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# Comments

## Presumption of Legitimacy and the "Action en Désaveu"

Parts I and II of this Comment appeared in 13 *LOUISIANA LAW REVIEW* at page 587. Part I is an analysis of Civil Code Articles 179, 184-192, and Part II is a discussion of the lacunae and problems presented by those articles.

### III. A SURVEY OF THE LOUISIANA JURISPRUDENCE

The jurisprudence of this state relating to the presumption of legitimacy and the "action en désaveu" involves two major problems and one incidental one. The greater number of decisions concerns the question of *who* may contest the status of a person born of a married woman. The second major difficulty is *what* must be proved by one who attacks another's status. A third and incidental problem concerns the application of Article 191 of the Civil Code relating to the time within which the action en désaveu must be brought.

#### *Who May Contest Legitimacy—The Exclusiveness of the Action En Désaveu*

Article 191 states clearly that only the husband of the mother or in certain cases his heirs may bring the action of disavowal. Under the jurisprudence, it is the only way in which the legitimacy of a child born or conceived of a married woman may be contested. It follows that under this interpretation, persons other than the husband or his heirs may contest legitimacy only by proving the child was not born or conceived of a married woman. Thus, the French solution, based on an article similar to Article 197 of the Louisiana Civil Code, to the effect that anyone may prove another's illegitimacy if that person has not enjoyed the reputation of being a legitimate child, though he be shown to be the child of a married woman, is not followed in Louisiana.<sup>1</sup> In this section of the Comment the jurisprudence on this question will be analyzed.

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1. See Comment, 13 *LOUISIANA LAW REVIEW* 587, 597 (1953).

In *Tate v. Penne*,<sup>2</sup> the earliest case involving legitimate filiation, the court avoided the question of who may contest the legitimacy of a child born of a married woman. There the mother herself sued to recover slaves inherited by her daughter on grounds that the daughter was an adulterous bastard and as such was not entitled to inherit. The court did not rule that the mother was without legal standing to contest the child's status but found that she failed to prove the physical impossibility of her husband being the father. Thus, the decision was based on the insufficiency of evidence. As to her right to bring the action, the court said, "Even if she had [established physical impossibility of cohabitation], we have strong doubts whether such a plea could be received from her, but we do not find it necessary to decide the question."<sup>3</sup>

The evasion of this most important question in the law of filiation was, however, short-lived. In 1841, in the case of *Eloi v. Mader*,<sup>4</sup> the plaintiff asserted rights to a portion of the succession of Jean Eloi. The admitted facts were that the plaintiff's mother was married to one Smith at the time of plaintiff's birth and that Smith died about a year later. The mother then married Eloi and baptized the plaintiff naming Eloi as the father. The court held that the plaintiff could not assert himself to be the son of Eloi because that would be disrupting his own status; further, that only Smith could have changed the status of a child born to his wife during their marriage and since he had not chosen to disavow the child, no one else could. The declaration by plaintiff's mother that he was the child of Eloi was given no weight whatsoever and the court has since been very consistent regarding that point.<sup>5</sup> While it cannot be said that it would have been impossible for the husband to have cohabited with the plaintiff's mother, the holding of *Eloi v. Mader* was later applied in cases in which such cohabitation was impossible as a matter of practical judgment.

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2. 7 Mart. N.S. 548 (La. 1829).

3. *Id.* at 556. Physical impossibility of cohabitation as grounds for disavowal is discussed at p. 408 *infra*.

4. 1 Rob. 581, 38 Am. Dec. 192 (La. 1841).

5. *Dejol v. Johnson*, 12 La. Ann. 853 (1857); *Beard v. Vincent*, 174 La. 869, 141 So. 862 (1932); *Evans v. Roberson*, 176 La. 280, 145 So. 539 (1933); *Howard v. Ingle*, 180 So. 248 (La. App. 1938); *Broughton v. T.S.C. Motor Freight Lines*, 200 La. 421, 8 So. 2d 76 (1942); *Feazel v. Feazel*, 222 La. 113, 62 So. 2d 119 (1952).

In *Vernon v. Vernon's Heirs*,<sup>6</sup> the plaintiff asserted succession rights alleging that he was the son of the deceased and proved that he was born during the marriage of his mother to the deceased. The facts showed that the spouses were living separate and apart during the period of conception and birth of the plaintiff and the defendants sought to prove physical impossibility of the deceased being the plaintiff's father. The court followed the interpretation it had given the articles of the Civil Code relating to the presumption of legitimacy in the *Eloi* case and held that the defendants could not be heard to question the plaintiff's status as that was a right exclusive with the husband of the mother, or in some cases, his heirs. In *Dejol v. Johnson*,<sup>7</sup> the court again adhered strictly to this interpretation and held that the legitimacy of the plaintiffs could not be questioned by the administrator of the estate of their mother's husband. The court said that since the plaintiffs were born during the marriage of their mother to the deceased, only he was entitled to contest their legitimacy. It said further that such an action must be by special suit, brought for that purpose, in which the child is made a party.

The actual improbability of the deceased in the *Dejol* case being the father was not brought out by the decision, and it was not until 1892 in the case of *Succession of Saloy*<sup>8</sup> that grave doubts were cast upon the reasonableness of the rule of *Eloi v. Mader*. The widow Saloy was one of three children born to her mother while living in New Orleans. It was undisputed that her mother had been married in Cuba to Juan Gestal who remained there when the widow Saloy's mother eloped with another to live in New Orleans. In her succession, the widow having no issue, the state claimed it was entitled to the assets of the succession because the deceased was an adulterous illegitimate and as such had no relatives. But following the decision in the *Eloi* case, the court held that the widow Saloy was the legitimate daughter of Juan Gestal. While the decision gave the widow Saloy a filial status obviously contrary to biological fact, the court nevertheless was able to expound a pattern for interpreting the legislation which seemed logically consistent. In pointing out that the French "contestacion d'état" includes contestacion of legitimacy for any grounds, it explained that any interested party has a right to contest the *identity* of an alleged heir or of its mother,

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6. 6 La. Ann. 242 (1851).

7. 12 La. Ann. 853 (1857).

8. 44 La. Ann. 433, 10 So. 872 (1892).

or to allege and prove that the child was not born during marriage. But the court emphasized that when it is once established that the child was born of a married woman, the only remaining "contestation d'état" is the action en désaveu and that this action may be instituted only by the husband of the mother or his heirs and within certain limited delays. The court stated its conception of the rationale behind the rules of the Civil Code on this point and these words have been used as the basis of all the jurisprudence on this subject since that time:

"The law has made [the husband of the mother] the sole judge of the propriety of engaging in such a course, with a reserve of the right to his heirs of doing so, in the event of his death within the delay. He is the only one who perhaps can know that he is not the father.

"When, aware of the circumstances under which he might have exercised the right of repudiation, the husband, who is the sovereign arbiter of his honor, fails to do so, the door is forever closed and no one can afterward assert a right strictly personal to him.

"Permitting such a thing would be to strike a heavy blow at the sacredness of family ties, keep the honor of the wife and of the children in a condition of constant trepidation and allow the foundation of society to be, at all times, exposed to tottering and upturning. 'Status hominum in perpetua incertitudine fluctuaret.'"<sup>9</sup>

In later cases, the court did not deviate from the strict rule of *Eloi v. Mader*. Although discussing the grounds alleged by the party contesting the child's status, the court based its decisions on the rule that only the husband of the mother can contest the legitimacy of a child born during marriage.<sup>10</sup>

In *Beard v. Vincent*,<sup>11</sup> the plaintiffs alleged they were children of the deceased and, as such, his legitimate heirs; they proved that he was married to their mother when they were born. The court held that they were not estopped to claim rights

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9. 44 La. Ann. 433, 443, 10 So. 872, 876.

10. *McNeely v. McNeely*, 47 La. Ann. 1321, 17 So. 928 (1895); *Ezidore v. Cureau's Heirs*, 113 La. 839, 37 So. 773 (1904); *Succession of Flynn*, 161 La. 707, 109 So. 395 (1926); *Favre v. Celotex Co.*, 139 So. 904 (La. App. 1932); *Evans v. Roberson*, 176 La. 280, 145 So. 539 (1933); *Jenkins v. Aetna Casualty Co.*, 158 So. 217 (La. App. 1935); *Vallery v. Teche Lines, Inc.*, 166 So. 646 (La. App. 1936); *Smith v. Smith*, 214 La. 881, 39 So. 2d 162 (1949).

11. 174 La. 869, 141 So. 862 (1932).

in the succession although it was shown that they were born while their mother was living in adultery with Armogene Vincent and that earlier they had been admitted erroneously to Vincent's succession as his legitimate heirs.

A court of appeal case involving workmen's compensation perhaps best illustrates the extremes to which the rule of *Eloi v. Mader* may lead. In *Favre v. Celotex Co.*,<sup>12</sup> an action was brought by the mother of an employee who was killed while in the employ of defendant. She alleged that her son was born in 1911 while she was legally married to one Billard, that he was therefore her legitimate son and that she was partially dependent on him for support. Defendant sought to introduce a sworn statement which the plaintiff had submitted to the court in another cause in 1927<sup>13</sup> that she had not seen nor heard from her husband, Billard, since 1908. But the court did not admit this statement into the record. The reason given was that only the husband of the mother may question the legitimacy of her child. One dissenting justice felt constrained to remark that the decision amounted to a fraud on the defendant.

#### *Causes For Disavowal*

A search of the jurisprudence of Louisiana fails to reveal a successful attack on the status of a person born of a married woman. There are only four cases involving an actual action en désaveu as contemplated by the Civil Code—that is, only four cases in which the action was brought by the husband of the mother and within the prescribed delays and in none of these was the action successful.<sup>14</sup> Most of the jurisprudence in which the grounds for disavowal are discussed is made up of cases in which the status of a person was contested by someone other than the husband of the mother or his heirs. As has been said, the court in all instances except one<sup>15</sup> disposed of these allegations of illegitimacy by stating that only the husband of the mother, or in certain cases his heirs, may contest legitimacy. The result is that there are many pages of dicta, and these dicta have

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12. 139 So. 904 (La. App. 1932).

13. This suit was an attempt by the plaintiff to secure the court's permission to remarry in accordance with Article 80 of the Civil Code, now repealed.

14. *Kuhlman v. Kuhlman*, 137 La. 263, 68 So. 604 (1915); *Switzer v. Switzer*, 170 La. 550, 128 So. 477 (1930); *Lejeune v. Lejeune*, 184 La. 837, 167 So. 747 (1936); *Feazel v. Feazel*, 222 La. 113, 62 So. 2d 119 (1952).

15. In *Tate v. Penne*, 7 Mart. (N.S.) 548 (La. 1829), the decision was based on other grounds as related at p. 402 supra.

been looked to by the court in deciding the four cases in which the action was properly instituted. This jurisprudence will be examined under the headings corresponding to the causes for disavowal listed in the Civil Code.

In Part I of this Comment it was shown that there are five instances in which the husband of the mother may disavow her child: (1) When the child is born less than 180 days after marriage, (2) when the child is born 300 or more days after dissolution of the marriage,<sup>16</sup> (3) when the child is born 300 or more days after separation from bed and board, (4) when the wife has committed adultery and has concealed the birth of the child from her husband, and (5) when it was physically impossible for the husband to be the father because of his remoteness from the mother.

There is no jurisprudence in which grounds (1) or (2), above, have been alleged.

(3) *Child born 300 or more days after separation from bed and board.* Article 187, by referring to Article 186, says that the non-presumption of paternity in the husband of the mother "applies with respect to the child born three hundred days . . . after the sentence of separation from bed and board." In *McNeely v. McNeely*,<sup>17</sup> the plaintiff attacked the validity of a will naming the defendant as universal legatee; further, plaintiff alleged that even if the will was valid, the legacy was subject to reduction because he was the legitimate child of the deceased and thus entitled to the forced portion of his father's succession. By way of defense, the universal legatee attacked the status of the plaintiff showing that he was born more than three hundred days after a declaration of separation from bed and board between his parents. However, it was shown by the plaintiff that the decedent had never contested his legitimacy. The court held the will to be valid, but reduced the legacy to the two-thirds disposable portion, declaring that the universal legatee was without legal right to contest the status of the plaintiff as that right belongs exclusively to the husband of his mother. Under the facts proved, it seems clear that had the action been brought by the decedent and within the delay period prescribed by the Civil Code it would have been successful. However, it should be remembered

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16. The peculiarities of this situation are discussed in Part I of this Comment, 13 LOUISIANA LAW REVIEW 587, 591-592 (1953).

17. 47 La. Ann. 1321, 17 So. 928 (1895).

that under such facts, the wife may attempt to prove that there was cohabitation after the decree of separation and if successful in such attempt, the action en désaveu fails.<sup>18</sup> Birth of the child three hundred or more days after separation from bed and board was not grounds in any of the four actions en désaveu.

(4) *Adultery of the wife and concealment of the birth.* Article 185 provides that adultery of the wife is not grounds for disavowal unless the birth of the child is concealed from the husband. *Lejeune v. Lejeune*,<sup>19</sup> was an action en désaveu in which the husband pleaded adultery and concealment. In an earlier suit, he was successful in obtaining a divorce by proving adultery by his wife. In the wife's answer to the divorce suit, she alleged that she was pregnant and that allegation proved to be deciding factor in the subsequent action en désaveu. The court looked to French doctrine<sup>20</sup> in deciding that concealment under Article 185 means concealment of pregnancy as well as birth, and hence, the husband had not met the requirements of that article.<sup>21</sup> It is noteworthy that Justice Fournet did not subscribe to the majority's interpretation of Article 185.

In *Feazel v. Feazel*,<sup>22</sup> the most recent action en désaveu, the plaintiff husband did not meet the first requirement of proving adultery, but the court proceeded to discuss the matter of concealment and concluded that he had also failed in that attempt. The facts were that the wife left the state and gave birth to the child while living in Kansas. There was evidence that the husband did not know of his wife's pregnancy nor of the subsequent birth until several days after the child was born. The important factor in the court's determination that the requirements of Article 185 had not been met was that, when the child's birth was registered, the plaintiff, the husband of the mother, was named as the father of the child. Again looking to the French

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18. Art. 188, La. Civil Code of 1870.

19. 184 La. 837, 167 So. 747 (1936).

20. 3 Baudry-Lacantinerie, *Traité Théorique et Pratique de Droit Civil* § 488 (3d ed. 1902).

21. "It is difficult for us to imagine in what better way she could have placed her husband on notice that she was going to give birth to a child other than by apprising him of her pregnant condition. In the natural course of events, it was inevitable that a child would be born. He could not, by his own indifference to the result which was to naturally and normally follow, say that the birth of the child had been concealed from him. The slightest inquiry on his part would have revealed that the child had been born. There was nothing hidden from him. The law does not require her to formally notify him of the child's arrival." 184 La. 837, 846, 167 So. 747, 749 (1936).

22. 222 La. 113, 62 So. 2d 119 (1952).



commentators,<sup>23</sup> the court reasoned that if a wife registers a child as that of her husband, by that action alone she has made the birth public, thus negating any idea of concealment.

Summarizing the two cases, it would seem that the Supreme Court's interpretation of the requirements of proving adultery and concealment as contemplated by Article 185 are (1) clear proof of adultery, (2) concealment of the pregnancy by the wife, (3) concealment of the birth by the wife, and (4) an attempt by the wife after the birth of the child to keep its identity concealed.

(5) *Physical impossibility of the husband being the father.* Article 189 provides that the presumption of paternity in the husband ceases "when the remoteness of the husband from the wife has been such that cohabitation has been physically impossible." In *Tate v. Penne*,<sup>24</sup> a mother sought to have her daughter declared an adulterous illegitimate, alleging that her husband could not have been the father of the child because of his remoteness from her at the time of its conception and birth. The evidence showed that the spouses had voluntarily separated and were living apart when the child was conceived, but the decision does not indicate how far apart they resided. The testimony dealt only with the whereabouts of the husband during the conception period, and the court said that this "negative" testimony was not sufficient to prove physical impossibility.<sup>25</sup> Although the case was not an action en désaveu, the decision was based on the plaintiff's failure to prove impossibility of cohabitation.<sup>26</sup>

In *Vernon v. Vernon's Heirs*,<sup>27</sup> although the decision was based on the incapacity of the party to contest legitimacy,<sup>28</sup> the court expressed the opinion that the requirements of physical impossibility of cohabitation were not met. The spouses had married in South Carolina, and the evidence showed that the wife had left her husband to live in Kentucky. Only one witness was used in attempting to prove the remoteness, and he said that the husband remained in South Carolina and that he saw him about two or three times a month. He could not testify as to the

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23. 3 Baudry-Lacantinerie, op. cit. supra note 20, at §§ 489, 490.

24. 7 Mart. N.S. 548 (La. 1829).

25. "The evidence of the husband's residence is only negative. He was not on the east side of the lake. Where the wife was, the proof is silent. How can we tell from the evidence that they did not meet and cohabit?" Id. at 555.

26. See p. 402 supra.

27. 6 La. Ann. 242 (1851).

28. See p. 403 supra.

whereabouts of the wife during the separation; he had merely been told that she lived in Kentucky. Under these facts, the requirements of Article 189 were not considered met. The court said further that even if it had been shown that the wife remained in Kentucky during the period of conception, remoteness as contemplated by Article 189 would not necessarily have been proved, for the husband lived close enough to Kentucky to have visited her there without the above-mentioned witness knowing of such visit. In *Harris v. Louisiana Oil Refining Corporation*,<sup>29</sup> there was a very feeble attempt to prove physical impossibility of cohabitation. The evidence was clear that the spouses were living only a few miles apart when the child was conceived, and the court concluded that the requirements of Article 189 had not been met. This article was pleaded as grounds for disavowal in only three other cases.<sup>30</sup> In each of them it was shown that the spouses lived in the same city when the child was conceived, and in each the court ruled that cohabitation was not physically impossible.

Summarizing the jurisprudence, it appears that it is very difficult for a husband to meet the requirements of Article 189 as applied by the Supreme Court. Excluding special circumstances, such as one of the spouses being confined in prison, it would appear that in order to prove physical impossibility of cohabitation, the husband would have to show that the spouses were a great distance apart during the time of conception and also show the whereabouts of *both* spouses at all times during that period. In view of modern transportation facilities, the possibility of meeting these requirements becomes increasingly remote.

#### *Delay Period for Bringing Action en Désaveu*

The case of *Kuhlman v. Kuhlman*<sup>31</sup> illustrates the narrowness with which the court interprets the provisions of Article 191 prescribing the delay periods within which the husband must institute the action en désaveu. In the case where the husband is absent when the child is born, it provides that he must institute the action within two months after his return. This was the factual situation in the *Kuhlman* case, and the plaintiff husband

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29. 13 La. App. 416, 127 So. 40 (1930).

30. *Switzer v. Switzer*, 170 La. 550, 128 So. 477 (1930); *Lejeune v. Lejeune*, 184 La. 837, 167 So. 747 (1936); *Feazel v. Feazel*, 222 La. 113, 62 So. 2d 119 (1952).

31. 137 La. 263, 68 So. 604 (1915).

filed the action within the delay period, but the suit was dismissed on an exception of jurisdiction.<sup>32</sup> Six months later he filed a second action, this one in the proper court, and the wife successfully pleaded two months prescription under Article 191. On appeal to the Supreme Court, the plaintiff contended that the institution of the action stopped the running of prescription regardless of the fact that it was filed in the wrong court. But the court affirmed the decision of the district court sustaining the plea of prescription. It may be, then, that the only case in which the husband may have met the very stringent requirements for disavowal was lost because of a procedural error on the part of counsel.

#### IV. COMPARISON AND APPRAISAL

The concluding part of this comment includes a brief comparison of the French Civil Code articles and jurisprudence to the Louisiana law previously discussed. This is followed by an appraisal of the Louisiana situation and suggestions for the changes which appear to be needed.

##### *Exclusiveness of the Right to Contest Legitimate Paternity Under the French Civil Code*

Articles 312-317 of the French Civil Code prescribe basically the same rules as Articles 184-192 of the Louisiana Civil Code. These articles permit the husband of the mother, or in certain cases his heirs, to disavow her child for certain named causes. They specifically preclude all other persons from instituting an action to disavow. It should be remembered, however, that these articles in both the French and Louisiana Codes deal only with children born of a married woman.<sup>33</sup> Hence, they do not prevent other interested persons from disproving the identity of the alleged mother, or from proving that the child was not born of a married woman, or that the mother was not married to the alleged father.

The French courts' interpretation of Article 325 of the French Civil Code has greatly minimized the effect of the very stringent requirements of Articles 312-317. That article is in the chapter

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32. The Supreme Court agreed with the ruling of the district court that the domicile of the plaintiff husband is the proper jurisdiction for the institution of the action en désaveu "for the conclusive reason that the domicile of the father is the domicile of the child of the marriage." A discussion of the correctness of this ruling is beyond the scope of this comment.

33. See Part I of this Comment, 13 LOUISIANA LAW REVIEW 587, 589 (1953).

of the French Code entitled "Of Proofs of Filiation of Legitimate Children." The earlier articles of that chapter enumerate the ways in which a person may assert and prove legitimate filiation. Article 325 provides:

"Proof to the contrary may be made by all means of a nature to establish that the claimant is not the child of the person who he pretends to be his mother, or even, if the maternity is proved, *that he is not the child of the mother's husband.*"<sup>34</sup> (Italics supplied.)

The French courts have held that this article is applicable to the situation in which the person who asserts legitimate filiation lacks the apparent status or reputation of legitimacy.<sup>35</sup> The result of this interpretation is that in cases in which there is no such status, any interested person may prove that the person who asserts legitimate filiation "is not the child of the mother's husband." The French do not consider this an action en désaveu, as that name is reserved to an action by the husband of the mother or his heirs, under the rules and requirements of Articles 312-317.<sup>36</sup> Even if the status is questioned by the husband of the mother, it is not an action en désaveu if the basis of his action is Article 325.<sup>37</sup> The effect of this interpretation of Article 325 on the entire subject of the presumption of legitimacy is tremendous. The many cases in which children are born to a mother who is living openly in adultery are easily resolved under this rule. Article 197 of the Louisiana Code is in substance the same as Article 325 of the French Code, but quite obviously the Louisiana courts have not followed the French reasoning. If they had, decisions such as *Succession of Saloy*,<sup>38</sup> *Eloi v. Mader*,<sup>39</sup> *Dejol v. Johnson*,<sup>40</sup> *Beard v. Vincent*,<sup>41</sup> and *Favre v. Celotex Co.*<sup>42</sup> could not possibly have been rendered. At least one writer has suggested that the French application of the article is the proper

34. Art. 325, French Civil Code (Cachard's transl. 1930) (punctuation by writer).

35. 2 Planiol et Ripert, *Traité Pratique de Droit Civil Français* § 733 (2d ed. 1952); 1 Colin et Capitant, *Traité de Droit Civil* § 913 (Julliot de la Morandière's ed. 1953).

36. 2 Planiol et Ripert, *op. cit. supra* note 35, at § 814; 1 Colin et Capitant, *op. cit. supra* 35, at § 907.

37. 1 Ripert, *Traité Élémentaire de Droit Civil de Marcel Planiol*, n° 1309 (1948).

38. 44 La. Ann. 433, 10 So. 872 (1892).

39. 1 Rob. 581, 38 Am. Dec. 192 (La. 1841).

40. 12 La. Ann. 853 (1857).

41. 174 La. 869, 141 So. 862 (1932).

42. 139 So. 904 (La. App. 1932).

one and that the Louisiana courts should follow it.<sup>43</sup> It is noteworthy that the result of the French courts' application of Article 325—permitting persons other than the husband of the mother to contest the status of her children—is not without criticism.<sup>44</sup>

*Other Consequences of French Civil Code Article 325*

The problem of *who* may contest legitimacy is not the only area which is affected by the French courts' interpretation of Article 325. As stated earlier, the article is not one of the group relating to the action en désaveu. Hence, the rules prescribed in that group of articles have no application when Article 325 is the basis of an attack on a person's legitimate filiation. It is not necessary to establish any certain set of facts as Articles 312-317 require. All evidence is admissible which may tend to disprove the paternity of the mother's husband, and, if there is a preponderance of evidence to that effect, the contesting party is successful. It follows that the articles prescribing the delay periods within which the action en désaveu must be brought<sup>45</sup> likewise have no application.<sup>46</sup>

*Causes for Disavowal Under French*

*Civil Code Articles 312-317*

Presumptions and non-presumptions of paternity in the French Civil Code are very similar to those prescribed in the Louisiana Code. However, there are differences which will be shown in the discussion following:

(1) *Child born less than 180 days after marriage.* Article 314 of the French Code provides that the husband may contest the legitimacy of a child born to his wife less than 180 days after his marriage unless (1) he had knowledge of his wife's pregnancy before the marriage, or (2) he was present at the recorda-

43. See Work of the Supreme Court for the 1952-1953 Term, 14 LOUISIANA LAW REVIEW 62, 125 (1953).

44. Rouast does not disagree with the application of Article 325 of the French Code to situations in which there is no reputation of legitimacy, but he feels that permitting anyone but the husband of the mother to contest status violates the whole scheme of Articles 312-317 and is a misinterpretation of Article 325. 2 Planiol et Ripert, *op. cit. supra* note 35, at § 733. See also 1 Colin et Capitant, *op. cit. supra* note 35, at § 913.

45. Arts. 316, 317, French Civil Code.

46. 1 Colin et Capitant, *op. cit. supra* note 35, at § 913. As a matter of statutory interpretation, the writer does not agree with the French court's analysis of Article 325. It would appear, however, that the rules developed under this analysis suggest a more workable scheme which deserves consideration in planning legislative change.

tion of the birth and signed or placed his mark on such record, or (3) it has been declared that the child cannot live. Except for the provision precluding the action when "it has been declared that the child cannot live," this article is the same as Article 186 of the Louisiana Code.

The application of this article has not raised any serious difficulties because proof of the dates of marriage and the birth is all that is required of the husband in this situation.<sup>47</sup>

(2) *Child born 300 or more days after dissolution of marriage.* Article 187 of the Louisiana Civil Code is very similar to Article 315 of the French Code, but there is a difference in their language which could lead to difficulty. The latter provides:

"The legitimacy of the child born 300 days after the dissolution of the marriage may be contested."

Article 187 of the Louisiana Civil Code, by referring to Article 186, which provides that a husband may contest the legitimacy of a child born less than 180 days after marriage, provides:

"The same rule applies with respect to the child born 300 days after the dissolution of the marriage, or after sentence of separation from bed and board."

The French courts have held that "may be contested" under Article 315 means may be contested by any interested person and at any time;<sup>48</sup> an actual action en désaveu is not required.<sup>49</sup> The necessity of making even this simple protest has been criticized by French commentators who feel that a child born 300 or more days after dissolution of marriage should be considered illegitimate from the fact of birth at that date.<sup>50</sup>

47. 2 Planiol et Ripert, *op. cit. supra* note 35, at § 806; 1 Colin et Capitant, *op. cit. supra* note 35, at § 906.

48. 1 Ripert, *op. cit. supra* note 37, at n° 1309 (1948); 2 Planiol et Ripert, *op. cit. supra* note 35, at § 733; 1 Colin et Capitant, *op. cit. supra* note 35, at § 896. The writer feels compelled to disagree with these conclusions as a matter of statutory interpretation. The fact that Article 315 is one of the group of articles dealing with the action en désaveu would seem to indicate that the words "may be contested" mean may be contested by the husband in an action en désaveu.

The new Italian Civil Code of 1939 has remedied the problem. Article 248 provides that in the case of a child born 300 or more days after dissolution of the marriage, legitimacy may be contested by any interested party at any time such interest is threatened.

49. The statement is in conflict with the statement in Part I of this Comment, 13 LOUISIANA LAW REVIEW 587, 592 (statement preceding note 2) (1953). The latter is faulty and was the result of a mistranslation.

50. 2 Planiol et Ripert, *op. cit. supra* note 35, at § 733. See also Bailly, *L'article 315 du code civil et la condition des enfants nés plus de 300 jours*

While there is no Louisiana jurisprudence interpreting Article 187 of the Louisiana Civil Code, a comparison of the wording of this article with that of Article 315 of the French Code indicates that an interpretation different from that of the French might result. In order to understand the problem it is necessary to consider Article 186. Under that article, it is required that the husband institute an action en désaveu to disavow a child born less than 180 days after marriage. Article 187 says "The same rule applies," which could reasonably be taken to mean that an action en désaveu is required. This argument is further strengthened by reason of the fact that the provision, which permits disavowal in case of birth 300 or more days after separation from bed and board, is part of Article 187, and an action en désaveu is necessary to contest legitimate paternity under those circumstances.<sup>51</sup> However, requiring an action en désaveu to contest the legitimacy of a child born 300 or more days after dissolution of marriage could lead to absurdities. It would be highly illogical to require the action by a husband when his former wife bears a child years after divorce, or to require his heirs to institute the action when a child is born years after the death of the husband.

(3) *Birth 300 or more days after separation from bed and board.* In France, from the time of the promulgation of the Code Napoleon in 1804 until the year 1850, a child born to a mother who was legally separated from her husband was considered a child born during marriage, and there was no cessation of the presumption of paternity.<sup>52</sup> Since 1850, however,<sup>53</sup> a child born 300 or more days after separation from bed and board may be disavowed by a simple declaration by the husband of the mother that he is not the father of the child.<sup>54</sup> This is the same simple declaration which is required in the case of a child born 300 or more days after dissolution of the marriage. However, only the husband may make the declaration when there has been a judicial separation, whereas, as shown earlier, any interested person may do so when there has been a dissolution of the marriage.

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après la dissolution du mariage, 47 *Revue Trimestrielle de Droit Civil* 372 (1949).

51. See discussion of child born 300 or more days after separation from bed and board below.

52. 2 *Planiol et Ripert*, op. cit. supra note 35, at § 808; 1 *Colin et Capitant*, op. cit. supra note 35, at § 905.

53. Law of Dec. 6, 1850, *Dalloz, Jurisprudence Générale*, IV, 207 (1850).

54. 2 *Planiol et Ripert*, op. cit. supra note 35, at § 809; 1 *Colin et Capitant*, op. cit. supra note 35, at § 905. The writer disagrees with the interpretation of this amendment for the same reasons set forth in note 48 supra, relating to the child born 300 or more days after dissolution of the marriage.

In all three of the civil codes of Louisiana, there have been provisions permitting the husband to disavow a child born 300 or more days after separation from bed and board.<sup>55</sup> However, it appears from the language of the court in the case of *McNeely v. McNeely*,<sup>56</sup> which is the only case involving the status of a person born 300 or more days after separation from bed and board, that a simple declaration by the husband is not sufficient to disavow such a child, and that an action en désaveu is necessary. But the language of the court regarding this question is dictum; the basis of the decision was that only the husband of the mother may contest legitimacy, and hence the defendant, universal legatee of the estate in question, was without standing to make such contest. However, the dictum in the *McNeely* case is very clear:

"It is, in our view, clear, under our Code, that the legitimacy of the child of the wife not divorced, born after the judgment of separation of bed and board, cannot be disputed, *unless the suit is brought by the husband to disavow that legitimacy.*"<sup>57</sup> (Italics supplied.)

Another interesting problem which arises in the case of a child born 300 or more days after separation from bed and board is the question of whether such a child may be legitimated by the wife's second husband when the child has not been disavowed by her first husband. On this point, a French legislative enactment of December 30, 1915, adds something to the French Civil Code which is unknown to the law of Louisiana. Article 313 of the French Code, by virtue of this 1915 amendment, provides that where a child born 300 or more days after separation (and hence subject to disavowal by the husband) is legitimated by the second marriage of the mother in conformity with Article 331, the child is no longer presumed to be the child of the former husband, even though he has not acted to disavow it.

(4) *Concealment of birth.* The first paragraph of Article 313 of the French Civil Code provides that a husband cannot disavow his wife's child on grounds of adultery "unless the birth has been concealed from him, in which case he is allowed to prove all facts tending to show that he is not the father." Article 185 of the Louisiana Code is substantially the same as this article, but the articles have received different interpretations by the courts.<sup>58</sup>

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55. Art. 9, La. Civil Code of 1808; Art. 206, La. Civil Code of 1825; Art. 187, La. Civil Code of 1870.

56. 47 La. Ann. 1321, 17 So. 928 (1895).

57. 47 La. Ann. 1321, 1324, 17 So. 928, 929.

58. The Louisiana jurisprudence interpreting Article 185 has been discussed at p. 407 supra.



The French courts have held that concealment of pregnancy, or even an attempt at concealing pregnancy, is sufficient to constitute concealment under Article 313.<sup>59</sup> However, proof of concealment alone is not sufficient to complete the disavowal. The husband must also convince the court that he is not the father of the child; he may do this by any evidence at his disposal.<sup>60</sup> Proof that the wife committed adultery is not an indispensable part of this evidence, although some writers have suggested that it should be.<sup>61</sup>

(5) *Physical impossibility of cohabitation.* Paragraph 2 of Article 312 of the French Civil Code provides that a husband may disavow his wife's child if it was physically impossible for him to cohabit with the wife during the period of conception. Then it names the two situations in which there is physical impossibility of cohabitation: (1) "on account of absence" or (2) "owing to some accident." Article 189 of the Louisiana Civil Code is very similar, but there is only one "physical impossibility" situation named, and that is remoteness of the husband from his wife. Hence, the Louisiana Code provides one less cause for disavowal than the French Code.

The physical impossibility of cohabitation "owing to some accident" is usually referred to as "accidental impotence" as contrasted with natural impotence, which is not a cause for disavowal.<sup>62</sup> Thus, the determination of whether impotence is accidental or natural becomes very important in France. Generally, the distinction drawn is that accidental impotence must be the result of some external wound or surgical operation,<sup>63</sup> while natural impotence is usually congenital or the result of natural causes. There is conflict as to whether impotence resulting from sickness is accidental or natural.<sup>64</sup> The Louisiana Civil Code pro-

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59. 2 Planiol et Ripert, *op. cit. supra* note 35, at § 803; 1 Colin et Capitant, *op. cit. supra* note 35, at § 904. See also the recent case of the Cour d'appel of Paris, Feb. 26, 1953, D. 1953, 445, 52 *Revue Trimestrielle de Droit Civil* 517 (1953).

60. 2 Planiol et Ripert, *op. cit. supra* note 35, at § 804; 1 Colin et Capitant, *op. cit. supra* note 35, at § 904.

61. 2 Planiol et Ripert, *op. cit. supra* note 35, at § 805; 1 Colin et Capitant, *op. cit. supra* note 35, at § 904. Note that proof of both adultery and concealment is required under the Louisiana Supreme Court's interpretation of Article 185. See p. 407 *supra*.

Article 235(4) of the Italian Civil Code requires proof of adultery as well as proof of concealment of both pregnancy and birth.

62. Art. 313, French Civil Code.

63. 2 Planiol et Ripert, *op. cit. supra* note 35, at § 801; 1 Colin et Capitant, *op. cit. supra* note 35, at § 903.

64. *Ibid.*

vides simply that impotence is not sufficient grounds for disavowal,<sup>65</sup> and has no provision corresponding to the "accidental impotence" provision in the French Code.

Proof of physical impossibility of cohabitation because of absence or remoteness of the husband is very difficult under both the Louisiana and French courts' interpretations of their respective codal provisions, except in situations where one of the spouses is confined in prison or in a hospital or mental institution. There is no substantial difference in the interpretations given the respective provisions in the Louisiana and French Civil Codes.<sup>66</sup>

#### *Delay Periods for Bringing the Action en Désaveu*

Article 316 of the French Civil Code prescribes the same delay periods as Article 191 of the Louisiana Code.<sup>67</sup> Both of these articles provide that in the case of a husband who is absent at the time of the birth, the action must be instituted within two months after his return. The French courts, however, have held that the important factor in determining the beginning of the running of the delay is not the actual date of the husband's return, but the time of his being informed of the birth.<sup>68</sup>

#### *Appraisal and Suggestions for Change*

Looking back, we find that Articles 184-191 of the Louisiana Civil Code and the interpretations placed on them have extended the presumption of legitimacy to unreasonable ends. Concededly, the presumption of legitimacy should be rebuttable only by very strong evidence; but legal presumptions should not lead to such absurdities as are found in *Succession of Saloy*<sup>69</sup> and *Favre v. Celotex Co.*<sup>70</sup> The juriconsults who prepared the Code Napoleon of 1804 had a most beautiful plan in mind when they drafted the articles relating to the presumption of legitimacy.<sup>71</sup> In theory, the articles seem to say: Where there is doubt as to the paternity of a child born to a married woman, that doubt should be resolved

65. Art. 185. La. Civil Code of 1870.

66. See discussion of the Louisiana jurisprudence on this point at p. 408 supra. The French jurisprudence on this subject is discussed in some detail in 2 Planiol et Ripert, *op. cit. supra* note 35, at § 800. See also 1 Colin et Capitant, *op. cit. supra* note 35, at § 892.

67. See discussion of the delay periods under the Louisiana Code in Part I of this Comment, 13 LOUISIANA LAW REVIEW 587, 593 (1953).

68. 2 Planiol et Ripert, *op. cit. supra* note 35, at §§ 793, 794.

69. 44 La. Ann. 433, 10 So. 872 (1892).

70. 139 So. 904 (La. App. 1932).

71. Discussion Du Conseil D'Etat, 10 Fenet, Recueil Complet des Travaux Préparatoires du Code Civil 3 et seq. (1836).

by declaring the husband to be the father. In situations where there can be no doubt that the husband is not the father, he may disavow his wife's child. But a husband in such a situation may nevertheless wish to be considered the father; he has displayed this desire when he fails to contest the child's status immediately after birth. Since the husband did in fact wish that the child be considered his and did not want his wife to be shamed for her misdeed, no one else should be permitted to contest the child's status or to brand his wife as an adulteress.

Nobody will question the desirability of such a plan. No law could be more consistent with Christian principles. But a century and a half of jurisprudence has shown that this plan, as set out in the articles of the civil codes of many countries, simply has not worked. Courts have had to add new meanings to the words of the articles in attempts to avoid unfairness and absurdity.<sup>72</sup> Many decisions have been very unfair where the language of the articles was unequivocal and could not be dodged. Several French commentators have criticized many of the provisions of these articles.<sup>73</sup> It seems clear that the redactors of the Code Napoleon did not anticipate the unfair and even absurd results reached by an application of these rules. Suffice it to say that there is a need for change in the law of this state relating to the presumption of legitimacy. The writer offers the following suggestions in the hope that they will be of some benefit in revising the legislation on the subject.

It seems clear that different rules should govern situations in which the child whose legitimacy is contested is from all appearances considered to be the child of the mother's husband and those in which a common sense appreciation of the facts would indicate that the child is the product of his mother's adulterous conduct. It is submitted that the problems involving status of persons can be most realistically resolved by dividing circumstances of birth into four categories and applying different rules to each category:

(1) A child born to a woman who is living with her husband or who has not been voluntarily separated, judicially separated, or divorced from him for 300 or more days, should be presumed

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72. See *supra* notes 46, 48, 54.

73. See, for example, 2 *Planiol et Ripert*, *op. cit. supra* note 35, at §§ 733, 816; 1 *Colin et Capitant*, *op. cit. supra* note 35, at § 913.

to be the child of the mother's husband;<sup>74</sup> for disavowal of a child born under these circumstances, the following rules are submitted:

1. There should be disavowal only by the husband of the mother, or, in the event of his death during the delay period, by his heirs.
2. The husband should be successful in this action only if he can convince the court to a reasonable degree of certainty that he is not the father of the child.<sup>75</sup> On the matter of evidence:
  - (a) Certain and permanent impotence or sterility should of themselves be sufficient for disavowal.<sup>76</sup>
  - (b) Circumstances which strongly indicate non-paternity such as the concealment of birth, temporary impotence, uncertain sterility, and the distance separating the spouses at the time of conception, or the fact that the child probably was conceived before marriage, should be evidentiary factors, but not sufficient in and of themselves for disproof of paternity.
3. The husband or his heirs should have a reasonable period of time after knowledge of the birth in which to institute

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74. It should be noted that this classification includes a child born at any time during the marriage, even if conception before marriage is indicated. This would not involve a change in the existing substantive rule, for under Article 186, the child is considered that of the husband unless he disavows it. There might be, however, a shift in the burden of proof in such instances of disavowal. Whereas the proposed rule would require the husband in all cases to prove he is not the father, under Article 190 "the husband cannot contest legitimacy . . . if he was acquainted with the circumstances of his wife being pregnant previously to the marriage," a provision which may mean that the wife has the burden of proving his knowledge.

75. A survey of the jurisprudence and statutes of the common law states on the subject of proof of non-paternity reveals a great variety of evidence rules. The Supreme Court of the United States has held that nothing short of actual impossibility of the husband being the father shall suffice to prove non-paternity. *Patterson v. Gaines*, 6 How. 550 (U.S. 1848). Some courts have said that the evidence must prove "beyond a reasonable doubt" that the husband is not the father. *Egbert v. Greenwalt*, 44 Mich. 245, 6 N.W. 654, 38 Am. Rep. 260 (1880). Others require evidence that is "clear and conclusive." *State v. Romaine*, 58 Iowa 46, 11 N.W. 721 (1882). The courts of some states have held that "competent testimony sufficient to satisfy the mind of the tribunal" is sufficient. *Wilson v. Babb*, 18 S.C. 59 (1882). See Note, 36 L.R.A. (N.S.) 255 (1912).

76. The writer fails to see why certain and permanent impotence or sterility should not be sufficient grounds for disavowal. Perhaps in 1804, permanence of impotence was always uncertain, but that is no longer true. As far as could be determined, Louisiana is the only state in which permanent impotence is not sufficient grounds. It is noteworthy that the new Italian Civil Code provides that impotence, "even if only impotence to procreate" is sufficient cause for disavowal. Art. 235 (2), Italian Civil Code.

the disavowal action. This period should be substantially longer than the one and two month delays presently prescribed by Article 191.<sup>77</sup>

(2) A child born to a wife who has been voluntarily separated from her husband for 300 or more days should be presumed to be the child of the mother's husband; however:

1. Legitimacy should be susceptible of contest by any person who has a real interest in the question. This interest should be a substantial one so as to prevent attacks for personal or malicious reasons.
2. The attack should be successful only if the evidence is such as completely to satisfy the court that the husband is not the father.
3. There should be no limit on the time within which the contest may be made.

(3) A child born 300 or more days after judicial separation should be presumed to be illegitimate, but such child should be given the right to establish, at any time, for any purpose, and by any type of affirmative evidence sufficient to satisfy the court, that his mother's husband is in fact his father.

(4) A child born 300 or more days after divorce or death of the mother's husband should be considered illegitimate.

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<sup>77</sup> Art. 244, Italian Civil Code, provides that the husband is given three months to bring the action beginning from the time he receives knowledge of the birth of the child.