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The Work of the Louisiana Appellate Courts for the 1967-1968 Term

A Symposium

PRIVATE LAW

PERSONS

*Lee Hargrave**

DISAVOWAL OF PATERNITY

*Feltus v. Feltus*¹ stands out as a rare case in which a husband successfully disavowed a child born to his wife during the marriage.² The husband having been assigned to a naval vessel operating in Vietnam waters when the child was conceived, the court found sufficient remoteness to apply Civil Code Article 189:

“The presumption of paternity as an incident to the marriage is also at an end, when the remoteness of the husband from the wife has been such that cohabitation has been physically impossible.”

More important was the court's interpretation of Article 191 establishing the period in which a disavowal action must be brought “within one month, if he be in the place where the child is born, or within two months after his return, if he be absent at that time.”

The action was brought within two months of the husband's return to Louisiana, conforming with the apparent requirements. However, it was established that while in Louisiana on leave, he had seen his wife five to seven months pregnant. Defendant accordingly argued the prescription should run from the time of knowledge of the impending birth. The court rejected the argument and applied Article 191 literally—the period begins to run “within two months after his return.” Knowledge of the pregnancy is irrelevant.

The decision is a welcome turn towards reality in the law of disavowal which is encumbered with presumptions that have

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1. 210 So.2d 388 (La. App. 4th Cir. 1968).

2. The law presumes the husband of the mother to be the father of children conceived during the marriage. LA. CIV. CODE art. 184. Articles 185-197 provide the grounds for and means of overcoming that presumption.

been interpreted such that the law's decisions on paternity are often patently incorrect biologically.³ Another aid in this direction is Act 158 of 1968 which amended Article 191 to lengthen to six months the period in which a disavowal action may be brought.

SEPARATION FROM BED AND BOARD AND DIVORCE

After five years of litigation and three appearances before the Court of Appeal for the Fourth Circuit, the Sciortinos finally terminated their marriage. In *Sciortino II*,⁴ the wife sought a judicial separation on grounds of abandonment and living apart for one year.

No abandonment was found. Civil Code Article 143 defines abandonment:⁵

"Separation grounded on abandonment by one of the parties can be admitted only in the case 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. . . ."

Since the husband had repeatedly attempted to return to his wife, the wife leaving the home when he did so, the article did not apply and there was no abandonment.

The wife also relied on the couple's living apart for one year as grounds for the separation. Article 138 of the Civil Code provides:

"Separation from bed and board may be claimed reciprocally for the following causes:

". . .

"(9) When the husband and wife have voluntarily lived separate and apart for one year and no reconciliation has taken place during that time."

The court held that Article 138(9) applies only when the living apart has been voluntary on the part of both spouses; both must agree to the living apart. It was found that the husband did not

3. *E.g.*, *Feazel v. Feazel*, 222 La. 113, 62 So.2d 119 (1952); *Succession of Saloy*, 44 La. Ann. 433, 10 So. 872 (1892). *See* Comments, 13 LA. L. REV. 587 (1953), 14 LA. L. REV. 401 (1954).

4. 188 So.2d 224 (La. App. 4th Cir. 1966), *writs refused*, 249 La. 726, 190 So.2d 237 (1966), noted in *The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Persons*, 27 LA. L. REV. 213, 313 (1968).

5. *See also* LA. CIV. CODE art. 138(5), 144, 145.

agree to the separation, but attempted to end it, so it was not mutually voluntary. Therefore, the wife's demand for a judicial separation was denied.

In *Sciortino III*,⁶ the third act of the trilogy, the wife was seeking a divorce under the provisions of R.S. 9:301:

“When the spouses have been living separate and apart continuously for a period of two years or more, either spouse may sue for and obtain a judgment of absolute divorce.”

Husband sought to defeat application of 9:301 by arguing, as he had in *Sciortino II*, that the living apart was not mutually voluntary. The court refused to accept his argument and affirmed the long-standing view that 9:301 permits divorce when the living apart has been voluntary on the part of one of the spouses.⁷

The result is that to obtain a separation under Article 138(9), both spouses must agree to the living apart; but, to obtain a divorce under 9:301, it is only necessary that one spouse voluntarily leave the other. The distinction may be justified on the grounds that Article 138(9) requires the spouses “have *voluntarily* lived separate and apart” to obtain a separation, whereas 9:301, without referring to voluntariness, provides for divorce when “the spouses have been living separate and apart continuously.”⁸ Going further, however, it seems difficult to justify the reasons for a legislative scheme providing for separation when both spouses voluntarily agree to live apart, but for divorce when the spouses live apart, be it voluntary or not. It has been argued that divorces under 9:301 should be granted only when both spouses agree to live apart.⁹

Theoretical difficulties aside, a possible hardship situation is created when the wife agrees to living apart but the husband does not, and the wife leaves the matrimonial domicile. She cannot obtain a separation and must wait two years before obtaining a divorce and its effect of terminating the community. In the meantime, the husband has been managing the community, possibly to her detriment, without her having an ef-

6. 209 So.2d 355 (La. App. 4th Cir. 1968), *writs refused*, 252 La. 461, 211 So.2d 328 (1968).

7. *E.g.*, *Otis v. Bahan*, 209 La. 1082, 26 So.2d 146 (1946); *Daggett, Divorce—Voluntary Two-Year Separation*, 6 LA. L. REV. 472 (1945).

8. *Legislation Affecting the Civil Code and Related Subjects—Civil Code Amendments*, 17 LA. L. REV. 22, 23 (1956).

9. *The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Persons*, 27 LA. L. REV. 312, 313 (1968).

fective means to terminate it and her husband's management of it. She also will have been denied alimony pendente lite. But, is she worthy of an earlier termination of the community and to alimony in view of her being the party terminating the marriage?

ALIMONY PENDENTE LITE

The hardship borne by husbands paying alimony to their separated or divorced wives has been publicized recently, accompanied with criticism of the law's largesse towards ex-wives.¹⁰ Perhaps responding to these conditions, recent cases have taken a more realistic view of the amount of alimony due to separated or divorced wives and have sought to work a fair accommodation in determining alimony.

*McMath v. Masters*¹¹ and *Schmidt v. Schmidt*¹² demonstrate these efforts by two different circuits in awarding alimony pendente lite under Article 148:

"If the wife has not a sufficient *income* for her maintenance pending the suit for separation from bed and board or for divorce, the judge shall allow her, whether she appears as plaintiff or defendant, a sum for her support, proportioned to her needs and to the means of her husband."¹³

(Emphasis added.)

Traditional interpretation of the article looks only to the wife's *actual income*, regardless of whatever assets she may own; she is not required to work if she does not wish to and she is not required to deplete her capital.¹⁴

In *Schmidt*, the wife was unemployed and had no current income. But, she was the beneficiary of a trust under which the

10. *E.g.*, C. METZ, *DIVORCE AND CUSTODY FOR MEN; A GUIDE AND PRIMER DESIGNED EXCLUSIVELY TO HELP MEN WIN JUST SETTLEMENTS* (1968).

11. 198 So.2d 734 (La. App. 3d Cir. 1967).

12. 210 So.2d 149 (La. App. 4th Cir. 1968).

13. Contrast with LA. CIV. CODE art. 160 dealing with alimony after divorce: "When the wife has not been at fault, and she has not sufficient *means* for her support, the court may allow her, out of the property and earnings of the husband, alimony which shall not exceed one-third of his income when:

"1. The wife obtains a divorce;

"2. The husband obtains a divorce on the ground that he and his wife have been living separate and apart, or on the ground that there has been no reconciliation between the spouses after a judgment of separation from bed and board, for a specified period of time; or

"3. The husband obtained a valid divorce from his wife in a court of another state or country which had no jurisdiction over her person.

"This alimony shall be revoked if it becomes unnecessary, and terminates if the wife remarries."

14. *E.g.*, *Shapiro v. Shapiro*, 141 So.2d 448 (La. App. 4th Cir. 1962).

trustees had complete discretion to expend both trust income and principal for her benefit. She had not requested payment of any income and was demanding alimony from her husband on the ground she had no income. The court indicated that she would be required to request payment of income from the trust and could not request complete support from her husband. The court held that until the trustees denied payment of income, trust income would be imputed to her, with the husband's alimony covering any additional amount needed.

The decision seems correct, for a wife with a substantial potential income should not be allowed to penalize the husband by making him pay high alimony when she has ready access to her own funds. Even if the trustees refused income payments when the trust could afford them, trust income should be imputed to the wife. Trustees might be tempted to deny income to the wife if they knew the husband could be required to pay that amount upon their denial. This would be an opportunity for an overly-cooperative trustee to assist a vindictive wife in obtaining alimony from the husband as a penalty.

McMath involved a case in which a wife was given \$100.00 per month alimony pendente lite. Then, after partition of the community by which the wife received \$30,000.00 cash and other items, the husband sought to end the alimony. The court terminated the alimony, reasoning that though she could not be required to work or deplete her capital, the wife could be required to make reasonable use of her capital assets to produce income. Investment of the \$30,000.00 would produce sufficient income to satisfy her needs.

Thus, the courts are in effect evolving an "imputed income" concept in interpreting Article 148. If the wife has potential income that is available without her engaging in labor or depleting capital, that amount will be imputed to her and considered as income received within the intent of Article 148. It could be argued that Article 148 looks to actual income only (in contrast to Article 160's alimony-after-divorce provision looking to any *means*). However, the *Schmidt-McMath* interpretation imputing certain income to the wife seems a permissible interpretation of the article. The imputed income concept has worked well in taxation law to make taxation rest on realistic economic consequences rather than on formal technicalities of ownership.¹⁵

15. *E.g.*, *Helvering v. Clifford*, 309 U.S. 331 (1940); INTERNAL REVENUE CODE OF 1954 §§ 673-75, 678; 26 U.S.C. 673-75, 678; J. STANLEY AND R. KILCULLEN, *THE FEDERAL INCOME TAX* 249 (1961).

Were the application of Article 148 limited to its original purpose (providing support to the wife until a judgment of separation is rendered, if that is the litigation pending, or until a judgment of divorce is rendered, if that is the litigation pending), the imputed income engraftment would be improper, for the alimony would be for a very short period during the litigation and there would be little opportunity to invest funds. Actual income alone should be considered.

But, the courts have extended article 148 to provide alimony even after a judgment of separation is rendered, up to the time a divorce is granted. Thus, the alimony payments continue for a substantial period—at least a year, possibly indefinitely if no divorce is desired by the parties. And, unlike Article 160's alimony after divorce provisions, Article 148 does not consider fault or the wife's capital. So, a literal application of Article 148 in this circumstance can work an injustice on the separated husband. The imputed income concept can thus be an instrument to avoid this injustice.

REMOVAL OF CHILD FROM COURT'S JURISDICTION

Whether to allow a divorced parent granted authority over a child to move with the child from the state granting the divorce is a problem facing many states. Moving from an early parochial view restricting the power to move the child from the court's jurisdiction, recent cases have been more willing to allow the child to be taken to another state.¹⁶ The usual inquiry is whether removal is in the child's best interest. Solution of the problem also hinges on the effect on the child's divorced parents—whether it is better to allow the spouse granted tutorship freedom of movement in seeking better jobs and living conditions and remarriage, or to require that parent to remain in the state so the parent denied custody can easily exercise visitation rights and continue his ties with his child.

*Pattison v. Pattison*¹⁷ continues Louisiana's trend toward allowing removal from the state.¹⁸ A wife granted custody remarried and moved to New York. The husband, a Louisiana resident, sought to compel the wife to return to Louisiana and

16. H. CLARK, DOMESTIC RELATIONS § 17.4 (1968).

17. 208 So.2d 395 (La. App. 4th Cir. 1968), *writ refused*, 252 La. 168, 210 So.2d 52 (1968).

18. See *Wilmington v. Wilmington*, 223 La. 221, 65 So.2d 321 (1953); *Fayard v. Fayard*, 181 So.2d 304 (La. App. 4th Cir. 1965); *Carlson v. Carlson*, 140 So.2d 801 (La. App. 4th Cir. 1962). *But see Sachse v. Sachse*, 150 So.2d 772 (La. App. 1st Cir. 1963).

to have child support payments suspended until the wife complied. The Fourth Circuit Court of Appeal denied his request, reversing the lower court. The court recognized the mobile nature of American society:

“In our highly mobile society, it is usually unrealistic to demand that a parent granted custody of the children be confined in a certain geographical area during their minority. We take judicial cognizance of the fact that men and women are readily subject to job transfer in our society and equity demands that they should be free to go where their best opportunities lie and pertinent to this case, that a woman who remarries should be free to go to the home which her new husband provides for her”¹⁹

Admittedly, allowing removal in some instances can practically cut a child off from the parent denied custody—quite a drastic effect. In those severe cases, perhaps orders denying the right to remove would be in order. But, considering the mobile society existing today and the actual transient conditions under which most people live, the courts are almost bound to tip the balance in favor of mobility. This is consistent with and apparently required by the authority this state’s legislation gives a person granted tutorship.²⁰ When removal is granted the court does have powers to ameliorate the hardships thus forced upon the parent denied custody in regard to visitation rights. As the court discussed in *Fayard v. Fayard*,²¹ the wealth of the parties can, for example, allow reduction of a relatively poor parent’s custody payments so he may have more funds with which to visit his children out of the state.

JUVENILE COURT—CUSTODY

Juvenile and family courts are granted jurisdiction over neglected children and empowered to remove such children from the parents and award their custody to an agency, institution, or individual.²² *In re Cruse*²³ was a complex custody dispute over three illegitimate children involving claims by the mother, a home for neglected children, the grandparents and another couple caring for some of the children. Never had a determination of neglect by the mother been made by any court. On appeal, the court correctly pointed out that the juvenile court

19. 208 So.2d 395, 396 (La. App. 4th Cir. 1968).

20. LA. CIV. CODE arts. 246, 216, 217, 218.

21. 181 So.2d 304 (La. App. 4th Cir. 1965).

22. LA. R.S. 13:1570(A)(1)(C), 1580 (1950).

23. 203 So.2d 893 (La. App. 4th Cir. 1967).

therefore had no power to remove the child from the parent, who rightfully had authority over the child. A finding of neglect is a prerequisite to any change of custody under this legislation.

This case points up the wide discretion and informalities that have pervaded juvenile courts, a state of affairs that is being forced to change by *In re Gault*²⁴ and the procedural rights it establishes in juvenile court cases. The changes to come will be even more profound,²⁵ and the state should be preparing to respond legislatively to the movement to ensure more procedural rights to parties coming before juvenile courts. *State in Interest of Elliot*,²⁶ noted more fully elsewhere in this symposium,²⁷ is in the current trend in that it denies admission of hearsay testimony in a juvenile court proceeding.

ADOPTION

Ordinarily, a child cannot be adopted without the consent of his legitimate parents.²⁸ R.S. 9:422.1 dispenses with parental consent (1) when a parent denied custody of the child after divorce refuses or fails to comply with a court order of support for one year or (2) when a nonresident parent denied custody fails to support the child for one year after a judgment awarding custody to his spouse or to the grandparents. The statute applies if the person seeking to adopt is the spouse of the parent granted custody, or the grandparent or grandparents granted custody.

Because the statute breaks the parent-child relationship without the parent's consent; because it serves one of mankind's most important and basic natural relationships, the statute has understandably been given a strict construction. It could only mean, the courts have said, that consent is dispensed with when the failure to comply with the support order is without justification.²⁹ Two recent cases decided by the courts of appeal continue this strict interpretation of the statute.

24. 387 U.S. 1 (1967).

25. Note, 28 LA. L. REV. 492 (1968); Comment, 27 LA. L. REV. 606 (1967).

26. 206 So.2d 802 (La. App. 2d Cir. 1968).

27. See page 320 *infra*.

28. LA. R.S. 9:432B (1950) (as amended by La. Acts 1960, nos. 250, 268. See Wadlington, *Adoption of Persons Under Seventeen in Louisiana*, 36 TUL. L. REV. 201 (1962), especially authorities cited in footnote 45.

29. Adoption was allowed without parental consent when the father made only a token payment (\$50 out of \$1440 due) when he had resources to pay much more; failure to support was not justified. *In re Ackenhausen*, 244 La. 730, 154 So.2d 380 (1963). But, removal of the children from the jurisdiction of the court by the ex-wife granted custody was not justification for the ex-husband to discontinue his court ordered child support; adoption by the step-father was

In *Domingue v. Thibodeaux*,³⁰ a stepfather attempted to adopt the child born of his present wife's prior marriage with defendant. Defendant had failed to comply with a court order of support. Thus, the requirements of Section 2 were met, and parental consent to the adoption was not required. Adoption was denied nevertheless, the court saying:

"It is true that under LSA-R.S. 9:422.1 the consent of the legitimate parent is unnecessary if he has failed, among other grounds, to support his or her minor child as directed by a court order for a period of one year. However, we are of the opinion that under the above quoted statute, some discretion is vested in the trial judge as to whether or not he will grant the adoption."³¹

The court then affirmed the trial judge's exercise of discretion in denying the adoption. Since petitioner had been married to the mother of the child for only a brief time, it would not have been in the best interest of the child that he be adopted by petitioner.

This decision is probably justifiable under the adoption legislation. Although 9:422.1 itself does not appear to confer any discretion on the trial judge, its sole effect is to dispense with parental consent to the adoption. Still remaining is the issue of whether adoption is to be permitted. Under the general adoption legislation, the judge need not allow adoption if it is not in the best interest of the child.³² That general rule should apply in all adoptions, including those based on 9:422.1.

In *Adoption of Schieman*,³³ the second wife sought to adopt children of her present husband's prior marriage. The husband had been granted custody of the children and the first wife, now living out of state and remarried, had not contributed to the child's support. Petitioner relied on Section 3 of the statute, which dispenses with consent if:

allowed. *In re Lafitte*, 247 La. 856, 174 So.2d 804 (1965); *In re Moody*, 201 So.2d 222 (La. App. 2d Cir. 1967). To the contrary, when child support was suspended by court order while the wife took the child from the state, the statute's requirements were not met and adoption was not allowed; in effect, no child support was due. *In re Bickerstaff*, 190 So.2d 117 (La. App. 4th Cir. 1966). Also, the father was justified in discontinuing child support payments when he and his second wife were ill and financially depressed and the first wife with custody moved about the country and kept her whereabouts secret to prevent the father from visiting his children; adoption was not permitted. *In re Hughes*, 175 So.2d 158 (La. App. 4th Cir. 1965).

30. 200 So.2d 784 (La. App. 3d Cir. 1967).

31. *Id.* at 785.

32. LA. R.S. 9:432B (1950) (as amended by La. Acts 1960, nos. 250, 268.).

33. 204 So.2d 433 (La. App. 4th Cir. 1967).

"The other legitimate parent is a nonresident of this state and has failed to support the child for a period of one year after judgment awarding custody to the mother or father or grandparent or grandparents."³⁴

Section 2 covers the situation when noncompliance with a court order of support is involved; Section 3 does not require there be a court order of support, it merely refers to a nonresident who fails to support. Thus, literal compliance with Section 3 would appear to have been met.

However, the court held Section 3 inapplicable because the ex-wife, the nonresident parent, had not been charged with the responsibility of supporting the child. Section 3 would thus apply only when the nonresident parent was under some obligation to support the child (other than under a court order, for that situation is covered by Section 2). Petitioner argued the ex-wife did have this duty under Civil Code Article 227 which imposes a duty of support on both parents. The court held, however, that this code duty of support had been relieved by the judgment in the divorce action in which no child support was imposed on the wife.

Though specific questions might be raised about the reasoning of the decision, its result is in conformity with an interpretation of the statute put forward by Professor Robert A. Pascal:

"Very obviously the alternative to condition (2) was meant to eliminate the need for a parent's consent where he has *culpably* failed to support a child and it has not been possible to obtain jurisdiction over him to order him to support the child. But the words of the amendment are broader than that. A parent may have 'failed' to support a child because he was not able to do so at the time or because he had not been apprised of its need. 'Failure' under such circumstances would not be sufficient justification for terminating the relationship of parent and child, and adoption does just that. The judiciary will be required to interpret this inartfully drawn legislation with care to prevent it from being an instrument of injustice."³⁵

INTERDICTION

*Interdiction of Adams*³⁶ affirmed a judgment of interdiction

34. LA. R.S. 9:422.1 (1950).

35. *Louisiana Legislation of 1962 Civil Code and Related Legislation*, 23 LA. L. REV. 41, 46 (1962).

36. 209 So.2d 363 (La. App. 4th Cir. 1968).

in a situation in which the decision is clearly proper.³⁷ In its opinion, the court repeated the traditional three prerequisites to sustain an interdiction: (1) incapacity to administer one's estate; (2) inability to care for one's person; and (3) an actual necessity for the interdiction. It can be shown, however, that the third element of this formula, necessity for the interdiction, is illusory, unnecessary, and not sustained by the decisions or the Code.

Article 389 provides for interdiction of persons "subject to an habitual state of imbecility, insanity or madness."³⁸ Nothing is said about necessity. In fact, by the terms of this article, incapacity to administer an estate or to care for one's person are not required; only habitual imbecility, insanity, or madness need be shown.

Article 422³⁹ provides for interdiction of persons not insane but who "owing to any infirmity, are incapable of taking care of their persons and administering their estates." No reference to necessity is made.

The necessity requirement apparently stems from *Francke v. His Wife*, where the court concluded its decision denying interdiction with:

"Under our law, to justify such a sentence, three causes are indispensable:

"First—The indisputable incapacity to administer one's estate.

"Second—The absolute inability to care for one's person.

"Third—An actual and unavoidable necessity to interdict. *In this case only one of these conditions, the first, was shown to exist.*"⁴⁰ (Emphasis added.)

37. Defendant, an aged unmarried schoolteacher living alone in a large house on St. Charles Avenue in New Orleans, became senile to the point of allowing three men, allegedly from the Sewerage and Water Board, to live in her home under the belief they had a right to do so though she feared harm from them. She was clearly incapable of caring for herself without aid and could not manage an estate worth more than \$200,000.

38. LA. CIV. CODE art. 389: "No person above the age of majority, who is subject to an habitual state of imbecility, insanity or madness, shall be allowed to take care of his own person and administer his estate, although such person shall, at times, appear to have the possession of his reason."

39. *Id.* art. 422: "Not only lunatics and idiots are liable to be interdicted, but likewise all persons who, owing to any infirmity, are incapable of taking care of their persons and administering their estates.

"Such persons shall be placed under the care of a curator, who shall be appointed and shall administer in conformity with the rules contained in the present chapter."

40. 29 La. Ann. 302, 315 (1877).

Here, the court found incapacity to administer an estate, but no incapacity to care for the person. This in itself is sufficient to sustain the judgment denying the interdiction since the two requirements of Article 422 were not met. The statement regarding necessity as a third requirement was clearly dictum and unnecessary to the decision. In *Francke*, defendant wife was living apart from her husband in her mother's home after a short commitment in an asylum. She sued for divorce and apparently could prove adultery by the husband with a mistress who lived in his house and bore him children. The husband's subsequent suit for interdiction came to defeat the wife's divorce action. Under existing law, the husband would automatically be curator of his wife if interdicted. In its opinion, the court spent much time considering the extreme fact situation involved, the wisdom of placing the woman in custody of an unfaithful husband and the blight of a judgment of interdiction on family honor.

*Interdiction of Watson*⁴¹ next considered the problem and denied interdiction of a young man with obvious mental deficiencies. He could neither take care of his person nor manage his property. Nevertheless, interdiction was denied because of a lack of necessity—he was well cared for by his family and his property interests were apparently well managed by his stepfather. The court said, "The case is almost a complete parallel to that of Mrs. Francke. The malady of both is the same. Neither is able to take care of his person or his property."⁴² (Apparently the court misread *Francke* in this regard; Mrs. Francke was able to care for her person.) Justices White and Spence dissented, on the ground the court was using the necessity requirement to exercise a discretion it did not have under the code provisions.

The next case on the subject, *Calderon v. Martin*,⁴³ did not mention the necessity requirement and granted an interdiction. The court distinguished *Francke*, pointing out its extenuating facts were not present.

Retreat from the *Francke-Watson* necessity requirement came in *Pons v. Pons*.⁴⁴ Inability to care for person and incapacity to manage property were found, meeting the two code requirements for interdiction. The trial judge denied interdiction nevertheless, on the ground of no showing of necessity. The Supreme Court reversed after full consideration of the issue

41. 31 La. Ann. 757 (1879).

42. *Id.* at 760.

43. 50 La. Ann. 1153, 23 So. 909 (1898).

44. 137 La. 25, 68 So. 201 (1914).

on rehearing. The court expressly held that once inability to care for person and property is shown, interdiction must be ordered; there is no basis for admitting a necessity requirement in the law. Or, as the court put it: "The necessity arises, however, from the obligation imposed upon the courts, to obey the mandates of the law which declares that: . . . [citing articles 389, 390, 391, 422]." ⁴⁵ *Francke* was distinguished because of its extreme facts and was said to rest on the fact that insanity or imbecility was not proved and that the defendant could care for her person. *Watson* was distinguished and said to rest on the fact that evidence there failed to make out a case for insanity. O'Niell dissented from the decision because no necessity for interdiction was shown.

Thus, the necessity requirement, in its inception, was dictum. The one case actually holding that interdiction would not be allowed because of a lack of necessity even after incapacity to care for property and person were shown, *Interdiction of Watson*, was de facto overruled by *Pons v. Pons*.

In no subsequent case found has denial of interdiction resulted when (1) inability to care for person and (2) incapacity to care for estate were shown.⁴⁶ Granted, the 3-fold test has been repeated often, but in all these cases, either (1) all three requirements were met, so the decisions are dictum as to the third requirement or (2) interdiction was denied because of lack of proof of requirement 1 or 2. Moreover, most of these cases fail to refer to *Pons* and do not consider the fact that *Pons* does away with the necessity requirement. The most recent case, *Interdiction of Adams*, is to the same effect. Incapacity to care

45. *Id.* at 48, 68 So. at 209.

46. *Interdiction of Taliaferro*, 231 La. 394, 91 So.2d 578 (1956) (Interdiction denied. Defendant could manage her person and her property; she was not insane.); *Interdiction of Scurto*, 188 La. 459, 177 So. 573 (1937) (Defendant able to care for her person and her property.); *In re Corbin*, 187 La. 968, 175 So. 636 (1937) (Interdiction ordered. Defendant incapable of administering her estate and incapable of taking care of her person. Necessity requirement met because of mismanagement of property.); *Landry v. Landry*, 171 La. 280, 130 So. 866 (1930) (Interdiction ordered. Defendant unable to administer her property and unable to care for her person; necessity in that she had property that could be made to produce revenue but that was not doing so.); *Andrus v. Andrus*, 136 La. 823, 67 So. 895 (1915) (Interdiction ordered. Defendant incapable of taking care of his person or administering his estate and there was "good cause" for his interdiction in that deceased granted a general power of attorney to his son over his \$100,000 estate and other family members questioned the son's administration as agent.); *Interdiction of Reeves*, 187 So.2d 546 (La. App. 3d Cir. 1966) (Interdiction granted. Defendant unable to care for his person or his estate.); *Doll v. Doll*, 156 So.2d 275 (La. App. 4th Cir. 1963) (Interdiction ordered. All three requirements met; necessity though defendant not squandering his property since the purpose of the law is to conserve property and protect the person.).

for person and property was found, so the statement about the necessity requirement was again dictum.

Furthermore, as a practical matter, the courts consider the necessity requirement to be met if requirements 1 and 2 are met. If a person is incapable of caring for his person, he needs assistance to do so and the necessity requirement is fulfilled. If he is incapable of administering his estate, he needs assistance from a curator on that point, and the necessity is present. The necessity requirement, fulfilled in early cases when defendant was squandering his property, has been watered down to the point the courts are saying it is satisfied if defendant owns property that could be squandered even though it is being well managed.⁴⁷ Thus, the necessity requirement has become somewhat meaningless.

The reluctance of the early cases to allow interdiction comes from conceptions of Creole honor under which such a judgment blighted a family's name. In today's society, where mental illness and senility are accepted as disease rather than dishonor, the underlying rationalization for the necessity requirement is eroded. In *Francke*, the reluctance to interdict came from the fact of a husband living openly with a mistress and attempting to interdict his wife to defeat a divorce action she had instituted. Considering the malevolent motives of the husband, the court's tendency is understandable, but *Francke* should be restricted to its hard facts and its nineteenth century conceptions of honor.

Thus, it would be more realistic to openly acknowledge that the necessity requirement is not required by the Code, is not required by the cases, and has been interpreted to the point where it is meaningless and adds little to the inquiry.

Looking to the future, it has been suggested it would be desirable to provide for interdiction of persons unable to care for their estates *or* unable to care for their persons.⁴⁸ Only one condition would be required, rather than both. As the law now stands, it is generally assumed that both requirements must be met. One can question that assumption, however. Could it have

47. *In re Corbin*, 187 La. 968, 175 So. 636 (1937); *Landry v. Landry*, 171 La. 280, 130 So. 866 (1930); *Doll v. Doll*, 156 So.2d 275 (La. App. 4th Cir. 1963). In *Watson*, the lack of necessity resulted from defendant's being cared for by his family and his property being well managed by his stepfather. Under the modern decisions, the necessity requirement would probably have been met since there was property to administer.

48. *The Work of the Louisiana Appellate Courts for the 1963-1964 Term—Minors and Interdicts*, 25 LA. L. REV. 298, 299 (1965).

been intended that a person unable to manage his estate because of some mental deficiency short of insanity but able to care for his person should not be interdicted when he was wasting his property to his detriment?

The courts are moving in this direction of allowing interdiction when a person is unable to care for his property though he may be able to care for his person. This has been done by interpreting the caring-for-person requirement to mean more than performing menial tasks such as dressing, washing, and doing household chores. In the language of the decisions, insane persons are often able to do these things, and more capabilities than these must be present to thwart a judgment of interdiction.⁴⁹

PROPERTY

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Predial servitudes are immovable¹ real rights.² The term "real right" under the civil law is anonymous with proprietary interest, both of which refer to a species of ownership."³ This definition, although questionable as to some types of real rights, is certainly correct as to predial servitudes, since they result from a partial dismemberment of the elements of ownership.⁴

It must follow that rules on the acquisition of ownership of immovables are generally applicable to the acquisition of predial servitudes.⁵ But an opposite conclusion was indicated⁶ in *Blanda v. Rivers*.⁷ The case posed a question of whether possession of

49. *In re Corbin*, 187 La. 968, 175 So. 636 (1937); *Landry v. Landry*, 171 La. 280, 130 So. 866 (1930).

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1. LA. CIV. CODE art. 471.

2. *Id.* art. 490.

3. 2 A. YIANNPOULOS, LOUISIANA CIVIL LAW TREATISE 265 (1967), quoting from *Hardwood Oil & Mining Co. v. Black*, 240 La. 641, 651, 124 So.2d 764, 767 (1960) and *Reagan v. Murphy*, 235 La. 529, 541, 105 So.2d 210, 214 (1958).

4. See 2 A. YIANNPOULOS, CIVIL LAW TREATISE 265 (1967).

5. Of course, it would seem inappropriate to mechanically apply such general rules where there are contrary special rules on servitudes, or where special interpretation is appropriate to accommodate peculiarities of servitude problems.

6. The word "indicated" is advisedly used. It is questionable whether the court really "held" that the rules of the rejected articles were inapplicable, in spite of language to that effect. After rejecting the articles on precarious possession, the court stated that adverse possession "is essential in the acquisition of ownership by prescription . . . and must also be an element in the acquisition of a predial servitude." 210 So.2d 161, 166 (La. App. 4th Cir. 1968). It is impossible to hold at the same time that possession may be precarious but must be adverse.

7. 210 So.2d 161 (La. App. 4th Cir. 1968). The case is also interesting for its holding that visible gas, sewer, heating flue, and water pipes were the subject