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Private Law: Persons

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And further,

> "Those decisions will be the means of improving legislation, but will not be laws themselves; the departments of government will be kept within their proper spheres of action. The Legislature will not judge, nor the Judiciary make laws."[13]

PRIVATE LAW

PERSONS

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In *Tannehill v. Tannehill*[1] plaintiff sued to have his marriage declared null and to disavow the child born to his purported wife. The trial court sustained exceptions of no cause of action as to both claims. The Third Circuit Court of Appeal reversed the exception as to the claim of nullity, but sustained it as to the action of disavowal. However, two judges dissented on the question of the action of disavowal.

The action of nullity rested in part upon article 3941 of the Code of Civil Procedure. Plaintiff alleged that defendant had obtained a divorce in LaSalle Parish purporting to dissolve a previous marriage while she and her husband were both domiciled in Winn Parish. Article 3941 provides that an action for divorce must be brought in the parish of domicile or of last matrimonial domicile under penalty of absolute nullity. The defendant's exception to the action of nullity was based upon "the strong jurisprudential rule preventing collateral attack upon divorce decree," a rule stated in *Wilson v. Calvin.*[2]

The court of appeal correctly distinguished the *Wilson* case from that before it on the ground that the *Wilson* ruling expressly barred collateral attacks on decisions only on "errors or irregularities *not jurisdictional,*"[3] whereas the error in venue in the divorce purporting to dissolve Mrs. Tannehill's previous marriage was one that was jurisdictional under article 44 of the Code of Civil Procedure. The court, however, indicated uncer-

13. *Id.*, 1 LOUISIANA LEGAL ARCHIVES LXXXV, XCIII (1937).

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1. 226 So.2d 185 (La. App. 3d Cir. 1969).
2. 221 La. 451, 59 So.2d 451 (1952).
3. *Id.* at 453, 59 So.2d at 453. (Emphasis added.)

tainty as to the correctness of its decision on the ground that "to permit collateral attacks such as the present is unwise and . . . may well have not been contemplated by the redactors of the 1960 Code of Civil Procedure."[4]

It is puzzling that the court treated the issue as one of purely procedural law. Nowhere in the decision is the applicable substantive law mentioned. If one turns to the applicable articles of the Civil Code, it becomes clear that the court reached the right result in *Tannehill* with respect to the action for nullity.

The substantive ground of the claim of the nullity of the *Tannehill* marriage must be article 93 of the Civil Code which prohibits married persons from contracting other marriages until the existing marriage is dissolved by law. Under article 113 of the Civil Code the incapacity stated in article 93 is one which "may be impeached either by the married person [persons] themselves, or by any person interested, or by the Attorney-General . . . ." The court could not have decided otherwise in *Tannehill* without destroying the absolute character of the nullity established in article 113. Any intent of the redactors of the Code of Civil Procedure to limit collateral attacks on judgments would have to yield to the positive substantive law, at least absent a clear expression of this intent.

The court's decision on the other exception of no cause of action is more dubious, as the dissent of two judges points up. The primary ground urged by plaintiff to disavow a child born to his wife was that he could not be the father as he is "sterile because of a childhood disease and is thus biologically incapable of producing spermatozoa to conceive a child . . . ."[5] The court of appeal based its decision upon the restrictive jurisprudence of *Williams v. Williams*[6] and its questionable progeny[7] and the proposition that the "Civil Code lists only five grounds for dis-

4. 226 So.2d 185, 187 (La. App. 3d Cir. 1969).

5. *Id.* at 188. Theodore Tannehill also sought to disavow the child on the ground of the nullity of his marriage and, in a separately stated claim, to have the child declared not legitimate on the ground that possible civil effects of the marriage as putative did not extend to the child in this case. It would seem that the former claim could not really be supported as a separate cause of action and is merely a restatement of the claim as to the lack of civil effects of a putative marriage which the court did not reach.

6. 230 La. 1, 87 So.2d 707 (1956).

7. *See* Lambert v. Lambert, 164 So.2d 661 (La. App. 3d Cir. 1964), and Comment, 23 LA. L. REV. 759 (1963).

avowal, none of which include the sterility of the husband . . . ."[8]

The dissenting judges correctly pointed out that almost all the pertinent "articles are written in the negative," excluding certain grounds and that "[t]o say that the redactors of the Code meant to establish in these short paragraphs the only method by which the legitimacy of a child could be contested" would be "to do an injustice to the intelligence of those men who were the writers of a Code on which the majority of our law is based."[9] The truth of the dissenting judges' observation on this point is borne out by the legislative history of article 313 of the Code Napoléon from which article 185 was drawn and which is identical to it. The *Projet* of the French *Code Civil*, like the Louisiana Digest of 1808, provided that non-paternity could not be proved by the "natural *or accidental* impotence of the husband,"[10] but after considerable debate the words "or accidental"[11] were stricken in order that accidental impotence, a ground not set forth explicitly, might be urged in an action to disavow.[12]

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8. 226 So.2d 185, 188 (La. App. 3d Cir. 1969).

9. *Id.* at 191.

10. For the relevant provision of the Projet of the French Code, *see* 10 FENET, RECUEIL COMPLET DES TRAVAUX PREPARATOIRES DU CODE CIVIL 3-4 (1836):

"L'enfant conçu pendant le mariage a pour père le mari.

"La loi n'admet contre cette paternité, ni l'exception d'adultère de la part de la femme, ni l'allegation d'impuissance naturelle ou accidentelle de la part du mari."

For the relevant provision of the Louisiana Digest of 1808, *see* La. Digest of 1808, bk. 1, tit. VII, art. 7 at 44.

11. *See* FRENCH CIV. CODE art. 313; 10 FENET, RECUEIL COMPLET DES TRAVAUX PREPARATOIRES DU CODE CIVIL 11 (1836).

12. *See* 10 FENET, RECUEIL COMPLET DES TRAVAUX PREPARATOIRES DU CODE CIVIL 5 n. (1836), a passage drawn from MEMOIRES DE M. THIBAUDEAU SUR LE CONSULAT 449-52. The following is the writer's translation of part:

"The First Consul: The consequence of adultery is not always a child. If a woman sleeps with her husband and with another man, one should presume the child belongs to the husband. It is not evident that it isn't his, it is very possible that he is the father of it. Impotence is a vague word, it could be only temporary. This is not a question of the interest of the wife, but of that of the child. The potency of the husband is proved by the existence of the child. What physician could say what the sickness is that renders one impotent and can give assurance that a germ of potency does not remain. It is otherwise when one opposes the physical fact of the absence of the husband (to the claim of legitimacy). . . ."

The Second Consul insists upon these two exceptions in certain cases.

"The First Consul: While there is a possibility that the child is the husband's, the law-maker should clasp his hand over his eyes. The child should be regarded as an interested third party."

The Second Consul is aroused against the inflexibility of the principle.

"The First Consul: You, who have experience at the bar, you have never seen impotence. When it needs to be proved, the wife always says the child proves the potency. In this contest, who will take care of the interests of the child, if it is not the law. There should be a fixed rule to

Nonetheless there are questionable points in the reasoning of the dissenting judges. Their argument rests upon the legitimacy of distinguishing *impotence* from *sterility*. Although the former could not be urged (if it were natural) under article 185, the latter might not be excluded by that article. However, it is probable that the word impotence as it was used in 1825 included sterility as well as the inability to perform the sexual act.[13] Yet the dissenting judges are correct in drawing this dis-

lighten all the doubts. It is said that this is against good morals. No, because if the absolute principle were not adopted, the wife would say to the husband, Why do you wish to hamper my liberty? If you suspect my virtue, you have the means of proving that the child isn't yours. One should not tolerate this. The husband ought to have an absolute power and the right to say: Madame, you will not go out, you will not go to the comedy, you will not see such or such a person, because the children which you will make will be mine. . . ."

"Maleville: But suppose the husband becomes impotent by a wound, a gunshot. There are cases of it."

"The First Consul: One should perhaps allow accidental impotence. But it must be clear as the sun. All the rest is only illusion."

Maleville, after agreeing in general with the spirit of the Projet on the subject, added:

"But there is a kind of accidental impotence which can be encountered after the marriage, whether because of battles or for some other cause, which cannot leave the least doubt, and one should not bar by an absolute rule the exceptions which can be produced." *Id.* at 10.

Napoleon responded that he thought it best to limit the exception (of impotence) to accidental impotence, but that it was not possible to recognize natural impotence, adding: "The law maker should not try to penetrate within the secrets that nature has hidden from him; besides, her silence is in the interest of children. Accidental impotence, to the contrary, is a physical fact about which one cannot be deceived. . . ." *Id.* at 10-11. After Napoleon expressed his view, the law was quickly adopted with amendment omitting the word "accidental," emphasizing "natural."

By omitting "accidental" from the list of grounds excluded, the redactors intended to permit a ground of attack on the legitimate filiation of a child not specifically spelled out. Thus disavowal on the ground of accidental impotence is permitted in France, though not specified as a ground for disavowal.

However, in practice the French might not go so far as the dictum of the dissenting judges would indicate. *See* 1 PLANIOL, CIVIL LAW TREATISE Nos. 1430-33 (La. St. L. Inst. transl. 1959).

Two defenses would have been raised to Mr. Tannehill's action for disavowal had the case arisen in France: (1) that the "impuissance" was natural and not accidental and (2) that even if it were deemed accidental, it could not be urged as the condition arose before marriage. On these points, the doctrine is divided. *See* 9 AUBRY ET RAU, DROIT CIVIL FRANÇAIS at nos. 48, 67 (7th ed. Esmein 1953).

13. In 9 AUBRY ET RAU, DROIT CIVIL FRANÇAIS (7th ed. Esmein 1953), the authors, in referring to the exception of accidental impotence, state "L'accident doit avoir rendu le mari absolument *incapable d'engendre*.... (Emphasis added.) *Id.* at 62 n. 48. In addition to referring to this impotence as one of the husband's being incapable of engendering, rather than incapable of performing the sex act, the authors refer to a case involving sterilization by radium, decided by a court of appeal as falling within the exception of accidental impotence.

In Latin, sterility is treated as a species of the category of impotence, *impotentia generandi* (the incapacity to procreate), as distinguished from

tinction insofar as the *rationale* of excluding natural impotence as a basis for disavowal is concerned, since the exclusion of this ground in the Code Napoléon and the Louisiana Civil Code rested on the impossibility *at that time* of ascertaining the natural impotence, whereas today it is possible. It is submitted that despite the historic evidence that the word "impotence" included "sterility," the former word is sufficiently ambiguous to permit an interpretation excluding the latter from its prohibition by application of the principle *cessante ratione legis, cessat lex ipsa.*[14] To so interpret it would bring the norms applied by Louisiana courts more closely in accord with the traditional civilian concept of justice.[15]

In *Succession of Vincent*[16] an illegitimate child, whom her father had duly acknowledged by notarial act, claimed his succession over the decedent's collateral relations. The basis of her claim was that to deny her a right which a legitimate child would have would be a denial of equal protection of the laws guaranteed by the Fourteenth Amendment as interpreted by the United States Supreme Court in the *Levy*[17] and *Glona*[18] decisions. The Third Circuit Court of Appeal denied the illegitimate's claim, but an appeal has been filed with the United States Supreme Court, which has noted probable jurisdiction.[19]

While stating that it found persuasive[20] the reasoning of the Supreme Court of North Dakota, in a decision where that court found that the rationale of *Levy* and *Glona* extended to

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impotentia coeundi (the incapacity to copulate). Most of the Romance languages use their derivatives of *impotentia* in both senses, although in French, *impuissance* has taken on the primary meaning of only the incapacity to copulate. *See, e.g.*, the definition of impuissance in LE PETIT LA ROUSSE (6th ed. 1964).

Toullier traces the exception of impotence, the presumption of *pater est quem nuptiae demonstrant*, back to a provision of Roman law found in the Digest (and quoted extensively in the consideration before the Council of State) that the child is not considered that of the husband if by reason of ill health the husband is not capable of engendering life by her—"*Si ea valetudine paterfamilias fuit generare non possit.*" 1 TOULLIER, DROIT CIVIL FRANÇAIS 252 (1833).

14. The reason of the law having ceased, the law itself ceases.

15. DIGEST 1.1.10. (*Ulpianus libro primo regulatum*): "*[I]uris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*" The precepts of justice are these: to live honorably, not to harm another, to render to each that which is his.

16. 229 So.2d 449 (La. App. 3d Cir. 1969).

17. Levy v. Louisiana, 391 U.S. 68 (1968).

18. Glona v. American Guar. and Liab. Ins. Co., 391 U.S. 73 (1968).

19. *Sub nomine* Labine v. Vincent, Appellate Docket Number 5257, October Term 1970, 39 U.S.L.W. 3146 and 3184.

20. 229 So.2d 449, 451 (La. App. 3d Cir. 1969).

matters of inheritance as well as wrongful death,[21] the Third Circuit Court of Appeal nonetheless ruled articles 206 and 919 of the Civil Code do not violate the equal protection clause because, unlike the wrongful death provision of article 2315, the limitation of rights of inheritance of illegitimates does have a rational relation to the legitimate state policies of encouraging marriage so as to discourage illegitimacy and insuring stability of land titles.[22]

It is difficult to see how the former rationale can withstand constitutional objection when the Louisiana court itself describes the policy as one that works "[t]o punish innocent children for the fault of their parents."[23] Conceptually, the court is in error in failing to distinguish between the *deprivation* of a right which would constitute punishment and not *granting* a right in the first place which might constitute discrimination but which is not, properly speaking, punishment. If one grants the court's assumption that the law is punishing the illegitimate child, then one must then ask whether it is inflicting a deprivation of property without due process.

The second justification which the court gave in defense of the Code, that of stability of land titles, is better founded. This reasonable state interest might have sufficed to uphold the provisions of the Civil Code in question under the pre-*Levy* standards of equal protection that allowed states great latitude in making reasonable classifications.[24] But the court of appeal erred in viewing these standards as unmodified by the *Levy* and *Glona* decisions.[25] In *Levy*, Mr. Justice Douglas concluded that it was invidious discrimination against illegitimates when "no action, conduct, or demeanor of theirs" was relevant to the classification at issue.[26] In the *Vincent* case, the court of appeal failed to point to any such qualities of the illegitimate that would serve to justify a distinction contrary to her interest.

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21. Estate of Jensen, 162 N.W.2d 861, 878 (N.D. 1968).
22. 229 So.2d 449, 451-52 (La. App. 3d Cir. 1969).
23. *Id.* at 452.
24. *E.g.*, the court of appeal in Succession of Vincent, 229 So.2d 449, 451 (La. App. 3d Cir. 1969) cites Morey v. Doud, 354 U.S. 457 (1957), and United States v. Burnison, 337 U.S. 87 (1950).
25. *See* note 24 *supra.*
26. 391 U.S. 68, 72 (1968). The language used by Justice Douglas has immediate reference to the lack of relevance of the distinction between illegitimates and legitimates "to the harm that was done their mother," but it would be illogical to narrow the principle implicit in the statement to something narrower than that stated in the text above.

It is submitted that the bench and bar of Louisiana should prepare themselves for the task of minimizing the disruptive impact of an overruling of the *Vincent* case in the likely event that the Supreme Court decides not to overrule *Levy*. *Burnett v. Camden*,[27] a recent Indiana case, may serve as a guide for Louisiana courts in interpreting the equal protection requirement. There the Supreme Court of Indiana sustained the constitutionality of its statute of descent and distribution which granted illegitimates the same *share* as legitimates, but imposed upon them a heavier procedural burden.[28] The United States Supreme Court refused to overrule the Indiana court.[29]

Burnett v. Camden suggests that the equal protection clause may merely require an equality of share and not an equality in the means by which the share is claimed. Thus, Louisiana courts could still treat illegitimates as not being *seized* of the succession, but rather as irregular heirs entitled to *demand* the same share of an estate as a legitimate would have. In that case the heirs would be personally obligated to pay the illegitimate's share, but could easily dispose of property free of encumbrance by the illegitimate's claim.

Fortunately, as the *Vincent* case involves an acknowledged child, it is possible that the Supreme Court itself might do much to limit the potentially unsettling effect of *Levy* in succession matters by making it clear in its decision in *Vincent* that it is invidious to discriminate between illegitimate and legitimate children only where the former child is freely and openly treated by the deceased as his own. It is submitted that such a decision would be consistent with *Levy*, where ties of spirit or emotion and of dependency between parent and child, as well as of biology, were relied upon by Justice Douglas in writing the opinion.[30] Such a limitation would be wise and in the interest of children conceived out of wedlock in the future, lest unmarried pregnant women be forced to choose abortion rather than bearing and surrendering their children for adoption from

27. 254 N.E.2d 199 (Ind. 1970), *rehearing denied*, 255 N.E.2d 650 (Ind. 1970).

28. The particular burden imposed on the illegitimate was that of having to prove paternity while the alleged father was still alive. However, it may be that other burdens would also be constitutional so long as the illegitimate were given an equal share.

29. *App. dism'd, cert. denied*, 38 U.S.L.W. 3504 (U.S. June, 1970).

30. 391 U.S. 68, 72 (1968).

fear of the public humiliation which might result from the child's later exercising the strengthened rights of inheritance which it would retain under article 214 of the Civil Code.

PROPERTY

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PUBLIC THINGS

According to Louisiana civilian classification, the category of public things includes property of the public domain, property of the private domain, and things subject to public use, whether they belong to a public body or to a private person.[1] In the 1969-1970 term, Louisiana courts decided a number of interesting cases dealing with property of the public domain, such as navigable waterbottoms, and things subject to public use, such as roads and streets, parks, cemeteries, and banks of navigable rivers.

Navigable Waterbottoms

According to well-settled principles of Louisiana civil law, navigable waterbottoms are things of the public domain which, by definition, are insusceptible of private ownership.[2] An involved course of legislative action, however, and judicial interpretation of obscure texts, have resulted in the recognition of private ownership in beds of certain navigable waters.

Originally, the prohibition against alienation by the state of the navigable waters was based upon the interpretation placed by the courts on article 453 of the Civil Code. The first direct prohibition occurred in 1886 when Act 106[3] of that year declared that the state owned all waters adjoining the Gulf and at the same time provided that the public ownership of these waters should be continued and maintained. Subsequently, the prohibition was fortified by the judicial doctrine of "inherent sover-

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1. *See* A. YIANNOPOULOS, CIVIL LAW PROPERTY § 30 (1966).

2. *See* LA. CIV. CODE arts. 453, 482; Miami Corp. v. State, 186 La. 784, 173 So. 315 (1936); State *ex rel.* Saint v. Timothy, 166 La. 738, 117 So. 812 (1928); State *ex rel.* Bd. of Comm'rs v. Capdeville, 146 La. 94, 83 So. 421 (1919); Louisiana Navigation Co. v. Oyster Comm'n, 125 La. 740, 51 So. 706 (1910); Milne v. Girodeau, 12 La. 324 (1838). *But cf.* California Co. v. Price, 225 La. 706, 734, 74 So.2d 1, 11 (1954), declaring that the bottoms of navigable lakes and bays "are by their nature susceptible or capable of private ownership."

3. *See* La. Acts 1886, No. 106, now LA. R.S. 49:3 (1950). *See also* La. Acts 1892, No. 110; La. Acts 1896, No. 121; La. Acts 1902, No. 153; La. Acts 1904, No. 52; La. Acts 1924, No. 139; La. Acts 1932, No. 67; La. Acts 1938, No. 55.