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The Work of the Louisiana Appellate Courts for the 1971-1972 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, 1971 to July 1, 1972.]

PRIVATE LAW

LAW IN GENERAL

Robert A. Pascal*

ODIOUS LAWS AND LAWS ENTITLED TO FAVOR

Article 20 of the Louisiana Civil Code is very clear:

"The distinction of laws into odious laws and laws entitled to favor, with a view of narrowing or extending their construction, can not be made by those whose duty it is to interpret them."

The majority opinion in *Tannehill v. Tannehill* nevertheless does just that in at least one, and possibly two, instances.

In the first instance the words of odium are unmistakable:

"The artificial and arbitrary concept embodied in C.C.P. 3941 (that a divorce rendered in a parish where neither party was domiciled and where the matrimonial domicile was not located is an absolute nullity) will continue to force courts to resort to presumption, inferences and specious reasoning to sustain the legality of regular judicial proceedings and the legality of matrimonial unions regular in all respects except for the accident of venue in a prior divorce proceeding."¹

The article referred to is indeed an abuse of legislative authority, for, as the opinion notes, its provisions are most unreasonable. The same Louisiana law is applicable in every parish

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1. 261 La. 933, 937, 261 So.2d 619, 621 (1972). Tate, J., recused, having participated in the judgment of the Third Circuit Court of Appeal; Barham, J., dissented on the second point discussed here, but not on the first.

and every Louisiana judge with jurisdiction *ratione materiae* must be deemed capable of applying it. It must follow, therefore, that to strike matrimonial judgments with nullity merely because they were obtained in one parish rather than another is so unreasonable as to amount to a denial of due process to the party affected adversely by its provisions. The supreme court might very well have—indeed, should have declared the article unconstitutional; but the court's failure to declare it so and to yet assert the intention to avoid its application whenever possible is contrary to clearly stated law.²

Another violation of Civil Code article 20 may exist—and the writer is of the opinion that it does—in the failure of the supreme court to interpret³ Civil Code articles 184-90 to allow the disavowal of the husband's paternity of the wife's child on the ground of sterility. Admittedly, the opinion expressed here involves a judgment on the motives of the participating justices, for the court's opinion admits *implicitly* that articles 184-90 might be *interpreted* to include causes of disavowal not stated there in express terms, but states (1) that "the public policy is against the *attack* [i.e., the bringing of suit] on the paternity of the infant . . . unless the likelihood of success is great,"⁴ (2) that the likelihood of disproving paternity on the basis of sterility is slim because "medical opinion evidence generally lacks the quality of certainty required to prove . . . parenthood,"⁵ and (3) the husband did not allege "with [sufficient] particularity"⁶ *the cause of his alleged sterility* and therefore pleaded a conclusion of law rather than material facts. It is submitted that these reasons, especially if viewed in the light of the supreme court's admitted record of never once having found a cause for disavowal to exist in fact, are not convincing. To say that a man

2. There are other equally unjust provisions of the Code of Civil Procedure making venue jurisdictional. Particularly to be mentioned are articles 3991 (emancipation by judgment—obsolete since the lowering of the age of majority to eighteen, except possibly for the emancipation of a minor under eighteen against the will of his parents because of mistreatment, as allowed by Civil Code article 368) and 4031 (the appointment of a tutor).

3. The writer uses the word *interpret* in its narrower traditional meaning of "reading between the lines" rather than its broader connotation including *construction*.

4. 261 La. 933, 943, 261 So.2d 619, 623 (1972).

5. *Id.*

6. *Id.*

who pleads "sterility" has pleaded a conclusion of law rather than a fact is to require the pleading of *evidence of fact* rather than the pleading of the fact itself. To say "medical opinion evidence" is too uncertain to disprove paternity—especially without mention of supporting evidence—is to ignore the possibility of the existence of tests which render the uncertainty minimal. And to state that "the public policy is against the *attack* on the paternity of the infant . . . unless the likelihood of success is great" distorts the Civil Code's provisions on the subject. The court could have said with more exactness that the Civil Code allows the suit for disavowal only where it is *reasonable to believe* the husband probably is not the father of the child. In order to appreciate the point being made here one need only realize that Civil Code article 185 permits the action of disavowal on a showing of adultery plus concealment of the birth from the husband, if not on the showing of concealment above.⁷ Certainly these causes neither separately nor in conjunction eliminate the possibility the husband is the father, for the husband may have had intercourse with his wife on the very day of her adultery and her concealment of the pregnancy and birth may be motivated by a cause other than the adultery.⁸

The court's construction of Civil Code articles 184-90 therefore, betrays an attitude toward disavowal not discernible from the legislation itself. The refusal to permit a husband to prove his sterility by modern scientific tests and thereby prove his non-paternity of the child, therefore, violates the principle underlining the articles on disavowal, and in doing so violates article 20 of the Civil Code by implicitly classifying the legislation on the subject as odious. The supreme court would have performed its function better by interpreting the existing legislation, dating from the days of a poverty of science on the subject, in a manner consistent with what the redactors, if sitting today, undoubtedly would have written into the Civil Code itself.

7. The French, under CODE CIVILE art. 313, which is the same in this respect, consider proof of concealment alone sufficient to prove the adultery as well. See 1 FLANJOL, *Traité élémentaire de droit civil* nos. 1435, 1436 (12th ed. 1937).

8. It is to be noted that whereas French C. Civ. art. 313 requires evidence beyond concealment of birth tending to prove the husband is not the father of the child, LA. Civ. Code art. 185 does not.