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Private Law: Torts

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order if they are intended as a means of giving effect to dispositions which are themselves illegal or against public policy, or if intended to protect a will from attack which is otherwise null for lack of form or for any other reason.[25] In *Kern*, the court, although holding the clause in question invalid as being against public policy, seems to indicate that if the penalty had called for the forfeiture of whatever benefits the unsuccessful attacker would have derived under the will, the clause would have been given effect, provided, of course, that the dispositions the testator intended to protect were not against public policy.[26]

TORTS

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PRODUCTS LIABILITY

Weber v. Fidelity & Casualty Insurance Co.[1] demonstrates that the plaintiff in Louisiana who has suffered harm caused by a defective product has a cause of action as effective as any plaintiff enjoying the benefits of common law strict liability in the products liability field. The facts in *Weber* are unique. Plaintiff's cattle were allegedly killed by an application of improperly formulated cattle dip manufactured by defendant. Immediately after the disaster, the plaintiff cattle owner interred both the cattle and the ominous dip in a final resting place in the earth soon covered by the concrete strip of a highway. Neither the cattle nor the dip were available as evidence in the litigation. The trial court gave judgment for the plaintiff; the court of appeal reversed and gave judgment for the defendant; and the

25. Such would be the case, for example, where the clause is intended to make effective dispositions to persons incapable of receiving or to give effect to dispositions exceeding the disposable portion of the disposer, or dispositions contained in testaments which are null as to form. 11 AUBRY ET RAU ET ESMEIN, DROIT CIVIL FRANÇAIS § 692 (6th ed. 1954) in LAZARUS, 3 CIVIL LAW TRANSLATIONS 295 (1969); 3 COLIN ET CAPITANT ET DE LA MORRANDIÈRE, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS no. 1402 (9th ed. 1945); 3 JOSSERAND, COURS DE DROIT POSITIF FRANÇAIS nos. 1548, 1549 (1933). For a discussion of the problem, generally, see Brown, *Provisions Forbidding Attack in a Will*, 4 TUL. L. REV., 421 (1930).

26. "If the clause in question were restricted to protests or challenges by the legatees receiving a benefit from the will, there would be little problem in the absence of forced heirs. However, the clause in question prohibits protests by 'any heir,' whether or not he is a party to the will or benefits thereby. Under the circumstances, the legatees are virtually helpless and at the mercy of any heir not mentioned in the will." 252 So.2d at 510.

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1. 259 La. 599, 250 So.2d 754 (1971).

Louisiana supreme court, in an opinion by Justice Tate, reversed again and found in favor of plaintiff.

The court defined the cause of action and found its elements proved, as follows:

1) "A manufacturer of a product which involves a risk of injury to the user is liable to any person, whether the purchaser or a third person, who without fault on his part, sustains an injury caused by a defect in the design, composition, or manufacture of the article, if the injury might reasonably have been anticipated. However, the plaintiff claiming injury has the burden of proving that the product was defective, i. e., unreasonably dangerous to normal use, and that plaintiff's injuries were caused by reason of the defect."[2]

2) The plaintiff need not prove specific negligence by the manufacturer if the product is shown to be defective by reason of hazard to normal use, for the manufacturer is presumed to know the vices in the things he makes; and knowledge of hazard equates to foresight of risk of harm, which in turn constitutes negligence.

3) The dip was proved to be defective because the most reasonable hypothesis from the evidence is that the dip contained an excessive amount of arsenic, since the plaintiff, without contradiction, testified that the dip was mixed and applied properly, according to the instructions on the label of the dip container, and harm to the cattle resulted.

4) A preponderance of the evidence showed that the defective dip caused the cattle's deaths, since nothing else occurred between application of the dip and harm to the cattle. The evidence was circumstantial but was found by the trial judge to be credible.

Thus, plaintiff's case was complete, absent refutation by defendant. The court noted that defendant offered no evidence to show that the dip had been manufactured properly; nor did defendant successfully rebut plantiff's showing of proper mixing and application of the dip. It is submitted that the presumption

2. *Id.* at 602, 250 So.2d at 755.

of knowledge by the manufacturer is not rebuttable as a matter of law.

The most logical line of defense was the presentation of evidence that the dip contained only the proper proportion of arsenic. The unique facts of this case, with the interment of the evidence, effectively put that defense beyond the reach of defendant. Had the defense been made successfully, it would have negated the defective character of the dip, which in turn would have negated any findings of negligence.

The importance of *Weber* to the jurisprudence of Louisiana lies in the hooking together of the presumption that a manufacturer knows the defects of his products with judicial recognition if plaintiff shows through credible evidence that the product was used according to instructions, and that harm ensued, plaintiff may have made a prima facie case for a defect, if that is the most reasonable hypothesis from the evidence. The Louisiana plaintiff at that point is in precisely the same position as a common law plaintiff operating under benefit of common law strict liability; for the presumption of knowledge on the part of the manufacturer has eliminated the requirement of proof of any particular negligence, which is the principal function of the common law theory of strict liability.

It is clear that *Weber* represents an application of the law of negligence, and not an application of the rules of warranty or of the common law notion of strict liability. As a matter of law, contributory negligence is not a defense to a claim based on common law strict liability. Does this leave the Louisiana plaintiff in a lesser status than his common law counterpart? Even at the common law, while the defense of contributory negligence, properly speaking, is not available, plaintiff's conduct which in fact contributes to his harm may be admitted on the issue of plaintiff's normal or proper use of the product, which is a relevant and substantial consideration on the issue of defective condition.

Who is a manufacturer?

Media Production Consultants, Inc. v. Mercedes-Benz of North America, Inc.,[3] held that defendant distributor was a

3. 262 La. 80, 262 So.2d 377 (1972).

manufacturer liable for the price of a defective automobile and other allowable expenses, even though plaintiff purchased the automobile from a dealer, had no dealings with defendant whatever and even though defendant did no more in this country than prepare automobiles for placement in the hands of dealers for retail sale.

Plaintiff purchased the defective automobile from a local Louisiana dealer which at the time judgment was taken was defunct. The lower court held defendant distributor not liable, and plaintiff on writs raised the question in the Louisiana supreme court of whether distributor should not be held liable *in solido* with the defunct retail dealer. The lower court agreed that the automobile was useless because of such defects as peeling interior trim, lights not functioning, transmission problems, and defective air-conditioner, to mention a few.

The decision written by Justice Sanders represents a most sound and equitable declaration of policy by our supreme court, as follows:

> "Louisiana has aligned itself with the consumer-protection rule, by allowing a consumer without privity to recover, whether the suit be strictly in tort or upon implied warranty. [Citations omitted.]
>
> "We see no reason why the rule should not apply to the pecuniary loss resulting from the purchase of a new automobile that proves unfit for use because of latent defects."[4]

The court therefore held defendant distributor solidarily liable with the retail dealer for the price of the automobile and other allowable expenses.

The supreme court of course needed no authority as precedent for finding liability on the part of the distributor to a third party, in this instance a consumer. The general duty of protection is easily justified. It appears from the opinion, however, that the liability is based upon implied warranty, and the court's authority for jumping the privity gap is French law stating that "the right to sue the original vendor for breach of warranty of quality is transmitted with the object of the sale."[5]

4. 262 So.2d at 381.
5. *Id.* at n.3.

While it is apparent that the case is one in warranty, rather than in tort, it nevertheless has substantial import in the tort field for establishing such distributors as manufacturers, particularly when long arm jurisdiction might be needed and when one views the law in light of *Weber*, discussed earlier in this article.

Along the same lines, the First Circuit Court of Appeal held in *Travelers Indemnity Co. v. Sears, Roebuck & Co.*,[6] that Sears was "subject to the same liability as the manufacturer of the stove for damages caused by defects even in the absence of actual knowledge thereof."[7] It was accepted by the court that Sears is not in fact the manufacturer of the Kenmore stoves; but the product did not show that it was in fact manufactured by anyone else, and the plaintiffs had dealt solely with Sears both in the purchase and in the subsequent service which was required for repairs. The holding is completely in line with the recent cases in Louisiana, such as *Penn v. Inferno Manufacturing Corp.*[8]

Analysis of Tort Problems—Duty-Risk Approach

Hill v. Lundin & Associates, Inc.[9] is a case of considerable impact on tort law in Louisiana, not for the result reached, but for the means of analysis utilized to reach that result. Plaintiff injured herself by tripping over a ladder lying on the ground at her employer's residence and sued the contractor who had left the ladder standing against the house after completing his repairs on the residence. An unknown party moved the ladder to the ground from its original standing position.

The Louisiana supreme court held that plaintiff failed to establish actionable negligence, noting that there can be no negligence unless there is a breach of a legal duty imposed to protect against a particular risk involved. To solve this issue in the absence of statutory or jurisprudential rules governing responsibilities for construction ladders left at job sites, the court in the final analysis must simply in its policy-making wisdom decide that this is the sort of injury for which the con-

6. 256 So.2d 321 (La. App. 1st Cir. 1971).
7. *Id.* at 325.
8. 199 So.2d 210 (La. App. 1st Cir. 1967).
9. 260 La. 542, 256 So.2d 620 (1972).

tractor must pay, or it is not. Using the duty-risk analysis as the rationale for articulating this decisional process, the court said,

> "The basic question, then, is whether the risk of injury from a ladder lying on the ground, produced by a combination of defendant's act and that of a third party, is within the scope of protection of a rule of law which would prohibit leaving a ladder leaning against a house."[10]

The court then noted that "the same policy considerations which would motivate a legislative body to impose duties to protect from certain risks are applied by the court in making its determination."[11]

The ultimate policy basis announced by the court for finding no duty on the part of this defendant in this instance was that leaving the ladder standing against the house did not create an unreasonable risk of harm to this plaintiff, because the defendant could not have reasonably anticipated that the ladder would be moved and placed on the ground, so as to create this risk of harm. The concept for defining and limiting duty so as to exclude this sort of risk is also characterized as a consideration of the ease of association of the risk with the conduct of the defendant.

It is speculation on the part of this writer to observe that the ultimate rationalization for thus limiting this contractor's duty to exclude that which he could not reasonably anticipate, is the basic feeling of the court that it is unjust and too great a burden to place on defendant to require him to take care to avoid risks which all of us as ordinary men know would not cross the consciousness of the individual defendant as a reasonable man of ordinary prudence.

Adoption of the duty-risk analysis should supplant the proximate cause analysis now prevalent in the jurisprudence of Louisiana. Whichever system of analysis is utilized, the substantive results of a particular case should not be different simply because one analysis rather than the other was used; but the explanation by the court of how it reached its decision

10. *Id.* at 549, 256 So.2d at 622.
11. *Id.* at 550, 256 So.2d at 623.

will vary greatly from one analysis to the other. The problem with the proximate cause analysis is that it tends to confuse the issue of whether or not defendant owes plaintiff an obligation to protect him from the risk of injury which did occur as opposed to the issue of whether a breach of that obligation *caused* the injury. More particularly, the confusion often occurs when the issue involves the evaluation of what are commonly termed intervening or superseding causes.

In the instant case, a proximate cause analysis might have produced the reasoning that the contractor was guilty of an act of negligence in leaving the ladder against the house, but the act of the unknown third party in laying it on the ground where it injured plaintiff was an intervening or superseding cause for which contractor should not be responsible. Therefore, the contractor was not guilty of conduct proximately causing the injury, although he was guilty of negligence at the outset. The duty analysis seems to be more candid and forthright in approaching that decisional problem as one requiring the drawing of the line at the outermost point to which the law will extend protection from defendant toward plaintiff.

BURDEN OF PROOF

Preponderance of the Evidence—More Probable Than Not

In a guest passenger suit against an intoxicated host driver, the supreme court held in *Marcotte v. Travelers Insurance Co.*[12] that the passenger's suit was barred by her assumption of risk in voluntarily riding with the person obviously intoxicated when the preponderance of the evidence showed that the driver's intoxicated condition caused him to disregard a red light which in turn caused the accident which injured passenger. The court took the case on writs to particularize the appellate court's holding that simply to ride knowingly with a manifestly intoxicated person was an assumption of risk barring recovery. The supreme court added to that holding the essential additional link that the intoxication must be causative of the injury for the assumption of risk to operate as a bar. The court emphasized again that in determining whether the intoxication was causative of the accident, the preponderance of the evidence would control.

12. 258 La. 989, 249 So.2d 105 (1971).

A preponderance was reached when it appeared more probable than not that the intoxication did cause the accident.

Res Ipsa Loquitur—Assured Clear Distance Rule

In *Craker v. All-State Insurance Co.*,[13] Justice Summers, writing for the majority, denied recovery to a plaintiff who as guest passenger sought recovery for her injuries incurred when her host driver collided at night with a truck stopped in the roadway without lights. Plaintiff's case consisted solely of proving that she was in the car with host driver, and, while she was asleep, the car collided with the rear of a parked truck. The host driver did not appear at the trial and his deposition was not taken. It is apparent that plaintiff could not recover except with the aid of an inference from circumstantial evidence, of the type customarily classified as res ipsa loquitur.

The question then arises whether the bare fact of a following motorist colliding with a stationary object in the road is suggestive of negligence by the following driver. The court recited as fact that "the scene was a country road with no street lights, and it was raining. . . . To the best of her knowledge the truck had no lights and was stopped in the roadway at the time of the impact."[14] If the probability is that the driver was negligent, are the scales of probability put back into balance with the additional facts that there were no street lights and that it was raining? The writer must agree with the dissent of Justice Tate that it is more probable than not that the following driver was negligent and that, as the court of appeal found in its opinion, the plaintiff guest passenger had made out her prima facie case. If one concedes that a prima facie case was made, then, the other requirements being met, the inference mechanism of res ipsa loquitur might well have been applicable.

From a substantive viewpoint, it would be regrettable to remove the suggestion of negligence which as a practical matter is there when a following driver collides with an object in the road. Certainly, though, if concurrently with those facts there are also other facts showing that vision was obscured and that generally the failure to stop was not unreasonable, then the

13. 259 La. 578, 250 So.2d 746 (1971).
14. *Id.* at 580, 250 So.2d at 747.

suggestion of negligence recedes; however, the burden should be the driver's to show it was not unreasonable to fail to stop.

Res Ipsa Loquitur—Unexplained Fire

In *Boudreaux v. American Insurance Co.*,[15] the supreme court on rehearing reversed itself and held that res ipsa loquitur applied in a wrongful death claim based on a restaurant owner's alleged negligence resulting in a fire in the restaurant's kitchen which spread to adjoining premises and caused the death of plaintiffs' decedent. The trial court and the court of appeal found for the defendant. In its first opinion, the supreme court affirmed those decisions.

In essence, the evidence was that the precise origin or cause of the fire could not be determined. However, the supreme court in the discussion in the first opinion of whether plaintiff had carried its burden to bring forward a preponderance of the evidence, made this statement:

> "There is lengthy testimony that the fire originated in Petrossi's kitchen, but plaintiffs did not prove to a legal certainty by a reasonable preponderance of the evidence that the cause of the fire allegedly originating in the kitchen was caused by the negligence of Petrossi and his employees."[16]

The foregoing characterization of the testimony is crucial in an appraisal of this case, because the plaintiff would win or lose depending on whether the court considered his burden discharged when he showed that the fire originated in the defendant's kitchen; or whether the court requires plaintiff to show that the fire not only originated in defendant's kitchen, but also to show the particular act of negligence of defendant which caused the fire.

The court declined in its first opinion to apply res ipsa loquitur because "a review of this record does not reflect that the alleged negligence of defendant's insured excludes every other reasonable hypothesis as to the cause of the fire."[17] The court then added that even if res ipsa loquitur was properly

15. 262 La. 721, 264 So.2d 621 (1972).
16. 264 So.2d at 627.
17. *Id.* at 628.

invoked in this case, "we must find that the defendant under the present facts and circumstances exculpated itself from negligence."[18] Finally, the court found that Civil Code articles 667 and 669 were inapplicable.

Justice Tate wrote a detailed dissent attacking the handling of res ipsa loquitur in the first opinion. Then, on rehearing Justice Tate wrote the majority opinion, which found in favor of plaintiffs. The reasoning was that the origin of the fire in defendant's kitchen was suggestive of some negligence, and that being so, the negligence must be that of the defendant, since the kitchen ultimately was in its exclusive control, and there was no showing to contradict that status of the kitchen.

Justice Tate correctly pointed out that

> "the circumstantial evidence requisite in civil negligence cases need not negate *all* other *possible* causes of injury, as the opinions of the previous courts seemed to hold. It suffices if the circumstantial proof excludes other reasonable hypotheses only with a fair amount of certainty, so that it be more probable than not that the harm was caused by the tortious conduct of the defendant. [Citations omitted.]
>
> "In this respect, the principle of 'res ipsa loquitur' (the thing speaks for itself) sometimes comes into play as a rule of circumstantial evidence, whereby negligence is inferred on the part of a defendant because the facts indicate this to be the more probable cause of injury *in the absence of other as-plausible explanation* by witnesses found credible. [Citations omitted.] Thus, by this principle where properly applied, the circumstantial evidence indicates that the injury was caused by some negligence on the part of the defendant, without necessarily proving just what negligent act caused the injury."[19]

Doctrinally, the statement in the opinion on rehearing as to the degree of certainty requisite for winning a decision is better formulated than that of the first opinion requiring proof to the exclusion of every other reasonable hypothesis. To require the latter level would be to impose a greater burden of

18. *Id.* at 629.
19. *Id.* at 636.

proof in res ipsa loquitur cases than in those not so designated but also founded on circumstantial evidence.

FAULT WITHOUT NEGLIGENCE

In *Langlois v. Allied Chemical Corp.*,[20] the Louisiana supreme court held that a violation of Civil Code article 669 constituted "fault" under Civil Code article 2315, thus allowing recovery for plaintiff without the showing of negligence by defendant. In such an action contributory negligence will not be allowed as a defense since the principal action is not itself based upon negligence, but rather upon the breach of a standard of conduct set forth in the Civil Code.

The plaintiff in *Langlois* was a fireman injured by his inhalation of a dangerous gas escaping from defendant's tanks located on defendant's premises. Plaintiff was engaged in his calling as a fireman at the time of the injury and was performing rescue work off defendant's premises.

Prior to *Langlois*, a plaintiff might have sought recovery under these circumstances by basing his case on a strained application of article 667. Under *Langlois*, a plaintiff finds a more rational basis for liability in resting his case on article 669, which the court indicates will be interpreted liberally and will place responsibility on land occupiers for a broad range of activities causing harm to virtually all categories of injured parties.

Langlois effectively defines "fault" under article 2315: "Fault is not limited to moral wrongs but encompasses many acts which are merely forbidden by law."[21] Putting it in still other words, the court said:

> "The defendant has injured this plaintiff by its fault as analogized from the conduct required under Civil Code Article 669 and others, and responsibility for the damage attaches to defendants under Civil Code Article 2315."[22]

In *Langlois*, the analogized standard of conduct was drawn from article 669. The court classified defendant's conduct as an

20. 258 La. 1067, 249 So.2d 133 (1971).
21. *Id.* at 1076, 249 So.2d at 137.
22. *Id.* at 1084, 249 So.2d at 140.

ultra-hazardous activity. It is not surprising that contributory negligence was excluded as a defense, since even at the common law contributory negligence is not recognized as a defense when strict liability is assessed against ultra-hazardous activities. It should follow from this rule of analogized standards of conduct that responsibility for damages under article 667 as applied in *Chaney v. Travelers Insurance Co.*,[23] should be assessed under article 2315.

It seems essential in using these analogized standards of conduct to constitute fault to examine carefully the statutory standard violated (whether Civil Code article, statute, or local ordinance) so as not to preclude the defense of contributory negligence when the standard merely proscribes conduct constituting ordinary negligence, not ordinarily subjected to absolute liability. Otherwise, for example, if fault is found from a breach of a traffic regulation setting speed limits, contributory negligence could not be pleaded against the plaintiff. This distinction seems to be envisioned by the court in *Langlois* in its statement that,

> "The activities of man for which he may be liable without acting negligently are to be determined after a study of the law and customs, a balancing of claims and interests, a weighing of the risks and the gravity of harm, and a consideration of individual and societal rights and obligations."[24]

In a footnote, however, the court classified a number of Civil Code articles providing effectively for absolute liability:

> "Civil Code Articles 666, 667, 668, 670 and 2322 [*sic*] and Articles 2318-2322 also express the intent of the redactors of our Code to impose liability for fault which does not encompass negligence. Without requiring negligence by him who is to respond in damages, some of these articles impose liability for constructions, others for activities, still others by reason of relationships."[25]

CONTRIBUTORY NEGLIGENCE

Justice Sanders, in *Campbell v. American Home Assurance*

23. 259 La. 1, 249 So.2d 181 (1971).
24. 258 La. at 1084, 249 So.2d at 140.
25. *Id.* at n.14, 249 So.2d at n.14.

Co.,[26] laid out the definition and application of contributory negligence. The thesis statements of the court were in connection with the conduct of a guest passenger failing to warn the host driver that to enter a smoke patch on the highway was dangerous. The court concluded that the conduct of the host driver and of the guest passenger were reasonable under the circumstances and refused to find contributory negligence since it had not been proved by the defendant.

Dog Bite—Owner-Knowledge of Vicious Propensities

In *Losch v. Travelers Insurance Co.*,[27] the Fourth Circuit Court of Appeal held that the facts did not show vicious propensities in a dog which inflicted a scratch on the face of a small child, leaving two small scars about 1.0 cm. in length. If the child had been horribly mauled, would the non-liability of the owner still have obtained? Regrettably, probably so.

As shown by the citations in the opinion, the rule currently applied in Louisiana for dog bite cases requires a showing of the owner's prior knowledge of the vicious propensities of the dog. It is a tragic anomaly to note that were it a sheep, rather than a child, the dog owner would be absolutely liable, under the provision of a statute specifically protecting sheep.[28]

Was it the intent of the Civil Code redactors to leave humans to the mercy of carnivorous canines? The subject may be heavily debated.[29] If the theory of presumption of fault is indulged, the owner still may be exonerated by bringing to the witness stand all those whom his dog has not bitten and who will testify that the dog is gentle. The better view unquestionably is to hold dog owners to absolute liability for their dogs' unprovoked attacks on humans. The pronouncements in *Langlois* discussed above, are more than ample authority for thus construing article 2321 of the Louisiana Civil Code.

Libel and Slander—Public Figure

On rehearing, the Louisiana supreme court found in *Francis*

26. 260 La. 1047, 258 So.2d 81 (1972).
27. 264 So.2d 240 (La. App. 4th Cir. 1972).
28. La. R.S. 3:2651-52 (1950).
29. Note, 34 Tul. L. Rev. 843 (1960); Note, 18 Tul. L. Rev. 163 (1943); Note, 17 Tul. L. Rev. 138 (1942).

v. Lake Charles American Press[30] that a newspaper enjoyed no privilege in publishing its false report that plaintiff failed to appear for arraignment on a Peeping Tom charge. Plaintiff was surety on the bond for the person arraigned, and it was clear error on the part of the newspaper to report as it did. The issue was whether defendant could claim privilege as set forth in *Rosenbloom v. Metromedia, Inc.*,[31] in which the U.S. Supreme Court held that the public figures subject to fair comment absent reckless disregard included private individuals involved in a matter of public interest. Justice Sanders in speaking for the majority on rehearing pointed out that it was the failure to show for arraignment which was the matter of public interest and there was no factual connection or involvement of plaintiff with that failure to appear. If the involvement of a private individual in a matter of public interest could be founded upon a false report of involvement then no erroneous reporting whatever would be beyond the privilege. Accordingly, the liability of the defendant was upheld. It is a laudable decision, furnishing some restraint on the rapid erosion of an already too-small island of privacy enjoyed by private citizens.

MATRIMONIAL REGIMES

*Robert A. Pascal**

Effect of Amendments to Legislation on Pre-Existing Matrimonial Regimes

Probably the most important single issue of law raised in any matrimonial regimes decision discussed in this section of the *Symposium* is whether the 1944 amendment to article 2386 of the Civil Code applies to community of gains regimes then already in existence. The Court of Appeal, Second Circuit, dismissed the affirmative contention with the statement: "We do not believe this to be the intent of the amendment. The amendment was intended to affect existing community of . . . gains as well as those established after its enactment."[1] The matter deserves more consideration.

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30. 265 So.2d 206 (La. 1972).
31. 403 U.S. 29 (1971).

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1. McElwee v. McElwee, 255 So.2d 833, 888 (La. App. 2d Cir. 1971).