Cir. 1966).

26. 178 So. 2d 489 (La. App. 1st Cir. 1965).

therefore the appointment of the tutor, is incidental to a yet pending suit for separation or divorce, as explained above. On the other hand, *Duplantis v. Bueto*<sup>27</sup> is a case in which the proceedings should have been by habeas corpus, but were not. The mother had been awarded custody and therefore was tutrix of the children. She had permitted the father to have custody in fact, but then sought to have the children returned to her. She proceeded by rule in the divorce suit, though certainly it had long terminated. She should instead have proceeded by habeas corpus and demanded return of the children on the basis of her having been awarded custody, and therefore appointed tutrix, at the termination of the divorce suit. With that the children should have been returned to her. Then, if the husband believed there was cause to remove her from the tutorship, he could have filed suit to prove the fact and have himself appointed tutor. Finally, *Fayard v. Fayard*<sup>28</sup> is very questionable in that custody issues after the award of custody to the mother were raised by rule in the same proceedings rather than as questions incidental to tutorship, as article 4034 of the Code of Civil Procedure requires. The parent awarded custody after either separation or divorce is, under article 157 of the Civil Code, appointed *tutor or tutrix*, as shown before. Thus any question relating to the tutor's custody must thereafter be brought in tutorship proceedings and may not be brought in the separation or divorce proceedings.

### *Interstate Jurisdiction*

Essentially the same consideration as those discussed above lead necessarily to the approval of the decision in *Nowlin v. McGee*.<sup>29</sup> A mother had obtained custody following divorce in Caddo Parish, Louisiana. The mother and child then moved to Texas, becoming domiciled there. The father sought to have visitation rights fixed by rule filed in the divorce proceedings, alleging "continuing jurisdiction," and the mother was given substituted service. The court of appeal correctly decided that under article 10(5) of the Code of Civil Procedure Louisiana refused jurisdiction to consider any problem relating to the custody of a child domiciled elsewhere and not physically present in the state. The court might also have noted that the mother was tutrix by reason of having been given custody and that

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27. 186 So. 2d 424 (La. App. 1st Cir. 1966).

28. 181 So. 2d 304 (La. App. 4th Cir. 1965).

29. 180 So. 2d 72 (La. App. 2d Cir. 1965)

under article 4034 of the Code of Civil Procedure all proceedings concerning the tutorship must be brought at the domicile of the tutor after his or her appointment.

### *Restrictions on Tutor Removing Child From State*

Increasingly Louisiana courts have assumed the authority to forbid parents with custody, who therefore are tutors of their children, to take the children outside the state temporarily or permanently except in accordance with directives of the court. Louisiana courts are not unique in this practice and the fact that the motive for removing the children is often to deprive the other spouse of his right to know them, as a matter of fact if not of law, gives rise to sympathy for the judicial practice. This sympathetic feeling is heightened, too, when it is the mother who has been given custody even though the family unit has been destroyed because of her fault. There is no legislation on the subject, but neither can it be said that the existing legislation has envisioned the problems resulting from the modern phenomenon of widespread increasing disregard for the sanctity of marriage and the family. Until the legislature acts, therefore, the courts cannot but proceed equitably under article 21 of the Civil Code, and in this the judges must be given wide discretion. *Fayard v. Fayard*<sup>30</sup> is an instance of a difficult situation which both the trial and appellate judges sought to resolve in all fairness to parents as well as children. Both permitted the mother with custody to move to New York with the children even though they recognized the father's opportunities for visiting them would be all but negated, his circumstances of life not affording him the means to provide for such visits. Certainly we in the ivory tower cannot pass judgments on facts such as those involved here.

## EMANCIPATION

### *Compromise by Emancipated Minor*

*In re Greer*<sup>31</sup> raised the question whether an emancipated minor, a widow aged thirteen years,<sup>32</sup> might compromise a claim

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30. 181 So. 2d 304 (La. App. 4th Cir. 1965).

31. 184 So. 2d 104 (La. App. 4th Cir. 1966).

32. Care must be taken to distinguish the *emancipated minor* from the person who is a *major* though under twenty-one years of age. Emancipated minors are (1) all minors emancipated for administration either by (a) authentic act or (b) judicial decree to that effect and (2) married persons under eighteen. See

for wrongful death. The court decided she could by reasoning that a minor emancipated by marriage or otherwise may certainly compromise a claim for money if he or she may *alienate* his or her movables. The writer submits that a compromise is not an *alienation*, or transfer for value in return, but a *disposition*, or transfer not necessarily for value. Nevertheless, the decision is correct, for under the Civil Code the emancipated minor not only may alienate his movables, but may also *dispose* of them otherwise than by way of donation *inter vivos*.<sup>33</sup>

## PROPERTY

Joseph Dainow\*

### WATER BOTTOMS

An interesting discussion of the difference in the application of *California Co. v. Price*<sup>1</sup> and *Miami Corp. v. State*<sup>2</sup> appears in the new case of *State v. Scott*.<sup>3</sup> It involved the ownership of a submerged area of land which was within the description of an 1883 patent, and which is now part of the bed of the Gulf of Mexico. As stated by the court: "If the land described in the patent was under water at the time of the issuance of patent then this case would come under the *Price* case, *supra*. However, if it were marsh land subject to overflow as set out in the patent and survey then it would come under the case of *Miami Corporation v. State*, *supra*."<sup>4</sup> The majority of the court adopted the

LA. CIVIL CODE arts. 365(1,2), 366, 367, and 379 construed in light of 382. Persons who are majors although under twenty-one are (1) those over eighteen relieved of "the time prescribed by law for attaining the age of majority" and (2) married persons over eighteen. See *id.* arts. 382, 385 as interpreted in light of the title to section 4 of the chapter on emancipation. A late decision not otherwise mentioned in this *Symposium*, *Speziale v. Kohnke*, 194 So. 2d 485 (La. App. 4th Cir. 1967), made the error of confusing the *major* under article 385 with an emancipated minor.

33. LA. CIVIL CODE art. 373 forbids the emancipated minor to "alienate, affect, or mortgage his immovables" except by following certain procedures, and article 374 forbids him "to dispose by donation *inter vivos*" except in one instance. Thus the inference must be that the emancipated minor may "alienate, affect, or mortgage" his movables absolutely (subject, of course, to the remedy for simple lesion) and "dispose" of them *otherwise than by donation inter vivos*.

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1. 225 La. 706, 74 So. 2d 1 (1954).

2. 186 La. 784, 173 So. 315 (1936).

3. 185 So. 2d 877 (La. App. 1st Cir. 1966), *writ refused*, 249 La. 485, 187 So. 2d 450, 451 (1966).

4. 185 So. 2d at 882.