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Lee Hargrave

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The Work of the Louisiana Appellate Courts for the 1970-1971 Term

A Symposium

[*Editor's Note.* The articles in this symposium discuss selected decisions of Louisiana appellate courts reported in the advance sheets dated July 1, 1970 to July 1, 1971.]

PRIVATE LAW

PERSONS

*Lee Hargrave**

The Obligation of Support—Criminal Neglect of Family

The obligation of a man to support his wife and children has been imposed by Louisiana's positive law from the earliest days and remains an important part of the present Civil Code.¹ Ironically, however, the procedures for enforcing this basic humanitarian obligation remain inadequate. The wife is prevented from suing her husband for support during the marriage until a suit for separation from bed and board or divorce is filed.² The minor child is also denied the capacity to sue his parents as long as he is not emancipated or his parents are not judicially separated or divorced; even after separation or divorce, he cannot sue the parent granted his custody and control.³

Absent some other effective remedy, the combined result of this legislation is to encourage separation and divorce actions by wives seeking support payment for themselves and their children.⁴ If the state is interested in discouraging such separations and divorces and in encouraging marital stability, it ought to remove the above-mentioned procedural incapacities so that

* Associate Professor of Law, Louisiana State University.

1. LA. CIV. CODE arts. 120, 227, 228. Substantially similar earlier code provisions are: LA. CIV. CODE arts. 122, 243, 244 (1825); LA. DIGEST of 1808, bk. I, tit. IV, art. 20; bk. I, tit. VII, art. 46, bk. I, tit. VII, art. 47.

2. LA. R.S. 9:291 (Supp. 1961), *added by* La. Acts 1960, No. 31, § 2, on recommendation of the Louisiana State Law Institute to transfer into the Revised Statutes provisions of La. Code of Practice art. 105 (1870).

3. LA. R.S. 9:571 (Supp. 1961), *added by* La. Acts 1960, No. 31, § 3, on recommendation of the Louisiana State Law Institute to transfer into the Revised Statutes provisions of La. Code of Practice art. 104 (1870).

4. Though a wife may not wish to be judicially separated or divorced, she must sue for one or the other to avoid the procedural incapacities to her suit for support. *See The Work of the Louisiana Appellate Courts for the 1963-1964 Term—Persons*, 25 LA. L. REV. 291, 298 (1965).

those in need can effectively enforce the obligation of support during the existence of the marriage. This the state has not yet chosen to do.

Rather, the state chose to make neglect of family a criminal offense and to enforce the support obligation through a succession of statutes patterned after the Uniform Desertion and Non-support Act,⁵ now codified as articles 74 and 75 of the Criminal Code.⁶ Accepting the incapacity of the wife and children to sue for support, the district attorney was chosen as the party to enforce the obligation. This does circumvent to some extent the procedural incapacities of the main parties in interest, but it is a remedy with which many district attorneys are not sympathetic, especially since overworked prosecutors have more important priorities to contend with in light of expanding criminal activity. The legislation also deprives the overall scheme of its most effective enforcers; it would seem reasonable to assume that the deprived parties, the neglected wives and children, would be the most anxious and energetic enforcers of their rights, rather than some government agency or official.⁸

Even so, the criminal neglect statute demonstrates the desire of the state to lend its coercive power to enforcement of the support obligation.⁹ However, the courts' restrictive interpretation of those statutes has prevented them from being as effective as they might be.¹⁰ The recent case of *Marchese v. Schulte*¹¹

5. 10 U.L.A. (1922).

6. LA. R.S. 14:74, 75 (1950). See La. Acts 1902, No. 34; La. Acts 1932, No. 77, § 1; La. Acts 1942, No. 43, arts. 74, 75; La. Acts 1950, No. 164, § 1; La. Acts 1952, No. 368, § 1; La. Acts 1968, No. 233, § 1; La. Acts 1968(E.S.) No. 14, § 1. Similar provisions were incorporated into the constitution by La. Acts, No. 543, adopted Nov. 3, 1964, as LA. CONST. art. VII, § 54. By La. Acts 1966, No. 311, § 2, similar provisions were incorporated into the Revised Statutes as LA. R.S. 15:304 (1950).

7. See *The Work of the Louisiana Supreme Court for the 1951-1952 Term—Criminal Law*, 13 LA. L. REV. 230, 247 (1953).

8. Granted the fact that some wives and children do not have the ability to hire an attorney to represent them in such proceedings, the possibility of having the district attorney act for them fills a void. But the gradually increasing availability of free legal services makes more attractive the option of enforcement by private litigation rather than unqualifiedly requiring enforcement by a district attorney. When there are substantial back payments due, as in *Marchese v. Schulte*, 235 So.2d 605 (La. App. 4th Cir. 1970), the possibility of hired attorneys increases.

9. LA. R.S. 14:75 (1950), comment by the reporters; Bennett, *The Louisiana Criminal Code—A Comparison of Prior Louisiana Criminal Law*, 5 LA. L. REV. 6, 39 (1942).

10. See Comment, 10 LA. L. REV. 481 (1950); Comment, 12 LA. L. REV. 301 (1952); *Louisiana Legislation of 1952*, 13 LA. L. REV. 21, 59 (1952); *The Work of the Louisiana Supreme Court for the 1951-1952 Term—Criminal*

continues this restrictive interpretation by denying enforcement of the criminal support order in the civil courts. It holds that a divorced wife and children (the procedural incapacity to sue having been removed by the divorce) cannot collect by civil proceedings *arrearages* in support payments the husband/father had been ordered to pay by a juvenile court applying the provisions of article 75 of the Criminal Code.

The neglect statutes, amended many times to make them more effective,¹² now provide that a defendant (by the terms of article 74) who deserts or intentionally does not support his children or his wife who are in destitute or necessitous circumstances is guilty of a criminal offense. He can be fined not more than five hundred dollars or sentenced to imprisonment for not more than six months, or both; but by the terms of article 74, "if a fine should be imposed, the court may direct it to be paid in whole or in part to the wife . . . or the minor child or children" If a fine is imposed and paid to the state, one can say this is a criminal proceeding; but it could also be said that it is a criminal remedy imposed to implement a civil obligation which cannot otherwise be enforced, as the comment by the reporters for the Criminal Code indicates.¹³ The coercive force of the state is being used as a means of encouraging the defendant to support his family. However, if the "fine" is paid to the family rather than to the state, one is leaving the "criminal" law, for the criminal law's domain hardly encompasses forcing one individual to pay money to another. This is more akin to the relationships created by the civil law, and the provisions of article 74 allowing the paying of the "fine" to the wife and children seem as "civil" as they are "criminal." The whole legislative scheme is to enforce a civil obligation of support, and the district attorney serves as a means of aiding the family which is unable to aid itself because of the procedural incapacity to sue.

Law, 13 LA. L. REV. 230, 248 (1953); *The Work of the Louisiana Supreme Court for the 1951-1952 Term—Persons*, 13 LA. L. REV. 230, 261 (1953); Note, 14 LA. L. REV. 898 (1954); *The Work of the Louisiana Supreme Court for the 1954-1955 Term—Persons*, 16 LA. L. REV. 211, 221 (1956); Note, 16 LA. L. REV. 799 (1956); *The Work of the Louisiana Supreme Court for the 1958-1959 Term—Persons*, 20 LA. L. REV. 201, 213 (1960); *The Work of the Louisiana Appellate Courts for the 1963-1964 Term—Persons*, 25 LA. L. REV. 291, 298 (1965).

11. 235 So.2d 605 (La. App. 4th Cir. 1970).

12. See authorities cited in notes 6 and 9 *supra*.

13. "The alimony provisions of this section are necessary in order to protect a wife who does not want to divorce her husband and yet wants to force him to support her." LA. R.S. 14:75 (1950), comment by reporters.

But even conceding that the payment of the "fine" to the wife under article 74 is somehow "criminal" rather than "civil" (since it is a penalty for prior misconduct and the defendant is penalized for failure to have supported in the past), article 75 is a different creature altogether. The article creates another option for the court, an option that is not termed a fine. Rather than, or in addition to, the fine provided, the court is granted an option which looks to the future behavior of the father/husband. The court is granted the discretion to "issue an order directing the defendant to pay a certain sum . . . to the wife . . . which sum may be increased or decreased by the court from time to time" The obligation of paying sums of money can be imposed, as one would expect, after conviction under article 74, but it also can be imposed "before the trial for criminal neglect of family" if the defendant consents. Granted, the obligation imposed under article 75 results from the contemplation of or the conviction under a criminal statute. But the obligation is not a fine. It is not in a specific lump sum. It does not punish for past actions, but provides for future support. It is the enforcement of the civil support obligation, and, functionally, once it is issued, it has no essential difference from a court order of support accompanying a divorce or separation action.¹⁴ And the statute specifically says that the sum shall be paid "to the wife, or to the tutor or custodian of the minor child, or to an organization or individual approved by the court as fiduciary for such wife or child." The sum is payable, not to the state, or through the state, but to the wife or other fiduciary. Furthermore, the amount is changeable, depending on changes in circumstances, as it is with the civil support order. As interpreted by the supreme court, the statute does not create the support obligation, but merely a means of enforcing it.¹⁵

In any event, whatever labels may be used to describe the procedure, it is a hybrid means of enforcing a civilly created duty of support with its own background and policy objectives.¹⁶

14. The amount payable under an article 75 support order and the amount payable under normal alimony may be different. See *The Work of the Louisiana Supreme Court for the 1954-1955 Term—Persons*, 16 LA. L. REV. 211, 221 (1956).

15. *State v. Mack*, 224 La. 886, 71 So.2d 315 (1954) ("in order to obtain a conviction there must be established the existence of a civil obligation to support . . ."); *State v. Hubbard*, 228 La. 155, 81 So.2d 844 (1955).

16. In *State v. Monroe*, 30 N.J. 160, 165-66, 152 A.2d 362, 365 (1959), the court used such a realistic approach to the New Jersey version of the Uniform Desertion and Nonsupport Act: "The legislative scheme comprehends

It is not truly criminal—for then there would not be the provisions for payment to individuals. It is not truly civil—for then the fine and imprisonment would not be involved. Granted, it does use the coercive power of the state to enforce the obligation—but how different is this from using the state's coercive power under civil judgment process to enforce alimony judgments by seizure and sale of a debtor's property? The state's coercive power is invoked in either case.

But the court in *Marchese v. Schulte* seems to have depended heavily on the characterization of an article 75 support order as criminal rather than civil to support its decision depriving civil courts of power to grant judgment for arrearages under an article 75 order in a proceeding brought by the neglected wife and children. The court's analysis seems to be:

- (a) article 74 is a criminal provision,
- (b) article 75 is assimilated to article 74 and also characterized as criminal,
- (c) an order of support under article 75 is a criminal judgment,
- (d) a suit by the wife and children to collect arrearages under such an article 75 order is not a civil matter,
- (e) article 2781 of the Code of Civil Procedure contemplates enforcement in civil courts of only civil judgments, and thus
- (f) this suit for arrearages cannot be enforced in civil district courts.

It is granted that articles 74 and 75 are listed in the Criminal Code and further that article 74's fine and penalties are criminal penalties. However, as discussed above, it is a step away from this "criminalness" when the payment of the "fine" under article 74 is made to the dependents. It is a further step when an article 75 order for future support is made. The attenuation is greater when one comes to enforcing an article 75 order by injunction. Further lessening of the criminal characterization

two proceedings, one civil and the other criminal, by means of a single complaint. Section 2 [analogous to article 74] defines the crime involved in the present case. Under section 3 [analogous to article 75] . . . the court may execute a final order for future support . . . Manifestly, therefore, the primary purpose is to assure an adequate and enforceable support order for the welfare of the dependents and to avert the need for public maintenance."

arises when, as in the instant case, the proceeding is to collect past-due support under the article 75 order. The obligation existed and was particularized by an order of alimony by a proper court judgment. No criminal penalties were requested for failure to comply with the order. Functionally, the plaintiff was not doing anything different from that she would have done in enforcing an alimony order by a civil court.

As said above, the problem is not one that is best handled by invoking labels or characterizations, especially since the intent of the drafters of the provisions was clearly to have the statute function in favor of the wife: "If it were not for the alimony provisions in this section a wife who did not want to divorce or judicially separate from her husband would be unable to secure anything from him other than the fine imposed for criminal neglect of family."¹⁷ The legislation can be traced to the provisions of the Uniform Desertion and Nonsupport Act, where again the purpose of the statute was to protect the wife and children. This legislation should be interpreted to effectuate that legislative intent. That could have been done in this case by realistic analysis: the enforcement procedure is neither criminal nor civil, but is a hybrid akin to civil proceedings that could be given execution under the Code of Civil Procedure as any other judgment.

Even assuming that the article 75 support order were to be labelled a "criminal" judgment, article 2781 of the Code of Civil Procedure does not preclude enforcement of arrearages under such an order by a civil court; it merely provides "[a] judgment rendered in a Louisiana court may be made executory in any other Louisiana court of competent jurisdiction, if its execution has not been and may not be suspended by appeal." There is no language saying that only judgments of "civil" courts are enforceable. All that is needed is a judgment "rendered in a Louisiana court." In this case, there was such a judgment rendered by such a court. The article does require that the second court wherein a judgment is to be made executory be one "of competent jurisdiction." In the instant case, there was no question of jurisdiction over the person. There would also be jurisdiction over the subject matter, for the constitution gives civil district courts unlimited jurisdiction over all civil matters.¹⁸ And, as

17. LA. R.S. 14:75 (1950), comments. See also notes 6 and 9 *supra*.

18. LA. CONST. art. VII, § 81.

discussed above, this is really a hybrid civil action akin to the normal support enforcement actions courts try daily and should be so treated.

The fact that the judgment of a criminal court underlay the obligation sought to be enforced does not make the suit for enforcement of the obligation criminal. It is a suit between two individuals seeking the enforcement of arrearages under an obligation created by law and recognized by a proper court.

Also lacking support is the court's statement that the twenty dollars per week ordered to be paid was not a judgment in favor of the plaintiff. The court reasoned it was a judgment "in the interest of the state of Louisiana. Any alimony ordered under LSA-R.S. 14:75 is not granted to the wife as a matter of right, but only in the discretion of the Court—as an alternative to the husband's serving a prison term."¹⁹ In answer to this, it is clear that an article 75 support order is not a judgment in favor of the State of Louisiana. By the terms of the article, the support is not paid to the state, nor even through the state; it is paid to the wife or other fiduciary for the children.²⁰ To say that the alimony is not a matter of right to the wife is of no consequence. Louisiana Supreme Court decisions have said that alimony after divorce is not a matter of right, but is payable in the discretion of the trial judge.²¹ Even it were a matter of right in the latter case and not in the former, that would still make no difference with respect to enforcement of the orders of support *once they are granted*.

In dictum the court indicates that not even a criminal or juvenile court would have the power to grant, upon suit by dependents, judgments in favor of those dependents against a husband and father providing for collection of past-due payments under article 75 support orders. The court contemplates that only the district attorney could institute suit to collect such arrearages. Certainly, article 75's provisions for enforcement contemplate action by the district attorney through contempt proceedings and possible imprisonment upon failure to pay. But article 75 does not state that it is exclusive. It would in fact be

19. *Marchese v. Schulte*, 235 So.2d 605, 607 (La. App. 4th Cir. 1970).

20. See text accompanying note 15 *supra*.

21. *E.g.*, *Jones v. Jones*, 232 La. 102, 93 So.2d 917 (1957). See *The Work of the Louisiana Supreme Court for the 1956-1957 Term—Persons*, 18 LA. L. REV. 10, 24.

exclusive so long as there is procedural incapacity for the wife or children to sue, but once removed (as following a divorce), there is no reason for denying individual action. Again, the simple fact is that the individuals who are deprived or neglected are the ones most anxious to collect and would be most efficient in collecting arrearages. Also, normal means of enforcing judgments—levying property or garnishing wages—would seem to be a more humane means of enforcement than using the statute's contempt provisions for imposing a non-supporting father, who is not likely to be able to earn money to support his family while in "debtor's prison."

It would seem, therefore, that the technical problems evidenced in this case and discussed here would be best solved by reducing the immunity from suit now granted the husband, and by allowing the wife and/or minor children to sue during the existence of the marriage. In the absence of this it would seem that a reversal of this case would be in order, or a change in the legislation making it clear that "civil" courts can entertain suits seeking to make executory judgments of "criminal" courts ordering support payments under article 75.

PROPERTY

A. N. Yiannopoulos

Public Things; Navigable Waterbottoms

In *Carter v. Moore*,¹ the Louisiana Supreme Court had the opportunity to reconsider the scope of application of Act 62 of 1912,² as interpreted in *California Co. v. Price*.³ The matter was discussed extensively in the last issue of this *Review*. It suffices to state here that the majority opinion deserves attention, because, in effect, it attributes to Act 62 of 1912 a narrower scope of application than that suggested by the *Price* decision. Thus it is now clear that when a defective patent is cancelled at the request of a successor to the original patentee, neither the 1912 repose statute nor *Price* may be invoked to compel re-issuance of the original patent. The *Carter* decision, however, is much

1. 258 La. 921, 248 So.2d 813 (1971).

2. See La. Acts 1912, No. 62, now R.S. 9:5661 (1950). For detailed discussion, see A. YIANNPOULOS, CIVIL LAW PROPERTY, § 32 (1965); Yiannopoulos, *Validity of Patents Conveying Navigable Waterbottoms; Act 62 of 1912, Price, Carter and All That*, 32 LA. L. REV. 1 (1971).

3. 225 La. 706, 74 So.2d 1 (1954).