

II Persons

A Definition of “person”

What is a “person” or, as its sometimes called, a “subject” of the law? The part of the CC that concerns persons in general (Book I, Title I), in fact, never defines the term, presumably because the drafters of that title believed that the task of developing such definitions should be left to “doctrine.” The note that follows gives you a sample of what the doctrine has come up with.

NOTE

Argentina: 1 Jorge Joaquín Llambías, *TRATADO DE DERECHO CIVIL: PARTE GENERAL* n° 314, at 245 (“With the word ‘person,’ the law designates every being endowed with the aptitude to acquire rights and to contract obligations.”); Belgium: 1 Henri de Page, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL BELGE* n° 233, at 349 (3d ed. 1962) (“In juridical language, a ‘person’ is considered to be every being capable of having rights and duties.”); Brazil: Washington de Barros Monteiro, *CURSO DE DIREITO CIVIL: PARTE GERAL* 56 (14th ed. 1976) (“In its juridical acceptance, ‘person’ is an entity, physical or moral, that is susceptible of rights and duties.”); France: 1-2 Henri & Léon Mazeaud et al., *LEÇONS DE DROIT CIVIL: LES PERSONNES* n° 438, at 5 (8th ed. 1997) (“In the language of the law, the ‘person’ is the subject of rights and duties; it lives the juridical life. Personality is the aptitude to become a subject of rights and obligations.”); Germany: 1-1 Ludwig Enneccerus, Theodor Kipp & Martín Wolff, *TRATADO DE DERECHO CIVIL: PARTE GENERAL* § 76, at 325 (Hans Karl Nipperdey rev. 39th ed., 13th rev. 1931; Blas Pérez Gonzalez & José Alguer trs. [German to Spanish] 1947) (“The concept of ‘subjective rights,’ as a power invested by the juridical order that serves for the satisfaction of human interests, presupposes a ‘subject’ to whom this power is attributed or, that which is the same thing in juridical language, a ‘person’. Personality, however, is not a right (subjective), but a juridical quality, one that constitutes the prerequisite for all rights and duties; it is equivalent to ‘juridical capacity’.”); see also Hans Kelsen, *GENERAL THEORY OF LAW & STATE* (Anders Wedberg tr. 1945) (“The concept of the legal person – who, by definition, is the subject of legal duties and legal rights, – answers the need of imagining a bearer of the rights and duties. . . . In reality, however, the legal person is not a separate entity besides ‘its’ duties and rights, but only their personified unity”); Italy: Alberto Trabucchi, *ISTITUZIONI DI DIRITTO CIVILE* (40th ed. 2001) (“‘Personality’ means to be a subject of rights, with the aptitude to become the titleholder of every situation of juridical rights or duties.”) Mexico: 1 Rafael de Pina, *ELEMENTOS DE DERECHO CIVIL MEXICANO* 197-204 (7th ed. 1975) (“A person is a being of physical or legal existence who possesses the capacity to have rights and duties.”)¹

¹ Add to this doctrine Argentine *Código Civil* art. 30, which reads as follows: “‘Persons’ are all entities susceptible of acquiring rights or of contracting obligations.”

B Types of persons

Following modern civil law theory² (which, in turn, is rooted in Roman law), the CC recognizes two different types of persons. What are they? *See* CC art. 24, par. 1.³

1 Natural persons

a Definition

What is a “natural” person? *See* CC art. 24, par. 2, sent. 1.

b Duration of natural personality

1) Commencement

a) General rule: “live birth”

When does “natural personality” begin? Read CC art. 25; then read the following note.

² The subdivision of the category “persons” into the two sub-categories of “human beings” and “associations of human beings” is a nearly universal feature of modern civil-law doctrine. *See, e.g.*, 1 C. Massimo Bianca, *DIRITTO CIVILE* n° 95, at 138 (1982) (“‘Person’ is distinguished [in Italian law] into physical person and juridical person.”); 1 Jorge Joaquín Llambías, *TRATADO DE DERECHO CIVIL: PARTE GENERAL* n° 319, at 249 (“Our juridical order ‘recognizes’ two species of persons: (1) persons of visible existence and (2) persons of ideal existence.”) 1-2 Henri & Léon Mazeaud et al., *LEÇONS DE DROIT CIVIL: LES PERSONNES* n° 439, at 5 (8th ed. 1997) (“Among persons in the juridical sense, some, called ‘physical persons,’ are human beings; others, called ‘moral persons,’ are either groups or masses of goods endowed with autonomy.”); Washington de Barros Monteiro, *CURSO DE DIREITO CIVIL [DE BRASILIA]: PARTE GERAL* 56 (14th ed. 1976) (“There are . . . two species of persons recognized by the [Brazilian] juridical order: the ‘natural person,’ sometimes called a physical person (or a man – or woman –, a human entity, a human being), and the ‘juridical person,’ likewise called a moral or a collective person (human groups aimed at ends of common interest).”); 1-2 Arthur von Tuhr, *DERECHO CIVIL: TEORIA GENERAL DE DERECHO CIVIL ALLEMAN* § 2.I, at 4 (Tito Ravà tr. [from German to Spanish]1946) (“The [German] legislation distinguishes between natural persons (human beings) and juridical persons (associations, foundations, and all those of the public law).”).

³ Some legal scholars, most (if not all) of them trained in the French civil law sub-tradition, poke fun at the Louisiana Civil Code for its use of the expression “juridical person” to refer to “associations of human beings.” The expression strikes them as inexact, for in contemporary French civil law writing, the expression of which it is the transliteration – *personne juridique* – means “that which the law recognizes as a person” (in contrast to, for example, “a person as a matter of biology,” which might be called a “biological person,” or a “person for purposes of ethical theory,” which one might call an “ethical person”). Thus, as the French use the concept *personne juridique*, it entails not only “associations of human beings” but also “human beings” themselves.

In my judgment, these scholars need to broaden their horizons, in particular, to open their eyes to the fact that there’s more to the civil-law tradition than French civil law. If they did that, they’d discover that in many, if not most, other civil-law subtraditions, the transliteration of the expression “juridical person” is used precisely as that expression is used in Louisiana, namely, to refer to “associations of human beings” and nothing more. Examples of jurisdictions within those other subtraditions include Argentina, *see* *CÓDIGO CIVIL* art. 32 (*personas jurídicas*); Brazil, *see* *CÓDIGO CIVIL* art. 40 (*pessoas jurídicas*); Chile, *see* *CÓDIGO CIVIL* art. 54 (*personas . . . jurídicas*); Germany, *see* *BÜRGERLICHES GESETZBUCH* § 14 (*juristische Person*); Italy, *see* *CODICE CIVILE* art. (*persone giuridiche*); and Spain, *see* *CÓDIGO CIVIL* art. 35 (*personas jurídicas*), just to name a few.

NOTE

What does it mean for a child to be “born alive,” as that phrase is used in CC art. 25? For this question, former CC art. 963 (1870; repealed 1999) made the following provision: “With regard to the proofs necessary to establish the existence of the child at the moment of its birth, one judges whether it be born alive not by the mere palpitation of its members, but by its respiration or its cries or by other signs that demonstrate that it existed.” That article was based on the following excerpt from Toullier’s treatise on the French *Code civil*:

96. . . . [I]t is not always easy to determine whether a child was born alive, when it died a brief instant after its birth. It’s a question of knowing by means of what signs one can distinguish life.

It is not doubtful when the child has been heard to cry at the moment of its birth. This sign is infallible. But it is not the only one: [Justinian’s Codex bk. 6, tit. 29] *de posthumis*, law 3 affirmatively declares that it is not necessary that the child have pushed forth cries.⁴ This law was always followed in the old jurisprudence. One even finds [within that jurisprudence] some judgments in which the determination that the child was born alive was based on very equivocal signs.

It is, however, an error to treat as a sign of life any and every kind of movement in the body of the child who has been born. The doctors teach that a child who has just come into the world and has not yet been separated from his mother often has convulsive movements and that, if it is very weak, it sometimes has incomplete respirations accompanied by sighs, but that these pulsations of the heart and the arteries, these movements of the limbs, and even mere sighs do not accord civil life to a child

2-2 C.-B.-M. Toullier, *LE DROIT CIVIL FRANÇAIS* n° 96, at 58-59 (J.-B. Duvergier rev. 1846). Modern French doctrine seems to be in accord with Toullier’s opinion. See, e.g., Gilles Goubeaux, *DROIT CIVIL: LES PERSONNES* n° 41, at 48 n. (2) (1989) (“It is generally admitted that a child is born alive when it has respired, which reveals the presence of air in the lungs.”)

PH 1. In the course of time, Julie became pregnant by her husband, Pascal. The child was their first. When Pascal broke the news to his friend, Olide, Olide made a donation of \$10,000 in favor of the child, in proper form, with the stipulation that the donation was to become effective “when the child’s legal personality begins.” Seven and a half months into the pregnancy, Julie delivered the child via Caesarian section. Once out of the birth canal, the child took one breath and then cried for

⁴ Justinian apparently laid down that rule in order to take account of “dumb” children, who, by virtue of their disability, cannot, of course, cry aloud. JUST. COD. 29.29.3 (“The Sabinians held that if the child was born alive and did not utter a cry, it broke the [father’s] will; but it is evident that if it was born dumb it could not do so.”)

a few seconds, but, when that cry ended, immediately stopped breathing. The surgical team's efforts to revive the child proved fruitless. An autopsy revealed that the child suffered from a congenital heart defect, one so serious that the child was, as the pathologist put it, "foredoomed to die." In any event, a dispute soon erupted between Olide and Pascal regarding the donation. Pascal, insisting that the condition attached to the donation – that the child's legal personality begin – had been fulfilled –, argued that the donation had become effective and, further, that he and Julie, as the child's heirs, were now entitled to the \$10,000. Olide argued that the condition had failed and, therefore, that the donation had never become effective. Who's right? Why? *See* CC art. 25 & cmt. (b); *see also* cmt. (e) to CC art. 26.

b) Exceptions

*** Note on the "relativity" of the exceptions**

1] Conception

a] Operation of the exception

PH 2 α . The same as before (PH 1), except that, this time, there's no "donation"; instead, there's a "succession," to be precise, that of Pascal, who died, intestate, six months into the child's pregnancy (in other words, 1 ½ months before the "birth"). The question now is "who's entitled to what was Pascal's 'separate property' – his widow, Julie, or his brother, Baptiste?" Here's Julie's theory: (i) when the child was "born," Pascal's separate property devolved upon him under CC art. 888, inasmuch as the child was Pascal's sole "descendant"; (ii) then, when the child died, the property (now the *child's* separate property) devolved upon her under CC art. 892, ¶ 2, inasmuch as the child had no siblings and she was his only surviving parent. And here's Baptiste's theory: (i) when Pascal died, he then had no descendants, inasmuch as the child had not then been "born"; (ii) thus, when Pascal died, his separate property devolved upon him (Baptiste) under CC art. 892, ¶ 1, inasmuch as Pascal had no parents and he (Baptiste) was Pascal's only sibling. Who's right? Why? *See* CC art. 26, sent. 1.

PH 2 β . The same as before (PH 2 α), except that, this time, the child, after emerging from the birth canal, never breathed nor cried, not even once (in other words, was "stillborn"). What result now? Why?

PH 3 α . The same PH 1 & 2, except that, this time, the child survived long after its birth (and, indeed, is still alive) and there was neither a donation nor a succession; instead, there was a "quasi-delict," to be precise, a "slip and fall." The slip and fall occurred on an aisle in Jean Sot's grocery store; the immediate cause of the slip and fall was a piece of ice that Jean Sot, through his negligence, had left out in the aisle; the slipper-faller was Julie, at that time six months pregnant. When the child was born three months later, it exhibited multiple physiological defects, all of which the child's doctors attributed to the slip-and-fall accident. Within a year of that accident, Pascal and Julie, on behalf of the child, brought suit against Jean Sot to recover damages for the child's personal injuries. Jean Sot met the suit with a peremptory exception of "no cause of action." His theory was this: (i) to be entitled to sue for "personal" injuries under CC art. 2315 or 2316, one must, of course, be a "person" at the time at which the injuries for which one seeks compensation were sustained; (ii) the child was not yet a person at the time of the accident, for it had not yet been "born alive." What result would you predict? Why? *See* CC art. 26, sent. 1 & cmt. (c).

PH 3 β . The same as before (PH 3 α), except that, this time, (i) the child, after emerging from the birth canal, never breathed nor cried, not even once (in other words, was "stillborn") and (ii) the parents styled their suit as a "survival action" (per CC art. 2315.1) to recover damages for "personal

injuries” (pain and suffering) that the child suffered due to the accident. Will Jean Sot’s exception be successful now? Why or why not? For purposes of this hypothetical, you should assume (i) that the cause of the child’s still-birth was not the accident, but rather a congenital heart defect (as in PH 1), but (ii) that the child’s body, as in PH 3 α , still exhibited numerous physiological defects that had been caused by the accident and (ii) that the wounds that caused those defects were inflicted on the child before his congenital heart defect had finally killed him. See *Wartelle v. Women’s & Children’s Hospital*, 704 So. 2d 778 (La. 1998) (“[T]he stillborn fetus is not a ‘person’ who can acquire and transmit a survival action pursuant to article 2315.1”).

PH 4. After Clodice, who’d been “shackin’ up”⁵ with Olide for several years, discovered that she was “with child,” she told Olide about it. Olide responded by promptly leaving her. Faced with a mountain of pre-natal medical care expenses (Clodice was, at least, a conscientious mother), Clodice decided to sue Olide. In her suit, she sought two things: (i) first, a judgment of “filiation” under CC art. 209, declaring that Olide was, in fact, the father of her still unborn child; and (ii) second, a judgment of “child support,” ordering Olide to contribute to the payment of her pre-natal expenses. Olide met the suit with a declinatory exception of “prematurity.” His theory was as follows: (i) though a child is considered to be a person from the moment of its conception for all purposes related to its interests, this “personality” of the conceived child is contingent on the child’s eventually being “born alive”; (ii) for that reason, one can’t determine whether the child in fact has such a protectable interest unless and until it is actually born alive. Does Olide’s exception have merit? Why or why not? See CC art. 26 & *Malek v. Yekani-Fard*, 422 So. 2d 1151 (La. 1982) (because “unborn children are regarded by the law as already born in property matters undertaken for their benefit” and “parental filiation with consequent entitlement to support and heirship is a property right of an unborn child,” an action for filiation and support can be brought on a child’s behalf while the child is still *in utero*).

PH 5. The same PH 3 α , except that, this time, the child “died” while still *in utero* (in other words, before it even entered the birth canal) as a result of the slip-and-fall accident, that is to say, the accident precipitated a spontaneous abortion. Within a year of the accident, Pascal and Julie sued Jean Sot to recover damages for the “wrongful death” of their child. Jean Sot met the suit with a

⁵ This is a folksy way of referring to what your grandparents and the remnant of moral traditionalists that survives today (myself included) like to call “livin’ in sin” and what the civil law, from its origins in Rome, has always called “open concubinage.” All three terms refer to a situation in which a man and a woman live together more or less *as if* they were husband and wife (i.e., live in the same house, where they share household expenses and responsibilities; enjoy a more or less monogamous sexual relationship, which may or may not have produced children; appear at social and other public gatherings together “as a couple”), yet have never formally married, in particular, have never “exchanged vows” in a proper “wedding ceremony.”

Historically the civil law has taken a dim view of concubinage, a view that remains in place to this day. That was true even in the classical period of Roman law, when that law, from a Christian standpoint, was still rather “pagan.” In the Middle Ages, when the Roman law was “Christianized,” concubinage was discouraged with a vengeance, for orthodox Christianity, then as now, regards all sexual intercourse outside of marriage as a grave moral fault. It was not until late in the Modern Era, indeed, the very end of the 20th century, that this hostile attitude toward concubinage began to wane a bit. But though it has waned, it has hardly been eliminated.

peremptory exception of “no cause of action.” Here was his argument: (i) under CC art. 2315.2(A) (“If a *person* dies due to the fault of another” , a wrongful death action presupposes, among other things, that some “person” must have died; (ii) because the child was never “born alive,” it never became a “person.” Will Jean Sot’s exception be successful? Why or why not? See CC art. 26, sent. 2, & cmt. (d).

b] Definition of “conception”

PH 6. After years of trying, without success, to conceive a child the old-fashioned way, Pascal and Julie, husband and wife, sought out the assistance of the Acadian Fertility Clinic. Under the direction of the clinic staff, Pascal and Julie then “made deposits” of their respective “gametes” at the clinic. Then the staff used Pascal’s sperm to “fertilize” several of Julie’s eggs, thereby producing several embryos. Pending the implantation procedure, at which time the embryos were to be implanted into Julie’s uterine wall, the embryos were kept in cold storage at the clinic. But before that procedure could take place, Pascal died in a tragic ‘gator-hunting accident. Determined “to keep the memory of *mon très cher mari* Pascal alive,” Julie decided to go ahead with the procedure nonetheless. A few weeks later the implantation was done; nine months after that, Julie gave birth to a strapping baby boy, whom she named Ti-Cal. Not long after Ti-Cal’s birth, a dispute erupted between Julie and Pascal’s brother, Baptiste, regarding the proper disposition of what had been Pascal’s separate property. Both parties agreed on at least this much: to whom that property belongs depends on whether Ti-Cal had already become a “person” as of the moment of Pascal’s death, which, in turn, depends on whether he had already been “conceived” as of that moment (*see* CC art. 26): if he had been, then the property belongs to him as Pascal’s sole descendant (*see* CC art. 888); but if he had not been, then Ti-Cal was never a “descendant” of Pascal, properly so called, and, as a result, Pascal’s separate property falls to his sole sibling, Baptiste (*see* CC art. 892). What do you think? Had Ti-Cal already been “conceived” as of the moment of Pascal’s death? Why or why not? See CC art. 26 cmt. (b).

On the status and rights of human embryos, read La. Rev. Stat. 9:121-133. (Merely *reading* this legislation will be sufficient; don’t waste your time outlining it.)

2] Mere “collection of gametes,” etc.

PH 7. The same as PH 6, except as follows: (i) the cause of Pascal’s death is not a car accident, but SARS (sudden acute respiratory syndrome); (ii) not long after Pascal gets the diagnosis, he draws up an instrument in which he authorizes Julie to “proceed with our plans to conceive a child” in the event that he should die; (iii) when Pascal dies, the staff at the clinic has not yet fertilized Julie’s ova with his sperm; (iv) a few months after Pascal dies, Julie directs the staff to proceed with the fertilization; (iv) a week after that, several of the embryos are implanted into her uterus; (v) nine months after that (one year after Pascal’s death), Julie gives birth to a strapping baby boy, whom she names Ti-Cal. Who inherits Pascal’s separate property now – Ti-Cal or Baptiste? Why? See La. Rev. Stat. 9:391.1.

2) End

a) Actual death

PH 8. While trying to pull moss from the upper limbs of a cypress tree, Jean Sot slipped off the branch on which he’d been standing and fell 20 feet to the ground. When he hit the ground, he immediately lost consciousness and stopped breathing. Though his partner, Olide, gave him mouth-to-mouth respiration, Olide never managed to get Jean Sot to breathe again spontaneously. Eventually an EMS helicopter team arrived on the scene and, after “bagging” Jean Sot (putting a

breathing bag over his nose and mouth), continued to respire him artificially. Jean Sot was then flown to Our Lady of the Bayou Medical Center. To this day (about three months from the date of the accident) he has remained there in the intensive care unit on an “iron lung.” His doctors don’t believe that he could breathe on his own were he to be removed from the respirator, but they aren’t sure and, in any event, are afraid to try it. EEG (brain wave) monitors attached to Jean Sot’s head show some brain activity, but it is marginal. Jean Sot’s children – Beau, Meau, and Seau –, who consider Jean Sot to be “dead already,” want to “pull the plug” on the respirator, but Jean Sot’s wife, Chloe, who has the final call, refuses. Beau Sot then files a petition for a “judgment of possession,” asking that he, his siblings, and his mother be put into possession of Jean Sot’s estate. Chloe opposes the petition, arguing that it is “premature” in that “Jean Sot is not yet dead.” Who wins? Why?

b) Presumed death

1] Exposure to peril

PH 9 α . Late one night, while Jean Sot and his friend, Olide, were sound asleep in the hold of his bateau, *Le Cause Perdu*, out in the Gulf of Mexico just off the shore of Grande Isle, a huge oil tanker struck *Le Cause Perdu*, causing it to break up and to sink. An intensive week-long manhunt by the Coast Guard and numerous volunteers managed to turn up both the remains of *Le Cause Perdu* and the body of Olide, but not the body of Jean Sot. Beau Sot, Jean Sot’s eldest son, then filed a petition for a “judgment of possession,” asking that he, his siblings, and his mother be put into possession of Jean Sot’s estate. Chloe opposes the petition, arguing that it is “premature” in that “we don’t know for sure yet if Jean Sot is dead.” Who wins? Why?

PH 9 β . Several years after Pascal purchased a life insurance policy (on his own life) from Cajun Insurers, Inc., he was diagnosed with TB. His condition thereafter worsened, and he allegedly became despondent and melancholy. Then he just disappeared. Seven years later, Julie, as the beneficiary of the policy, sued Cajun for the proceeds. Is she entitled to them? Why or why not?

2] Absence for five years

PH 10. Several years ago, Pascal, who was in perfect health, left Nulle Part on a business trip to Bunkie. He never returned. Desperate to find him, Julie, his wife, hired a private investigator. Though the investigator conducted a diligent inquiry (he interviewed the staff at the hotel in which Pascal had stayed, Pascal’s business partners, etc.; contacted local police; checked nearby hospitals & morgues), he was unable to discover what had become of Pascal. Seven years have come and gone. Julie now wants to open Pascal’s succession. Can she do so? Why or why not?

b Effect of natural personality: capacities

1) “General juridical capacity” (or “capacity of enjoyment” or “capacity to be a title-holder”)

What is “general juridical capacity”? Read CC art. 27. Then read the following doctrinal material:

1 Jorge Joaquín Llambías, *TRATADO DE DERECHO CIVIL: PARTE GENERAL*
n^{os} 558, at 383 (6th ed. 1975)

558. *Capacity: concept.* – One calls “capacity” the aptitude of the

person to be the title-holder of juridical relations.

This aptitude is the salient quality of juridical personality to such an extent that one can say, with justification, that it cannot be lacking from an individual in an absolute manner: the absence of capacity would be contradictory to the personality that modern law predicates of all individuals. Nevertheless, it cannot exist in anyone fully and intact: juridical capacity is always a question of degree; each person oscillates between the two extremes [i.e., full capacity and no capacity] without reaching either.

. . .

559. *Terminology.* – It is desirable to know at the start the terminology that is used in this matter. Juridical capacity is more frequently denominated capacity of “enjoyment,” by opposition to capacity of “exercise,” which is also called capacity “to act” The Italian authors have come up with the denomination “titularability,” a term that is very expressive for defining the [distinctive] characteristic of juridical capacity.

560. *Nature.* – From the point of view of [its] juridical nature, capacity is an inherent attribute of personality. It has been rightly said capacity is the most typical attribute of persons: [it is] that which serves precisely to define persons as such, from the angle of the law, because it pertains not only to the nature but also to the essence of personality. That is, one is not dealing here with a quality that is [merely] suited for or conformed to the notion of the legal person, but with one that is consubstantially integrated into this very same notion.



Gérard Cornu, *DROIT CIVIL: INTRODUCTION, LES PERSONNES, LES BIENS*
n^{os} 473, 475, & 477, at 167 (8th ed. 1997)

473. Juridical capacity is a fundamental element of the law of persons. It is defined as the aptitude to become the title-holder of rights and obligations It therefore becomes evident that juridical capacity and juridical personality partially coincide with each other.

. . .

475. Because they [juridical personality and capacity of enjoyment] are developed on the same plane, the two notions necessarily meet each other. The absence of juridical personality would be defined as a general incapacity of exercise. If it were recognized, a general incapacity of enjoyment would be equivalent to the absence of juridical personality. Within their limits, the special incapacities of enjoyment are encroachments on – partial amputations of – juridical personality.

. . .

477. *Capacity . . . is susceptible of degrees.* – It suffers certain particular exceptions that result precisely from incapacities of enjoyment . .

. . . Now, one must understand, the incapacities of enjoyment hold in check the juridical personality within their limits. But this personality, as a generic aptitude to be the subject of the law, [nevertheless] remains. Persons stricken with an incapacity of enjoyment, [which is] necessarily limited, [nevertheless] remain subjects of the law.

2) “Special juridical capacity” (or “capacity of exercise” or “capacity to act”)

What is “*special* juridical capacity”? Read CC art. 27 cmt. (b) & CC art. 28. Then read the following doctrinal material:

1-1 Ludwig Enneccerus, Theodor Kipp & Martín Wolff,
TRATADO DE DERECHO CIVIL: PARTE GENERAL § 76, at 325
(Hans Karl Nipperdey rev. 39th ed., 13th rev. 1931;
Blas Pérez Gonzalez & José Alguer trs. [German to Spanish] 1947)

Juridical capacity [general] must not be confounded with the capacity to act (that is, the capacity to contract . . .) or the capacity to produce juridical effects by means of one’s own will. Moreover, juridical capacity and the capacity to act do not always coincide. Minor children . . . and the mentally infirm are incapable of acting, but have juridical capacity. In Roman law, slaves did not have juridical capacity, but certainly had capacity to act.

1-2 Arthur von Tuhr, *DERECHO CIVIL: TEORIA GENERAL DE DERECHO CIVIL ALEMÁN*
§ 2.1, at 4 (Tito Ravà tr. [from German to Spanish] 1946)

The most important juridical quality of man is the capacity to act, that is to say, the condition of the will that the law considers necessary in order for human acts to produce juridical effects. Those who are incapable of acting include children and the mentally infirm; the acts necessary for the exercise of their rights and the safeguarding of their interests belong to their legal representatives. . . .

The [German] civil code [so also the Louisiana Civil Code] ignores the term and the concept of capacity to act, limiting itself to the regulation of the capacity necessary for the most important acts, that is, for declarations of will (contractual capacity . . .) and the prerequisites for liability for illicit facts and for violations of contracts The legislation does not establish what grade of capacity is required for the efficacy of licit juridical facts that do not fall into the category of juridical acts. Capacity to act presents itself in diverse gradations: it can be limited, by requiring the authorization of other persons,

or unlimited; there can be certain prerequisites for capacity for certain kinds of juridical acts. In this sense, alongside the general capacity to act there exists a special capacity for marriage and another for making testaments.

c Attributes of natural persons

1) Status

What is “status”? Read the following doctrinal material.

1 Jorge Joaquín Llambías, *TRATADO DE DERECHO CIVIL: PARTE GENERAL*
n^{os} 465-470, at 337-39 (6th ed. 1975)

465. *Importance.* – In modern law the juridical notion of “status” has lost a great part of the importance that it had in Roman law. In Rome the word “status” alluded to the diverse elements that [were thought to be] constitutive of personality or *caput* [legal life], which consisted precisely in the union in the same subject of the three integral *stati* thereof: the *status libertatis* [free, as opposed to “slave,” status], *status civitatis* [status of citizen, as opposed to that of “foreigner”], and the *status familiae* [status of *sui juris*, i.e., one able to act for oneself (such as a *paterfamilias*, i.e., head-of-family, as opposed to that of *alieni juris*, i.e., a subordinate family member, e.g., child, wife, or daughter-in-law of the *paterfamilias*]. It was sufficient, in order for the disintegration of the personality to result, that any one of these *stati* be lacking; that happened when the person was a slave . . . , a foreigner, or an *alieni juris*. The foreigner was at the margin of the *jus civium romanorum* [Roman civil law] and, as such, was not subject to that juridical order. And likewise the *alieni juris*, as one submitted to the power of another, lacked a personality different from that of the one who had him (her) under his power, in such a fashion that, in theory, he (she) could not come to be the holder of his (her) own rights unless they were sponsored in the person of his (her) father or her husband, depending on what the incapacity was [i.e., that of a child or that of a wife].

In modern law these characteristics and discriminations have lost all meaning. The *status libertatis* no longer exists inasmuch as it has ceased to be a factor of differentiation of persons [for slavery is now prohibited]. . . . In the same way *status civitatis* has ceased to be a recognizable elements, since Argentine law [and Louisiana law as well] protects and obligates [all] human beings on an equal basis, regardless whether they are national citizens or foreigners Thus, all that remains is the *status familiae*, which at present has a different sense from that of the Roman law.

. . . .
466. *Concept.* – According to Savatier, “the status of a person is the

conjunction of the extra-patrimonial qualities that are determinative of his individual and familial situation.” This conjunction of personality qualities translates itself into a mode of being of the person in society.

But if we want to move forward some distance [in our understanding of] this very vague concept to identify which are the constitutive *elements* of the status of persons, we notice in the modern doctrine a manifest uncertainty. The positions of the authors vary depending on whether they have a more or less broad view of the factors that one should take into account for this purpose.

467. *Elements of status.* – With respect to this topic, diverse opinions have been set out. They can be grouped into three distinct conceptions, which we will consider separately.

468. a) *First conception (Aubry and Rau, Colin and Capitant, Bonnecase, Coviello, and Stolfi).* – The first conception more closely approximates the Roman concept of status. By the elimination of its other elements [i.e., those that, as Lllambias explained earlier, don’t “fit” modern law, namely, *status libertatis* and *status civitatis*], it is conceived of as the position that corresponds to the person in relation to the social and the familial group to which he belongs.

469. b) *Second conception (Baudry-Lacantinerie, Planiol, Josserand, de Ruggiero, and Salvat).* – For the authors who profess the second conception, “status” responds to a much broader concept. It includes not only the factors that fix the position of the person in the face of society and the family, but also the inherent qualities of the person, such as age, sex, or mental health. The qualities that are not related to the person in himself but rather to his occupation or profession are the only qualities that lie at the margin of this notion.

470. c) *Third conception (Ferrara).* – This author has the broadest understanding of status. It is made up of all the qualities of the person that have an influence on a more or less extensive conjunction of juridical relations: thus, the quality of absentee, heir, employee, military, etc.

Washington de Barros Monteiro, *CURSO DE DIREITO CIVIL [DE BRASILIA]:*
PARTE GERAL 56 (14th ed. 1976)

Status of natural personality. – The expression “status” comes from the Latin *status*, used by the Romans to designate the various integral predicates of personality. It was the mode of being by virtue of which men find themselves to be susceptible of rights in civil society.

Status as a whole presented itself under three aspects: liberty, citizenship, and family (*status libertatis*, *status civitatis*, and *status familiae*). Natural personality attained its plenitude only when the three elements were united.

. . . caput civile. The loss of one of the attributes configured the *capitis deminutio* [diminution of legal life], which were three-fold: maximum, medium, and minimum.

The *capitis deminutio maxima* followed from the loss of liberty, which brought about the loss of the other *stati*. The *capitis deminutio media* resulted from the inhibition of citizenship, which implied the loss of the status of family, but without affecting that of liberty. The *capitis deminutio minima* was the consequence of the loss of the last status, by having a citizen change families.

In modern law only the last two *stati* – nationality and family – have managed to survive, for, presently, all men are equally free and capable of rights and obligations. With justification, then, Picard has affirmed that the word “liberty” has today less sonority than it did in earlier times.

With Clovis, we can define “status” as a particular mode of existing. It is the juridical position of the person in the heart of the collectivity. Every person has a status, from which result multiple juridical relations. This status can be considered under three different angles: individual, familial, and political.

“Individual status” (or physical status) is the mode of being of a person under the aspect of his organic constitution. In this status are set out diverse objective elements, such as age, sex, and health, which exercise a decisive influence over one’s civil capacity

“Familial status” is the position occupied by the person in the heart of the family. Every individual is framed within a determinate family by three orders of relations: the conjugal bond, relatives by consanguinity, and relatives by affinity. Under this aspect, familial status distinguishes persons into “married,” “single,” “widowed,” “separated,” “related” (by consanguinity or affinity) or “not related.” . . .

Finally, “political status” is the juridical quality that comes from the position of the individual as a part of a politically organized society, which is called a “nation.” . . . Of the political status: nationality and citizenship. . .

Sometimes expressions such as these are used as well: status of heir, status of partner [in a business]. This usage is improper. To designate such situations, says Torrente, it is preferable to use the locution “juridical quality.”

Gérard Cornu, *DROIT CIVIL: INTRODUCTION, LES PERSONNES, LES BIENS*
n^{os} 531-533, at 200-01; n^{os} 535-536, at 201-02; n^o 539, at 203;
n^o 542, at 203-04; n^o 544, at 204; n^o 547, at 205(8th ed. 1997)

531. The distinction of person rests on certain substantive criteria. These distinctive elements determine, by virtue of the consequences that the

law attaches to them, the personal situations of individuals; they compose the civil status of each: these are the "elements of status of persons."

...

§ 1. – *The Elements of Status of Persons*

532. Within the individual, the civil law takes into consideration a whole series of particularities and qualities to which it attaches diverse juridical consequences. In the traditional doctrine, the only elements considered were those that rached the individual to a state or to a family; covering the status of citizenship (*status civitatis*) and the status of family (*status familiae*), "status" [in this conception] entailed only nationality and parentage (paternal and maternal filiation). The modern doctrine tends to take an open and more diversified view of status. Age, sex, profession, and religion are also recognized as elements of status. The familial situation results not only from filiation, but, embracing the matrimonial and parental situation, reflects all the events that mark life – marriage, widowhood, separation, divorce, remarriage, paternity, and maternity. . . .

533. Though diverse, these elements all assume the same general function: characteristics or "types," they concur in *individualizing* each person in society. They constitute, in the broad sense of the term, "factors of civil identification." But, in a specific fashion, each elements produces juridical effects; each is a source of rights and duties. The *sum of these juridical consequences* determines the personal situation of the an individual in regard to the civil law; it confers on him a certain civil status; it fixes his "civil condition."

...

A. – *Natural Order Factors*

535. These are some elements of a biological order, some natural criteria, some physical particularities. The civil law takes account, concretely, of certain of these particularities, but not all of them. Never does it take into consideration the race of an individual so as to attach juridical consequences to it. There is no civil racial discrimination. The law forbids it.

a) *Sex*

536. The civil law deduces diverse consequences from one's belonging to one sex or the other. . . .

...

b) *Age*

539. Age is an important element of the civil status of persons. . . .

...

c) *Health*

542. Health is today recognized, in the background, as a secondary, but not negligible, element of the status of persons. . . .

B. – *Social Order Considerations*

To the elements of biological order are adjoined some considerations

of social order.

a) *Matrimonial condition & family origin*

544. Founded in a true *status* [in the Roman sense of the word], certain social order considerations concur to determine the status of persons. It is the case with the institution of marriage. . . .

. . .

b) *Other elements*

547. The other considerations of a sociological order entail, in the civil law, only fragmentary and secondary consequences. It is the case with one's profession, social milieu, social condition, level of fortune, etc. . . .

a) **Elements of status**

1] **Individual status**

a] **Sex**

1} **Recognition**

Is "sex" among the *stati* recognized in current Louisiana law? Read CC arts. 89 & 184-190.

2} **Species**

What are the various alternative sex-based *stati*? There are, of course, at least two: male and female. But is that all? What about the hermaphrodite? Does Louisiana law attach any distinctive juridical consequences to being hermaphroditic? *See* La. Rev. Stat. 40:62.C (authorizing a "pseudo-hermaphrodite" who as undergone "corrective surgery" to obtain a new birth certificate that reflects his clarified sex, be it male or female).⁶

3} **Significance**

NOTE

Though it would be an understatement to say that "sex" no longer has *the same* juridical significance that it once had, it would be an overstatement to say that it no longer has *any* such significance. There are, in fact, at least two contexts in which one's sex still matters, legally speaking.

The first is that of the "impediments to marriage." According to Civil Code art. 89, persons of the same sex cannot marry each other. Because that is so, every man can do something that no woman can do – marry a woman – and, by the same token, every woman can do something that no man can do – marry a man.⁷

The second is that of "proof of paternity." In Civil Code arts. 184-190, one finds a number of rules that concern two related topics: "presumptions of paternity" and

⁶ This is the *only* Louisiana legislation that deals in any way with hermaphrodites.

⁷ This distinction between the sexes is rooted in public policy. *See* CC art. 3520.B ("A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana . . .")

“disavowal of paternity.” These presumptions operate against only husbands (current or former), and the right to disavow operates in favor of only husbands (current or former)⁸; and under our law, as we have seen, only men can be husbands.

b) Age
1} Recognition

Is “age” among the stati recognized under Louisiana law? Read CC arts. 27, 28, 1476, 1918; 2333; & 3469.

2} Species

What are the various alternative age-based stati? There are, of course, at least two: minor and major. But is that all? Consider the following doctrinal material:

1-2 Arthur von Tuhr, *DERECHO CIVIL: TEORIA GENERAL DE DERECHO CIVIL ALLEMAN*
§ 24.II, at 42-44 (Tito Ravà tr. [from German to Spanish]1946)

The qualities of a person that constitute the natural foundation for his capacity to act do not arise with birth, but will unfold in a progressive manner. For this reason, the juridical order must establish distinctive norms for the adult and the juvenile. The Romans recognized three stages for juveniles: [i] *infantia*, up to the seventh (7th) year; [ii] *impubertas*, up to the fourteenth (14th) year; and [iii] *minor ætas*, up to the twenty-fifth (25th) year. In the common law [pre-codification Germano-Roman law], *minores* and *impuberes* were combined and, then, with the Law of the Year 1875 on the status of persons, the age of majority was fixed at twenty-one (21) years completed. In this way have arisen the two grades of age [for juveniles] of the [German] Civil Code: infancy, up to seven (7) years, and minor age, which endures up to twenty-one (21) years. Infants completely lack the capacity of acting [cannot make juridical acts] and of imputability [cannot commit delicts]; minors have a limited capacity to act As long as one has not

⁸ *This* distinction between the sexes is rooted in nature. Because the mother’s role in procreation is, shall we say, more extensive and intensive than that of the father, in particular, because she not only participates in the act of fertilization, but thereafter incubates the child for nine (9) months or so and then delivers it into the world, determining who the mother of a given child is presents no difficulty: she is the one from whose body the child emerged. Determining who the father is is another matter. His role in procreation is, of course, limited to fertilization, an event that takes place nine (9) months or so before the birth, in secret and to which there are only two witnesses. And so it is that when the child is born, an outside observer can never be as sure of who the father is as he can be of who the mother is.

Both the “presumptions of paternity” and the “right of disavowal” are part of a legislative response to this unique indeterminacy that surrounds the identity of the father. The presumptions consist of rules that attribute paternity, at least tentatively, to what one might say is the most probable candidate. The right of disavowal enables this candidate to prove that the tentative identification was inaccurate.

attained the age of majority, one is under the power of one's parents or, if one has none, one's tutor.

A status inferior to that of majority [but nevertheless different from that of infancy or minority] has importance in certain relations: . . . [e.g.,] the capacity to make a testament runs from [the age of] seventeen (17) years .

. . .

Gérard Cornu, *DROIT CIVIL: INTRODUCTION, LES PERSONNES, LES BIENS*
n^{os} 540-541, at 203(8th ed. 1997)

540. – *Legal age.* – It happens that the law sets an age (the “legal age”) that, within civil society, distinguishes various age classes (that which has surpassed this age limit [and] that which has not) so as to give to all individuals of the same category an appropriate status. To discuss the most typical example, the law distinguishes majors and minors in this way on the basis of eighteen (18) years. It attaches to this age a considerable juridical consequence: to the individual who has completed eighteen (18) years, the law grants full capacity of exercise – the full capacity to accomplish all the act of civil life (notably to engage himself by way of contracts: contractual capacity) alone and by himself (without representation or assistance). During his minority, the individual is thought to have need of protection: in the acts of civil life he is either represented or assisted by persons who have authority over him.

It is, however, important to observe that civil legislation today has a tendency to “stagger” majorities. Beneath the general age of majority, it institutes some “special anticipated majorities” that, in particular domains, confer on the minor a certain independence or, at least, the right to be consulted. . . .

541. – *Real age.* – The “real” age of an individual (within his age class) is not a matter of indifference. Considerations of age (young age [or] advanced age) constitute, for the judge, elements of evaluation in the application of the law; these are balancing factors for judicial individualization. In civil matters, delictual capacity (distinct from contractual capacity) furnishes one of many characteristic examples of this. The capacity to obligate oneself by means of civil delicts is not tied to general majority (18 years): it attaches to a minor of less than 18 years from the moment at which he is endowed with discernment. But the acquisition of discernment is a question of age, and the age of reason – the age of discernment – is a question of fact for the judge, one the settlement of which, in each case, is a function of the real development of the child (in general, 7 or 8 years). In the matter of delictual responsibility, age is an element in the determination of the personal injuries suffered by the victim

It is clear, then, that in ancient Rome, as in Germany and France today, other age-based status aside from those of “majority” and “minority” were / are recognized. But what about in Louisiana? Does our law, too, recognize additional “grades of age” beyond those of “majority” and “minority”? Consider, first, the following legislation: CC arts. 134(9) & 136.B(3); CC art. 230.B; CC arts. 370-376, 382 & 385; CC art.1476. Then consider the following jurisprudence:

Turner v. Bucher,
308 So. 2d 270, 273-74 & 276 n. 14 (La. 1975)

. . . the Louisiana and French concepts coincide in holding that nondiscerning persons do not possess the capability of knowing the consequences of their conduct; they lack the moral guilt usually associated with delictual responsibility and, therefore, they should not be legally liable for acts under an objective standard designed for normal reasoning persons.

. . .
 . . .¹⁴

¹⁴ We are not called upon to decide in this case whether a nondiscerning minor child may also be liable for his delicts. However, it must be very apparent from our discussion . . . that it almost necessarily will follow that a nondiscerning minor child will not have delictual liability since our language had indicated that a nondiscerning minor is incapable of being legally at fault.

. . .
We believe that our jurisprudence, the French jurisprudence and the French doctrine are all correct in finding that those minors incapable of discernment are immune from legal liability for delicts arising from negligence. Any basis in this opinion for concluding that there is no liability on the part of the minor for his offenses or his quasi-offenses is limited to the minor of tender age who is so incapable of discernment as to also be incapable of being legally at fault.

3} Significance

PH 11. Not long ago Olide’s three children ran amok. His eldest child, Avarice (aged 18), persuaded her younger sister, Desirée (aged 13), and her still younger brother, Ti-O (aged 4), to join her in (i) stealing peaches from Pascal’s orchard and (ii) ordering hundreds of dollars worth of merchandise by telephone from the “home shopping” network. Pascal then sued all three children (but, curiously, not Olide), as did the still unpaid merchants from whom the children had ordered goods – Hollywood Jewelers (from whom Avarice had ordered a ring), Mystic Music (from whom Desirée had ordered the collected works of Britney Spears), and Toys-R-Us (from whom Ti-O had

ordered the complete line of “Barney & Friends” paraphernalia). Assess the potential liability of each child with respect to (i) Pascal and (ii) the merchant from whom she / he ordered goods. Explain.

c) Health

1} Recognition

Is “health” among the *stati* recognized under Louisiana law? Read CC art. 28 cmt. (b); CC arts. 354 & 356; 389 & 390; 1477; 1918; 3469.

2} Species

What are the various alternative health-based *stati*? Look again at the legislation you just read; then read the following doctrinal materials:

1-2 Arthur von Tuhr, *DERECHO CIVIL: TEORIA GENERAL DE DERECHO CIVIL ALLEMAN* § 25.I, at 49, & II, at 51-53 (Tito Ravà tr. [from German to Spanish] 1946)

In the civil law, physical defects do not have much importance; in particular, they do not limit the capacity to act. But it is possible for them to make the administration of one’s juridical relations difficult as a matter of fact. If the affected person – in particular, if he is deaf, blind, or mute – cannot manage his affairs, or a certain category of them – for example, the patrimonial –, and is not under parental power or tutorship, the court . . . can designate a curator for his person and his patrimony or for a certain category of his affairs. . . .

. . . .
Much more important are the intellectual defects, for they directly affect the juridical core of the person – volitional capacity. The [German Civil] Code contemplates three grades:

1. Articles 104⁹ and 827 [of the German Civil Code] designate the most grave case as pathological disorder of the intellectual activity, which excludes the possibility of one’s determining one’s will freely. This status excludes imputability [delictual liability] and implies the nullity of declarations one has made. It takes away the capacity to act, if, by its nature, it does not have a transitory character. The incapacity begins *ipso jure* [by operation of law, i.e., no judicial finding is required for the incapacity to begin] and, therefore, also terminates with the commencement and the end of the intellectual infirmity. During so-called “lucid intervals,” which sometimes take place in the course of the infirmity, the capacity to act exists, because the will can then be determined freely, and that is so even though the lucid intervals, from a strictly medical point of view, may be such as not to interrupt the unitary process of the infirmity. . . .

⁹ *BGB* § 104(2) (“[Incapacity to act] A person is incapable of acting . . . who is in a medical condition of disturbance of mental activity that prevents the free exercise of his will, unless the condition is temporary in nature.”)

Infirm persons can be incapacitated by interdiction ([BGB] art. 6, n° 1¹⁰). When the interdiction is founded on the motive of reference, it implies the incapacity to act.

...

There is considerable dispute regarding the cases in which the free determination of the will does not exist in certain directions – by the effect of fixed ideas, manias, and analogous states –, even though, for the rest, the infirm person is capable of reasonable resolutions. By virtue of the connection that exists between mental functions, the medical profession treats these persons as infirm. Do they, for this reason, lack the capacity to act, with the result that even their reasonable acts will be null? I believe that article 104 ought to be applied exclusively when the possibility of the free determination of the will is absent, that is, when it is absent in every direction and not just in certain fields. An act founded on a fixed idea or some other psychic abnormality will, of course, be null, but in accord with article 105, n° II.¹¹ Such a solution is advisable [in view] of the respect that must be given to juridical interactions, in which man is considered to be capable of acting so long as his abnormality is not manifested.

...

Gérard Cornu, *DROIT CIVIL: INTRODUCTION, LES PERSONNES, LES BIENS*
n° 543, at 204(8th ed. 1997)

It is [with respect to] . . . the “capacity of exercise” that the civil law takes account of the alteration of the mental and physical faculties of the individual. When, by virtue of an alteration of his personal faculties, an individual is not in a position to exercise his rights himself – to provide for his own interests himself –, he is provided with one of the regimes of protection that has been established by the law. The principle is posed in article 490 of the [French] Civil Code: depending on the gravity of the interested person’s state and the intensity of the need for protection that he is experiencing, he can be placed under judicial protection or put into curatorship [interdiction] or, in the most grave cases, placed under tutorship. The common character of these three regimes of protection is that they are organized in the very interest of the individual whose faculties have been altered.

The alteration of mental faculties is equally taken into consideration by the civil law in regard to “consent” to juridical acts. To make a valid act, one must be of sound mind ([French] Civil Code art. 489). It is a condition for the validity of the act. The nullity that sanctions [an act that does not meet this condition] is designed to protect the person who has taken an engagement while under the dominion of mental trouble.

¹⁰ BGB § 6(1) (“ . . . ”)

¹¹ BGB § 105(2) (“[Nullity of declaration of intention] A declaration of intention that is made in a condition of unconsciousness or during a temporary disturbance of mental activity is also null.”)

Does Louisiana recognize the same health-based stati as does Germany or France? Let me be more specific. Does Louisiana, as do Germany and France, recognize different stati based on physical (as opposed to mental) health? Does Louisiana have some mental-health based status comparable to that established by German Civil Code art. 104? Louisiana, like France and Germany, clearly has a regime of “curatorship” for mentally-disturbed persons. But does Louisiana, like France but unlike Germany, also have, in addition to this regime of curatorship, a regime of “tutorship” for mentally-disturbed adults?

3} Significance

PH 12. When it became clear that Mamère had a serious case of Alzheimer’s Disease, Papère, her husband, had her interdicted and, acting as her curator, placed her in a local nursing home. Depressed that his wife had lost her mind, Papère decided to “tie one on”: within a single hour, he managed to down a bottle of Ripple, a bottle of Mad Dog, a bottle of Boone’s Farm, and half a case of Schafer Light, all on an empty stomach. While he was still very much under the influence, Papère behaved badly: first, he ordered “The Complete Lawrence Welk,” a collection, on videotape, of all of the Lawrence Welk television shows, from QVC for a price of \$1,000 (though the QVC employee who took the order could tell that Papère was impaired, she processed the order anyway) and, not long after that, backed his car over Fideaux, Olide’s dog, killing it. Meanwhile, Mamère, who was enjoying a rare moment of lucidity (so her doctors, who were present at the time, will testify), decided to make out a testament, valid in form, in which she left all of her property to her nephew, Monte. Then, as she stood up from the table at which she’d just finished signing the testament, she unintentionally, yet carelessly, bumped into another patient named Rosalie, causing her to fall and to break her hip. The next day, Mamère died and Papère sobered up. Rosalie now wants to collect damages for personal injuries from Mamère’s estate and Monte wants to get from Mamère’s estate the property that Mamère left him. So also QVC wants its \$1,000 from Papère and Olide wants Papère to pay for the damages he caused by killing Fideaux. Will Rosalie, Monte, QVC, and / or Olide get what she / he / it wants? Why or why not?

2] Familial status

a] Recognition

Do the stati that are recognized by Louisiana law include some that are based on “familial relations”? Read CC arts. 86, 88, 90, 131, 141, 178-180, 184, 214, 216, 227, 263, 888, 891, 895, 896, and 1483.

b] Species

What are the various alternative family-based stati? Look again at the legislation you just read; then review the material on “familial relations” that appears at pp. 12-15 of this Supplement.

c] Significance

PH 14 α . Recall Ti-Boy’s family tree (FH 1.0, Supplement pp. 14-15). Ti-Boy would like to marry Cassis. Would there be any problem with such a marriage? If so, what and why? Could he marry Denise, instead? Why or why not? *See* CC art. 90.

PH 14 β . The same as before, except Suppose that Papère, who has just died, left behind a testament that contained some particular legacies for his grandchildren, including a legacy of Tract A to Cassis and a legacy of Tract B to Ti-Boy. Both tracts have been and, for the foreseeable future, will continue to be leased to farmers on a month-to-month basis. Both Cassis and Ti-Boy are minors. (i) Who is entitled to the next month’s rent on Cassis’ tract, Tract A? Why? (ii) Who is entitled to the next month’s rent on Ti-Boy’s tract, Tract B? Why? *See* CC arts. 223 & 226.

PH 14γ. The same as before, except . . . Suppose that Tante had died and that Noncle (now aged 50) has fallen on extremely hard times. He lacks the resources necessary to provide himself with food, clothing, shelter, and basic health care and, for whatever reason, is ineligible for governmental assistance. Noncle wants to know whether he can demand assistance from any of his relatives, in particular, his father, Ozon; his son, Monte; his granddaughter, Denise; his brother, Papère; or his nephew, Pascal? What will you tell him? Why? See CC art. 229.

PH 14δ. The same as before, except . . . Suppose that Basile has just died intestate. Which of his relatives is entitled to his property? Why? See CC art. 888. What if that person had predeceased Basile: who, then, would have been entitled to his property? Why? See CC art. 891. What if those persons, too, had predeceased Basile: who, then, would have been entitled to his property? Why? See CC art. 895. What if those persons, too, had predeceased Basile: who, then, would have inherited his property? See CC art. 896.

3] Political status

Does Louisiana recognize any sort of political status, in particular, the status of “citizen” and “foreigner” (or “alien”)? Read the following doctrinal material:

A.N. Yiannopoulos, LOUISIANA CIVIL LAW SYSTEM:
COURSEBOOK, PART I § 51, AT 101 (1977)

Nationality and citizenship. The nationality of a person is ordinarily fixed at birth, either as a result of descent from parents of a certain nationality (*jus sanguinis*) or as a result of birth in a certain country (*jus soli*). It may be changed subsequently by expatriation and naturalization.

The French Civil Code contains elaborate provisions concerning nationality. The Louisiana Civil Code has no corresponding provisions because nationality and the rights and duties of American citizens are matters regulated by federal law. Louisiana has legislative competence, within limits fixed by the United States Constitution, to determine the status and the rights and duties of its own citizens. Under Louisiana law, citizenship is determined by the domicile of a person within the state, and detailed provisions in the Civil Code and in the Revised Statutes regulate the acquisition and loss of domicile. Article 38 of the Civil Code provides generally that “[t]he domicile of each citizen is in the parish wherein he has his principal establishment,” and Article 46 of the same Code declares that domicile is lost by “voluntary absence of two years from the State, or the acquisition of residence in any other State of this Union, or elsewhere.”

As a general rule, political rights, and the exercise of certain professions, are reserved for Louisiana citizens. Citizens of sister states enjoy the same civil rights as Louisiana citizens by virtue of the equal protection clause of the United States Constitution. Aliens are protected by the due process clause of the Federal Constitution, and by international treaties signed and ratified by the United States. Under Louisiana private law, aliens and citizens of sister states enjoy practically the same rights as Louisiana citizens.

b) Acts of status

What is an “act of status” or, as the French are wont to say, “act of civil status”? Consider the following doctrinal material:

Gérard Cornu, *DROIT CIVIL: INTRODUCTION, LES PERSONNES, LES BIENS*
n^{os} 549-559, at 205-08(8th ed. 1997)

549. – Acts of civil status are written acts (“acts” in the instrumental sense of the term – *instrumentum*) that are received and written by the public authority to the effect of noting the most prominent events in the life of a physical person. The most important [of these acts] are the act of birth, the act of marriage, and the act of death. To the extent that civil status is officially noted, it is but an incomplete and scattered reflection of the multiple elements of the status of persons. Despite these lacunae [in the recorded data] . . . , [the registry] of civil status furnishes considerable useful information on the age of individuals, their family situation (single, married, divorced), the existence or the absence of a matrimonial agreement([so that] third persons will know, in this latter case [i.e., absence of a matrimonial agreement], that the spouses are married under the regime of the legal community), the existence of an act of acknowledgment for illegitimate children . . . and often (though an effort is made to mask these elements from third persons) the character of the filiation.

. . . [T]he regulation [of acts of civil status is] complex and meticulous

. . .

551. – The creation of acts of civil status is the product of a collaboration between the public authority and private individuals. The public authority is represented by the officer of civil status . . . or his delegate. Though his intervention is always necessary, it consists, for the most part, in receiving declarations, writing them up in the proper form, and signing them. This office leaves the active role to the private individuals These are the persons who present themselves to the civil status service to make the declaration that furnishes the substance of the act ([e.g.,] to declare a birth or a death). The legislation determines, for each category of act, which persons are qualified to make this declaration But the declarants are not always the interested principal parties. And these declarants must sometimes, but more rarely, get witnesses to accompany them: the presence of witnesses is . . . required . . . for the act of marriage.

552. – The ideational content of the acts of civil status is exhaustively determined by the law. The law specifies, for each type of act, the exhaustive enumeration of the data that must compose it. Aside from the enunciations that are always required [for every kind of act], the content of each act varies according to its object (birth . . . , marriage . . . , death . . .). . . .

553. Among the data that must by law be mentioned, several distinctions have

their importance. Certain of the elements that must be enunciated in the acts can and must be verified by the officer of civil status who receive the declaration But the majority of the declarations are received by the officer of civil status without verification on his part. Thus, in order to put together the act of birth, the officer of civil status does not personally assure the sex of the child or the hour of his birth. He is entitled to rely on the parties who are required by law to attest to these matters, without personal verifications.

. . .
556. – In a general manner, acts of civil status work together to identify physical persons. This purpose makes these acts to be instruments of civil identification. Under cover of [pursuing] this end, two specific effects are attached to them: acts of civil status are [i] elements of publicity and [ii] means of proof.

557. – Private individuals cannot directly consult the register of civil status to inform themselves about another person (for example, before contracting with that person. But the depositaries of this register are obligated, on certain conditions, to deliver to those who demand them either integral copies or extracts of the acts of civil status. This system therefore permits the depositaries to divulge certain elements of civil status [but to keep others secret]

558. – To consider their principal purpose, acts of civil status are received and written in view of recording certain elements of the status of persons. The probative value that is attached to the enunciations in the acts is, however, variable. The data that are thought to have been verified by the office of civil status are [considered to be] authentic Other enunciations are given credit only so long as there is no proof to the contrary, which can be freely made (an interested third person could offer to prove, at the charge of demonstrating it, that in reality the declarations made by the particular parties to the officer of civil status are false).

559. – Among all the vicissitudes that can affect the functioning of the civil status service ([e.g.,]irregularity in the creation of the acts that calls into question the responsibility of the officer of civil status, the destruction of registers . . . , [etc.]), the most important results from inexactitudes that the acts of civil status sometimes contain and that it is opportune to be able to correct. Such is the object of the “rectification” of acts of civil status. . . .

NOTE

In Louisiana, the law of “acts of status” is set forth in special legislation, namely, the “Vital Statistics Laws,” which are collected in Chapter 2, Title 40 of the Revised Statutes. This legislation establishes a central state registry of so-called “vital records” (La. Rev. Stat. 40:33), which is maintained by the “state registrar of vital records” (id. § 36). Among the “vital records” that must be recorded in this registry are the following: (i) birth certificates (id. §), (ii) certificates of adoption (§§ 79), (iii) marriage certificates (id. § 55), (iv) certificates of annulment or divorce (id. § 57), and (v) death

certificates (id. § 47).

Though any of these certificates can be altered to correct mistakes that they may be found to contain, birth certificates can, in a few extraordinary instances, be altered for still other purposes. For example, the legislation permits the issuance of a new, revised birth certificate (i) to reflect a change in the name of a child following (α) his legitimation (id. § 46) or (β) an adoption (id. § 75); (ii) to suppress a notation that the child was adopted (id. § 75(A)(3)); and (iii) to reflect a change in sex following “sex reassignment or corrective surgery” (id. § 62).

2) Domicile

a) Definition of domicile

What is a “domicile”?

1-1 Ludwig Enneccerus, Theodor Kipp & Martín Wolff,
TRATADO DE DERECHO CIVIL: PARTE GENERAL § 89.I, at 403
(Hans Karl Nipperdey rev. 39th ed., 13th rev. 1931;
Blas Pérez Gonzalez & José Alguer trs. [German to Spanish] 1947)

The domicile is the place that the law considers to be the center of the [juridical] relations of a person. The domicile is not a concept of mere fact, but one that has a juridical nature. It almost always coincides with one’s permanent residence in fact, with the place in which one lives. But it is not necessary that this be so. For example, if a minor in status moves himself to another place without the consent of his legal representative, he will not have his domicile there, and there are times when the legal domicile . . . is rooted in a place distinct from that of the residence. From the establishment at which one does one’s business, for example, a mercantile establishment, the domicile is distinguished, for the domicile refers not only to the relations of business, but also to the relations of life in general, without excluding possible exceptions.

1-2 Arthur von Tuhr, *DERECHO CIVIL: TEORIA GENERAL DE DERECHO CIVIL ALLEMAN*
§ 28.III, at 78-79 (Tito Ravà tr. [from German to Spanish] 1946)

. . . [I]n general, the domicile and the place of habitation coincide But whereas the place of habitation derives solely from the circumstance of living in a determinate place, for the domicile account must be taken as well of other facts . . . , in such a fashion that the domicile in certain cases is not the place where one in effect lives. The domicile is the place from the a person manages his affairs or, to employ the words of Diocletian, that he one does

not abandon without a determinate reason and the place to which one returns from conducting the business that caused one to depart/ In a figurative manner, the domicile can be designated as the central point of the human relations and activities [of a person]. By virtue of its general and central significance, the domicile is distinguished from the “commercial seat,” which, for certain juridical effects, takes the place of the domicile or subsists in conjunction with it. [Whereas] the commercial seat is the center of gravity of one’s commercial activity, the domicile is the center of gravity of one’s entire life, so that, if a manufacturer has a factory in A and lives with his family in B, the latter is his domicile.

b) Classification of domicile

Civil law theory recognizes two distinct “kinds” of domicile: (i) voluntary domicile (*domicilium voluntarium*) and (ii) legal domicile (*domicilium necessarium*).

1} Voluntary domicile

a} Definition

What’s a “voluntary” domicile? ? See 1-1 Ludwig Enneccerus, Theodor Kipp & Martín Wolff, *TRATADO DE DERECHO CIVIL: PARTE GENERAL* § 89.II, at 404 (Hans Karl Nipperdey rev. 39th ed., 13th rev. 1931; Blas Pérez Gonzalez & José Alguer trs. [German to Spanish] 1947) (“... [T]he voluntary domicile . . . [i]s constituted by the will to establish oneself permanently in one place and by the effective establishment of this place.”); 1-2 Arthur von Tuhr, *DERECHO CIVIL: TEORIA GENERAL DE DERECHO CIVIL ALLEMAN* § 28.III, at 78-79 (Tito Ravà tr. [from German to Spanish] 1946) (“The determination of the domicile [sometimes] depends on the individual will (*domicilium voluntarium*) The voluntary domicile is produced as a effect of permanent establishment in a place . . . ; for this is required [both] exterior conduct and the will to establish oneself with a permanent character”)

b} Determination

1} Original domicile

Where’s one’s voluntary domicile? Read CC art. 38, par. 1. Where’s one’s “principal establishment”? Read CC art. 38, par. 2, sent. 1, clause 1.

PH 15. Jean Sot, who resides with his wife and three children, year round, in a small house situated on the bank of Bayou Teche near St. Martinville (St. Martin Parish), runs a small taxidermy, pelt-treatment, and tanning shop in a small building situated at 123 Fourth Street in downtown New Iberia (Iberia Parish). In an attempt to expand the business, Jean Sot borrows \$10,000 from his buddy, Olide, which he’s to repay over the next year, in four quarterly installments of \$2,500. Olide, a lawyer who has an office in Lafayette (Lafayette Parish), resides with his family in Abbeville (Vermilion Parish). Where, exactly, is Jean Sot supposed to hand over the installments to Olide – at Jean Sot’s house near St. Martinville, at his shop in New Iberia, at Olide’s house in Abbeville, at Olide’ office in Lafayette, or somewhere else? Why? Read CC art. 1862.

2} Change of domicile

A person’s domicile can, of course, be changed. See CC arts. 41 *et seq.*

a} How accomplished

How does one effect such a change? What, precisely, is necessary? Read CC art. 41.

PH 16 α . At the end of his first year of studies at the LSU Law Center, Michel decides to take his second year of studies at the Tulane Law School, all the while intending to return to LSU for his third year of studies. Because his classes at Tulane run Monday thru Friday, Michel decides to “take a place” in New Orleans, specifically, the garage apartment of an aunt of his who lives just off St. Charles Ave., where he will stay five nights a week – Sunday thru Thursday. For Friday and Saturday nights, his plan is to return to his parents’ home in Baton Rouge, where he has lived all his life up till now and where he plans to live again full time during his third year of law school. Time passes. In November of Michel’s second year of studies, he marries Clodice, who, for the time being, moves in with Michel’s parents. At the time of their marriage, they enter into an “antenuptial agreement” (*see generally* CC art. 2328), one that creates a “separation of property” regime between them. He’s certain that he needs to file a copy of the agreement into the public records somewhere to make it “effective against third persons.” But where – East Baton Rouge Parish or Orleans Parish or both? Why? Read CC art. 2332.

b) How proved

How is such a change proved up? In other words, what qualifies as “evidence” of a change of domicile? Read CC arts. 42 & 43.

PH 16 β . Pascal, who has just resigned his post as President of the University of Louisiana in Lafayette to become the new Chancellor of LSU, will, of course, have to move from his present home, situated in Broussard (just south of Lafayette in Lafayette Parish), to a new home in Baton Rouge. Nevertheless, he wants to “hold onto” his Broussard house, which has been in his family for generations, so that his aunt Tante, who has lived there with him for the past several years, can continue to live there undisturbed. But he’s afraid that if he does so, some persons will continue to treat Lafayette as his domicile, something that could produce problems, e.g., they might try to “serve papers” on him there, via “domiciliary service,” by leaving the papers with Tante. ” *See* Code Civ. Proc. arts. 1231 (“Service of citation or other process may be either personal or domiciliary . . .”) & 1234 (“Domiciliary service is made when a proper officer leaves the citation or other process at the dwelling house or usual place of abode of the person to be served with a person of suitable age and discretion residing in the domiciliary establishment.”). Is there anything Pascal can do to “make clear” his change of domicile? If so, what exactly must he do?

2] Legal domicile

What’s a “legal” domicile? *See* 1-1 Ludwig Enneccerus, Theodor Kipp & Martín Wolff, *TRATADO DE DERECHO CIVIL: PARTE GENERAL* § 89.II, at 405 (Hans Karl Nipperdey rev. 39th ed., 13th rev. 1931; Blas Pérez Gonzalez & José Alguer trs. [German to Spanish] 1947) (“The legal domicile is the place that is considered to be one’s domicile as such, even though one’s permanent establishment is not in fact found there . . .”)

a] Minors & interdicts

What’s the domicile of an unemancipated minor? An interdict? Read CC art. 39.

PH 17. Pascal, who resides in Gueydan (Vermilion Parish), recently had to interdict his father, Papère, who theretofore had lived for years in Jennings (Jefferson Davis Parish). Acting as Papère’s curator, Pascal then placed Papère in a nursing home in Lake Charles (Calcasieu Parish). Meanwhile, Pascal’s 16-year-old son, Ti-Boy, ran away from home in Gueydan and took up residence with several of his buddies in Mamou (Evangeline Parish). A few weeks later, Pascal got word that Papère and Ti-Boy had both just been sued, Papère by his brother, Basile, for partition of

a tract of land located in Lafayette Parish that Papère and Basile co-owned, and Ti-Boy, by a stranger, Dustin, for personal injuries he sustained during a bar brawl at a seedy nightclub in Alexandria (Rapides Parish). The partition suit was filed against Papère in Calcasieu Parish (where he lives now); the tort suit, against Ti-Boy in Evangeline Parish (where he lives now). Pascal, who's the representative of both Papère (as his curator) and Ti-Boy (as his father) for purposes of litigation, wonders whether he can't file a declinatory exception of "improper venue" in both actions. What do you say? Why?

b] Military personnel

Read CC art. 40.1.

PH 18. Interested in the technical training in electronics that he could receive in the US Army, Johnny Smith, of Bismarck, North Dakota, signed up for a basic, two-year stint. His plan is to return to Bismarck and set up his own electronics supply and repair business. For his basic training, he was sent to the army base at Ft. Hood, Texas. After he finished there, he was sent to Folk Polk, Louisiana (Vernon Parish) for his first assignment. About eight (8) months into his stay there, Johnny gets into a brawl at the Dusty Rose, a seedy bar in nearby DeRidder (Beauregard Parish), as a result of which he severely injures Bubba. Bubba, who has just sued Johnny to recover damages for personal injuries, wants to serve Johnny via domiciliary service. But where is Johnny's domicile? Is it Bismarck, North Dakota or Fort Polk, Louisiana? Why?

c] Public officials

Read CC arts. 44 & 45.

PH 19. After they finished college, Pascal's two children – Ti-Boy and Lil-Fille – one by one returned to live in Gueydan (Vermilion Parish). Then they entered politics. Eventually, Ti-Boy was appointed Commissioner of Administration by the Governor of Louisiana (a position he holds at the governor's pleasure), which required him to relocate in Baton Rouge (East Baton Rouge Parish), and Lil-Fille was appointed to the United States Fifth Circuit Court of Appeals, which required her to spend a week or so out of every six-week period in New Orleans (the seat of the court), but otherwise did not alter her living arrangements. Then Pascal died, after which Ti-Boy and Lil-Fille both accepted his succession. Olide now wants to sue Ti-Boy and Lil-Fille on a tort claim he'd had against Pascal, one that arose out of a hunting accident that had occurred on Olide's estate in Lafayette Parish. If Olide does not sue the two in Lafayette Parish (the site of the quasi-delict), what other options does he have? Explain. Note that you must conduct a separate analysis for each of the defendants.

c) Loss of domicile

Can one lose, or "forfeit," one's domicile? If so, how? Read CC art. 46.

PH 20. After they finished college, Olide's two children – Renard and Desirée – one by one returned to live with Olide in Lafayette. Then their careers took off. Renard, a journalist, took a job as Paris bureau chief for Fox News; Desirée, a diplomat, was appointed as US Ambassador to France. Both have now been gone for three years. Suppose that each of them has been sued and that the plaintiffs want to serve process on them via "domiciliary service." Can such service be accomplished by serving the papers on Olide at his house in Lafayette? Why or why not? Note that you must conduct a separate analysis for each of the defendants.

d) Significance (effects) of domicile

What is the significance of one's "domicile"? In other words, why does – or, at least, might –

it matter whether a certain person is domiciled *here* in this parish rather than *there* in that parish?
Read the following note.

NOTE

Domicile has a number of highly-varied effects. These can, for purposes of analysis, be collected under two heads: (i) substantive law effects and (ii) procedural law effects. The former (substantive law effects) include the following:

- (i) an obligation is to be performed at the domicile of the obligor, if the parties have not provided otherwise and if there's no usage to the contrary, see CC art. 1862 (illustrated *supra* in PH 15);
- (ii) for a matrimonial agreement to become effective against third persons, it must be filed into the public records at the domicile(s) of the spouses, see CC art. 2332 (illustrated *supra* in PH 16α);
- (iii) a spouse in a covenant marriage who quits the matrimonial domicile without cause thereby provides the other spouse with cause for a separation, see La. Rev. Stat. 9:307.A(3) (not illustrated);
- (iv) for a tutor to create a "special mortgage" on his property to provide security to a minor who has been placed in his care, he must file into the public records at his own domicile a certificate that states the total value of the minor's property, see Code Civ. Proc. art. 4131.A (not illustrated).

The latter (procedural law effects) include the following:

- (i) the basic rule of venue in actions against natural persons is that such actions may (and, in some instances, "must") be brought at the domicile of the defendant, see Code Civ. Proc. art. 42(1) (illustrated *supra* in PH 17 & PH 19);
- (ii) exceptionally, the appropriate venue may be at the domicile of some other person, see, e.g., Code Civ. Proc. art. 74.1 (in an action to prove or disavow paternity, the domicile of child is an alternative venue) (not illustrated); art. 74.2 (in action an to fix child custody and / or child support, venue usually lies at the domicile of either parent) (not illustrated); and art. 76 (in action on an insurance policy, the domicile of the insured is an alternative venue) (not illustrated);
- (iii) service of process by means of "domiciliary service" must be made at the domicile of the party who is to be served, see Code Civ. Proc. arts. 1231 & 1234 (illustrated *supra* in PH 16β, PH 18, & PH 20).

3) Presence / absence

a) Definition of "absentee"

What is an "absentee"? Read CC art. 47, par. 1. Then read the following doctrinal material:

1 Gabriel Baudry-Lacantinerie & Maurice Houques-Fourcade, *DES PERSONNES* n° 1055, at 869; n° 1056, at 870; & n° 1065, at 878-79, in 1 *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL* (2d ed. 1902)

1055. – In ordinary language, one gives the qualification “absent” to every person who is not there where his presence is demanded. . . . But, in the language of the law, the word “absent” has a much more restrained sense: it designates a person whose existence is uncertain, because he has disappeared and there has been no news [of him] for some period of time. What characterizes absence, then, is the uncertainty in which one finds oneself regarding whether the absentee is dead or alive.

1056. – . . .

As to those over whose existence no doubt hovers, even if they have been away from their domicile and their residence for a more or less extended period of time, they are called “non-present” persons. Our civil legislation contains only a very small number of dispositions relative to non-present persons

1065. – A person has disappeared from his domicile or from his residence for some time; his family does not know where he is, and no one has had any news of him; and nevertheless his silence is inexplicable. A doubt arises: is this person deceased? If he were alive, would he, in such a fashion, leave his family disquieted and his goods perhaps abandoned? It is this doubt that constitutes the “presumption” of absence. Thus, an absentee is he whose existence has become uncertain, by virtue of a lack of news [of him] since he quit his domicile or his residence

It must be understood that this uncertainty will arise after a more or less extended period of time depending on the circumstances. Thus, the legislation abstains from specifying anything [in the way of a fixed time period], leaving the greatest latitude of appreciation on this point to the trier of fact, whose decision is committed to his sovereign discretion. . . .

2 José Maria Manresa y Navarro, *COMENTARIOS AL CÓDIGO CIVIL ESPAÑOL* 127 (Francisco Bonet Ramon rev., 6th ed. 1944)

Juridically speaking, an absentee is, according to what a noted author has said, “he who is not encountered in the place where he ought to be encountered, be it actively or passively, that is to say, where he ought to be encountered [i] so that he can avail himself of one of his rights or to use one of his faculties or [ii] so that another can exercise against him those rights or faculties that, in turn, correspond to the other.” In the legislation one frequently encounters the use of “absentee” in the sense that we have just exposed.

Though this is that term's juridical concept, nevertheless, the sense [of the term] with which the Code is concerned in the title on which we now comment is not *this*, but rather that of the legal status of him who has absented himself from his domicile, of whose whereabouts there has been no news, whose fate is not clear, and whose existence or non-existence cannot be known with certainty. In this special sense, as the author cited above says, the absentee becomes an "uncertain" individual, and this absence entails, as an essential attribute, a character of doubt and insecurity that distinguishes it profoundly from the "absence" that was explicated above [i.e., the broad sense of the term].

If one appreciates the legislation in the generality of its content, then it is appropriate to distinguish two terms. One [is] "certain" or "known" absence, that is, mere non-presence, and the other, "unknown" absence or absence properly so called. The first of the said terms refers to the status of a person who finds himself away from his habitual residence or from where his presence is needed, but whose existence and whereabouts are known; the second, to the status of a person whose existence and whereabouts are not known.

b) The problems posed by "absence"

What legal problems does absence create? Read the following doctrinal material:

1 Gabriel Baudry-Lacantinerie & Maurice Houques-Fourcade, *DES PERSONNES* n° 1057, at 870, & n° 1058, at 871, in 1 *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL* (2d ed. 1902)

1057. – By itself, the [mere] non-presence of a person does not modify his status. Because he is presumed to be present at his juridical seat – his domicile –, he can, in fact, go away from it without his going away having any effect on his rights and obligations. No doubt this going away can, in reality, make it less easy or even impossible for him to exercise his rights and to accomplish his obligations, but they nonetheless remain, legally speaking, what they would have been even if their holder had been there

1058. – "Absence," in contrast to [mere] non-presence, puts into question the very status of the person and does so in the gravest way, for of all the elements that constitute that status, none is more essential than that of his existence. Does he still exist or does he not? Such is the doubt to which absence gives rise. And its significance is immense for [his] familial relations and the fate of [his] patrimony – everything [pertaining to him] depends on the sense in which one resolves the question. It is, then, imperative for the law to occupy itself with this situation and to regulate, as

a matter of law, the condition of him whose existence has, in this way, become uncertain. Should he, from this time forward, be presumed dead or alive or should one [take] an intermediate course [and] presume neither one nor the other? Depending on what will be decided, absence will have variable consequences from the point of view of [i] the obligations and rights (be they already vested or eventual) of the absentee and [ii] the organization of the measures of protection to which it [the solution?] gives rise. In addition, insofar as it is not only the interests of the absentee that absence puts into question, it is not of him alone that the law must take account. To the contrary, the law must apply itself to reconciling with the interests of the absentee both [i] the particular interests of present persons, as much [a] the interests of those who have some *eventual* rights that are subordinated to the death of the absentee as [b] the interests of those who can oppose to him *already-existing* rights, and [ii] the interest of the collectivity, that is to say, of the good administration and the free circulation of wealth.

c) The solution to these problems: curatorship

What is the “solution” to the problems presented by absence? How is this “solution” put into motion? Read CC art. 47, par. 2.

1] Creation of curatorship

a] Prerequisites

What are the prerequisites for this curatorship? Re-read CC art. 47, par. 2. Then read the following doctrinal material:

1 Gabriel Baudry-Lacantinerie & Maurice Houques-Fourcade, *DES PERSONNES* n^{os} 1066-1067, at 879-80, in 1 *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL* (2d ed. 1902)

1066. – . . . [A]bsence does not give rise to the application of any measure relative to these goods [those of the absentee], as long as these goods do not suffer as a result of it. Necessity alone can legitimate the intermeddling of the judiciary in the interests of the absentee, for this intermeddling, however discrete it may be, always exposes the absentee more or less to the danger that his privacy in the conduct of his affairs will be penetrated. . . . Thus the presence of a mandatary [appointed by the purported absentee] who is endowed with powers sufficient for the administration of the [purported absentee’s] goods and who exercises these powers certainly excludes the intervention of the judiciary, for, in this case, the intervention is no longer legitimated by necessity

1067. – But it can be that the mandatary has only a special and limited mandate, one that gives him powers insufficient for this administration; or that his mandate, though as extensive as one could imagine, comes to an

end in some way; or that the mandatary fails to fulfill his mandate; or, finally, that he has interests that are opposed to those of the absentee. In these different cases, wherein it will be necessary to provide for the administration of all or part of the absentee's goods, will the judiciary, on the demand of interested persons, has the power to order the necessary measures? With nearly all the [other] authors, we say "yes" without difficulty. . . .

b) Persons entitled to *request* appointment

Who can demand that a curator be appointed for an absentee? Can just anyone or is it only certain persons? And if it's the latter, then who? Re-read CC art. 47, par. 2; then read the following doctrinal material:

1 Gabriel Baudry-Lacantinerie & Maurice Houques-Fourcade, *DES PERSONNES* n^{os} 1073-1075, at 884-87, in 1 *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL* (2d ed. 1902)

1073. – The different measures designed to safeguard the interest of an absentee cannot be ordered by a court *sua sponte*, but only on the demand of n interested party

Which persons does the law designate under the name of "interested parties"? It is certain that this expression does not include persons who have nothing but an interest of "affection," but only those who have a pecuniary interest in the conservation of the absentee's goods. For it is a basic principle that pecuniary interests alone authorize the exercise of a judicial action and, in the absence of an express text that derogates from that principle, there is no justification for setting it aside. Thus, friends and parents of the absentee cannot, as such, initiate the suit that concerns us.

1074. – But it is necessary to regard as interested parties, at the very least, not only the persons who have a pecuniary interest that is already vested and current, that is to say, that is already and henceforth existing, but also those who have only a future and eventual interest in the conservation of the goods in question. The doctrine has, in general, ruled in this way, as has the jurisprudence. On the one hand, in fact, the very broad terms of article 112 [La. Civ. Code art. 47, par. 2] embrace all interested persons, regardless whether their interest exists at present. On the other hand, and above all, if it is true that only those who have a vested and current interest can act, this rule is in applicable here by the very nature of things. That rule is founded on this consideration: that one could not possibly accord a judicial action to those who cannot, in so doing, cause an already vested right to be recognized, which is rightly the purpose of this [i.e., the typical] action. Now, this is not the purpose of the demand in this context; [rather,] it is to safeguard above all the rights of the absentee and, only by way of a

consequence [of this], to safeguard the rights, vested or to be vested, of the persons who are interested in the conservation of his patrimony.

. . .

1075. – The principle having been posed, one must regard as interested parties:

1° The absentee's creditors, even those whose credit right is not yet due or conditional, for every creditor, of whatever kind he may be, has a pecuniary interest in the conservation of the patrimony of his debtor, which is his pledge, and the conditional creditor, in particular, can exercise all acts that are conservatory of his right

2° The persons who finds themselves in a relationship of co-ownership or of partnership with the absentee or who, at the same time as he does, have a real right on a good, such as the naked ownership of a thing of which he [the absentee] has the usufruct.

3° The spouse of the absentee, for the revenues of his goods are, in whole or in part, dedicated to the needs of the marriage and, in addition, his absence can, in a more or less complete fashion, interfere with the execution of the spouses' matrimonial agreements.

4° The absentee's presumptive heirs as of the day of his disappearance or of the last news of him, [for they will] eventually [be] called to receive his succession. . . .

c] Persons entitled to *receive* appointment

Who can be appointed as the absentee's curator? Can just anyone or is it only certain persons? And if it's the latter, then who? Read the following special legislation:

LA. REV. STAT. 13:3433

When the appointment as curator for an absent person is claimed by more than one qualified person, preference in the appointment shall be given by the court in the following order to the absent person's:

- (1) Spouse not judicially separate from him;
- (2) Descendants;
- (3) Parents; and
- (4) Brothers or sisters, or descendants from them.

PH 21 α . About six (6) months ago, Olide, went off to Montana on what was to be a two week vacation. But he never returned. His relatives, in particular, his mother Lucille and his brother Bonjovi, tried repeatedly to locate him (e.g., inquired about him at the "dude ranch" at which he had stayed in Montana and with law enforcement and emergency services agencies and medical facilities

throughout Montana), all to no avail. About four (4) months ago, Olide failed to pay the local property tax assessment on his “rent house.” The Parish (the party to whom the taxes are owed) is now poised to “foreclose” on the rent house. Jean Sot, the lessee of the rent house, is understandably worried. He’s also frustrated, for he knows that Olide has considerable liquid assets (e.g., funds in a checking account) that could be used to pay off the taxes and, further, believes that Olide, had he “been there,” would already have used those assets for precisely that purpose. Is there anything Jean Sot might do, short of paying off the taxes himself, to stave off the Parish’ foreclosure action? If so, what? If not, why not? *See* CC art. 2692(3).

3] Effects of the curatorship

a] Duties of the curator

What duties does the curator of an absentee undertake? Read the following special legislation:

LA. REV. STAT. 13:3437

A. The curator shall take possession of, preserve, and administer the absent person’ property. He shall enforce all obligations in favor of the absent person, shall represent him in all civil matters, and may exercise all procedural rights available to a litigant. He shall act at all times as a prudent administrator, and shall be personally responsible for all damages resulting from his failure to act.

B. When an absent person has no known heirs and is presumed dead, it shall be the duty of the curator to initiate proceedings for a declaration of death.

b] Powers of the curator

What powers does the curator of an absentee enjoy? Read CC art. 48 & CC art. 47 cmt. (c). Then read the following special legislation:

LA. REV. STAT. 13:3438

The curator may exercise all functions with respect to the absent person's property consistent with prudent administration and disposition thereof. Within the limitations of the foregoing standard, the curator may, with the approval of the court as provided in R.S. 13:3440:

(1) Exercise all functions and activities with respect to the administration and disposition of the absent person's property, including, but not limited to, lease, sale, purchase, exchange, borrow, loan, mortgage, deposit and investment.

(2) Compromise an action or right of action by or against the absent person, or extend, renew, or in any manner modify the terms of an obligation

owed by or to the absent person.

(3) Continue any business in which the absent person has an interest.

(4) Place all or a portion of the absent person's property in trust for administration, management and investment in accordance with the Louisiana Trust Code. The trust instrument shall name the absent person as sole beneficiary of the trust, shall name a trustee, and be subject to termination at the option of the beneficiary upon his return or at the option of his heirs or legatees after a declaration of death of the absent person. The court may, upon application, make such changes in the trust instrument as may be advisable. Upon creation of the trust, the curator shall be entitled to no further commissions with respect to the trust property.

(5) Perform the contract of the absent person who became an absent person before performing an executory contract evidenced by writing.

LA. REV. STAT. 13:3440

A. The curator shall file a petition setting forth the subject matter to be determined affecting the absent person's interest, with his recommendations and the reasons therefore, and with a written concurrence by the undercurator. If the court approves the recommendation, it shall render a judgment of homologation. The court may require evidence prior to approving the recommendations.

B. If the undercurator fails to concur in the curator's recommendations, the curator shall proceed by contradictory motion against him. After such hearing and presentation of evidence as the court may require, the court shall decide the issues summarily and render judgment.

C. The order of court may contain such conditions, restrictions, regulations, and requirements as the court may direct.

D. The order of court may contain a general grant of authority empowering the curator to act without further court approval in connection with a particular business or function under his administration, subject to such limitation as the court may direct and subject to such accounting as may be ordered in accordance with R.S. 13:3443.

PH 21β (a continuation of the last hypothetical). Suppose that Bonjovi is appointed as “curator” to represent Olide during his absence and that Olide’s property includes, in addition to the rent house and various liquid assets, (i) a number of tractors and (ii) several shares of IBM stock. (i) Bonjovi wants to lease out the tractors to raise some revenue for Olide. Can Bonjovi do it? Why or why not? If Bonjovi can do it, how may / must he do it? Can he act unilaterally or does he need to obtain some sort of approval? If it’s the latter, whose approval does he need and what does he have to do / show to get it? (ii) Bonjovi wants to sell off the IBM stock to pay various debts that Olide owes. Can

Noncle do it? Why or why not? If Bonjovi can do it, how may / must he do it? Can he act unilaterally or does he need to obtain some sort of approval? If it's the latter, whose approval does he need and what does he have to do / show to get it?

b) Capacity of the absentee

Does the appointment of a curator for an absentee strip the absentee of his capacity to act? Read CC art. 49.

4) Termination of curatorship

a) Causes of termination

Under what circumstances does the curatorship of an absentee come to an end?

1} Termination as of right

When does such a curatorship end "of right," that is, "automatically" by operation of law? Read CC art. 50.

2} Termination by declaration

How else might such a curatorship end? Read CC art. 51, par. 1. When might such a "declaration" be made? Re-read CC art. 54.

b) Effects of termination

What are the legal consequences of the end of the curatorship of an absentee? Read CC art. 52.

PH 21γ (a continuation of the last hypothetical). Suppose that Bonjovi leased out the tractors and sold the IBM stock, as he had intended; that he then squandered the money generated from these juridical acts, as well as the funds in Olide's bank account, on drugs, booze, gambling, and prostitutes; that the Parish, not having been paid the property taxes it was owed on Olide's rent house, foreclosed on it and had it sold. What's left of Olide's lifeless body has just been found floating in the Missouri River. By testament, Olide left all of his property to his girlfriend, Clodice. What rights, if any, does Clodice now have against Bonjovi? Explain.

2 Juridical persons

a Definition

What is a juridical person? Read CC art. 24; then read the following doctrinal material:

1-1 Ludwig Enneccerus, Theodor Kipp & Martín Wolff,
TRATADO DE DERECHO CIVIL: PARTE GENERAL § 96, at 434-39
(Hans Karl Nipperdey rev. 39th ed., 13th rev. 1931;
Blas Pérez Gonzalez & José Alguer trs. [German to Spanish] 1947)

I. Many human interests are not merely those of the individual, but are common to a more or less complete conjunction of men, and can only be satisfied through the ordered and enduring cooperation of this plurality. This explains why in all peoples the necessity has arisen for permanent *unions and institutions*, in a word, of *organizations for the attainment of common ends*: the state, the municipality, the church, associations, institutes, etc. This organization, [when made] by way of a *contractual union for the pursuit of a common end*, can be made in such a way that the individuals will, in their conjunction, the subjects of rights and of duties: a partnership. But then the "union" or conjunction finds itself in a situation in which it is dependent on

individual personalities [e.g., if one of them dies or withdraws, the union collapses], something that constitutes an obstacle for the attainment of permanent ends. For that reason, the form of “corporate” organization is [sometimes] preferred

These organizations are not living beings and do not have natural volition. But in them the human wills that have been united and the human forces that have been unified operate in a certain direction that is determined by the end of the organization. This is [only] an image, but it translates exactly the essence of things to qualify this force of the united wills as the will of the organization itself, for example, the will of the state, the power of the state, the interests of the state. For these reasons, we think that these organizations (the state, the association or organized conjunction of members, the institution) are subjects of will: we personify them (the theory of the personification of the end).

II. The law [German private law legislation] is also inspired by such an ideology to the extent that it accords juridical power and rights to certain organizations, deeming them to be subjects of the law – persons –, so-called “juridical” persons. [In so doing, the law] establishes a sharp separation between the patrimony (including the debts) of the organization and the patrimony (including the debts) of each one of the associates. With that, an urgent [theoretical-conceptual] necessity is satisfied. The realization of these common ends requires that the utilization of certain goods for these ends be guaranteed in a permanent fashion. But without a radical transformation in our private law, this [commitment of goods to such ends] cannot be done [i.e., cannot be “conceptualized”] save by means of recognizing “rights” on these goods, for all of our private law is dismembered into subjective rights. [Now,] every private right presupposes in its content and in its creation a subject of the law. Consequently, if one wants to put into harmony with the rest of the private law [this notion of] the binding of certain goods to the ends of these organizations, there is no other [conceptual] solution than to recognize these organizations as subjects of the law.**

** The problem of juridical personality has a most intimate connection with that of the subjective law. The principal theories can be grouped together in the following manner: 1. According to the theory that is called “fictional” (see especially Savigny, Puchta and Windscheid), the juridical person is based on a fiction. It is only a represented person (a “man” constructed by thought), which satisfies the need of juridical technique to be able to employ the concept of subjective law even in those situations where the rights of an individual are not involved. 2. According to the theory called “organic” or “Germanic” (initiated by Beseler, developed fully by Gierke, and to which Zitelmann, Regelsberger, and others also adhered in the main), [which] is currently defunct [i.e., no longer has any adherents], the juridical person is a collective person (“personality of union”) – a real person with a real collective will. With this theory, one confounds the metaphorical representation with the thing itself . . . ; the juridical person is not an organism. When we put together a “chess club” and we inscribe it in the register of associations, we in no way create a living being. . . . The theory of “technical reality,” defended in France by Michoud, Saleilles, Gény, and Colin-Capitant, avoids the exaggerations of the

organic theory, but is only slightly distinguished from it.

Whereas Savigny invents a man and Gierke admits the real existence of a living being, other theories ascribe the so-called "rights of the juridical person" to [various] real, natural persons and do so in diverse manners. 3. According to Ihering (theory of the "designee"), these rights correspond to the conjunction of the members (in corporations) or to the designees of the benefits (in a foundation); and Meuer endeavors to make these ideas more precise in this sense – "that the totality of the members of the corporation and of the designees of the foundation, present and future, is thought of as a unity" and considered to be the subject of the law. But with this theory, the very factor that is essential in the juridical person – its being ordered to some "end" [purpose] – disappears. . . . The thesis of Ihering approaches the theory of "represented collective" represented in France by Planiol and Berthélemy and in Holland by Molengraaf. The members in their conjunction and not individually are subjects of the rights and duties: "Moral personality is, in sum, only a means of explaining the rules of collective ownership." . . . 4. In contradistinction to Ihering, Hölder (theory of "office") considers the true subjects of the law to be not the designees, but those who have the power of disposition. He understands that the rights of the . . . association correspond to the members and he considers this association to be a collection of persons whose only distinguishing characteristic is that its members respond [for debts] only with the patrimony of the association [as opposed to their own individual patrimonies]. . . . 5. In contrast to these theories, Brinz (theory of "patrimony for an end") understands that the rights of juridical persons do not, to speak rigorously, belong "to no one," but rather that they belong only "for an end" [the purpose of the association], that is to say, that they are dedicated to this end. He substitutes the juridical person for the thesis of the patrimony-for-an-end [what the French call *la patrimoine d'affectation*]. But, as Enneccerus already pointed out in earlier editions [of this treatise] . . ., this theory, in essence, declares that the [traditional] concept of subjective law as a juridical power cannot be squared with the so-called rights of the juridical person, which is treated more so as a simple binding of goods (or of persons) to this end. . . . [This theory] appears in the doctrine of Duguit [in France]. 6. The point of view developed in the text [of this treatise], which can be qualified as the "theory of the personification of the end," proposes to reunite the ideas contained in the other theories, especially in the organic theory, in the idea of a patrimony-for-an-end, and in the theory of the fiction

III. Now, this personification in its juridical aspect can well be limited to the extreme mentioned earlier – to [general] juridical capacity – or can well extend also to the capacity of will [i.e., capacity to make juridical acts]. In the former case, the juridical person is regarded solely as a subject of the law and not as a subject of the will; in the latter case, as a subject of both the law and the will.

In the first conception, the juridical person is a person incapable of acting, one that, like natural persons who are incapable of acting, has to have a representative. The acts of this representative – provided that they have been executed in the name of

the juridical person and within the power of representation – give rights to and obligate the juridical person, but they are not considered to be acts of the juridical person itself.

In the second conception, the juridical person is represented by itself, acting through its organs, and the acts of these organs, within the function of their competency, are considered to be acts of the self-same juridical person.

1. The first conception is that of the Roman law. The juridical person, which is incapable of acting, can only be represented within the general limits of representation, that is, with respect to juridical acts, but not with respect to delicts. If the representative, even though he is conducting the affairs that pertain to the juridical person, commits a delict, this delict is not understood to be the act of the juridical person [and] this juridical person is not responsible for the delict. *Quid enim municipes dolo facere possunt?* (Ulpian: law 15, § 1, *de dolo* 4, 3, Digest). For this reason, the juridical person only responds for the fault of its representative in those cases in which a natural person would respond for his representative.

2. But early on the theory and the practice of the *ius commune* strove to surpass this conception, and the [German] Civil Code has been inspired fully by the second conception. The acts that the statutory organs (not the ordinary representatives, from whom they are distinguished with special clarity) execute in the performance of the functions for which they are competent are considered to be acts of the juridical person itself. Their will is valid as the will of the juridical person and, therefore, this person responds exactly as would a natural person for his own will. The juridical persons of the civil law are, then, *organizations* (that is, unions and institutions for determinate ends) *recognized as subjects of the law and of the will*.

One cannot ignore the progress that this [new conception] represents vis-à-vis the Roman law. For example, the [Roman] conception that a juridically capable association is only “represented” by the management or, perhaps, by the assembly of the associates and that, as a result, it avoids responsibility for the illicit acts of the same, *is not adjusted to the essence of things*. With respect to the juridical construction that separates the association, as a person constituted by thought, from the members, this conception overlooks the fact that it is only *the (organized) conjunction of the members* that is thought of as a *person*, and that whoever personifies the union of the members, in order to be consistent, has to consider also their unified will as the will of the person constituted by thought.

c Varieties

What are the different varieties of juridical persons?

1) Private v. public

What are and what’s the difference between private and public juridical persons? *See* CC art. 24 cmt. (c); then read the following doctrinal material:

1 Philippe Malaurie & Laurent Aynès,

116. Diversity. There are at the same time moral persons of the public law and moral persons of the private law.

In public law, the essential moral person is the state. One must also add the territorial dismemberments of the state, for example, the municipality, and the state's agencies of economic intervention, such as national enterprises

In private law, a moral person can have as its object the interests of its members or, more rarely, the interests of third parties. For those moral persons whose object is the common interests of the persons who defend them, the interests can be pecuniary--such is the case with commercial societies [i.e., corporations and partnerships]--or moral--such is the case with associations. . . .

2) Corporations, partnerships, & unincorporated associations

What are the different sub-varieties of private juridical persons? Read CC art. 24, par. 2 & cmt. (b); then read CC art. 2801 (on partnership); then read the following excerpts from Louisiana Revised Statutes, Title 12 (that which concerns corporations):

§ 1. Terms defined

...
G. "Corporation" or "business corporation" means a corporation for profit formed under this Chapter

...
O. "Nonprofit corporation" means a corporation formed under Chapter 2 of this title

§ 21. Incorporators

One or more natural or artificial persons capable of contracting may form a corporation.

§ 22. Purposes

A corporation may be formed for any lawful business purposes, except

§ 202. Incorporation

One or more artificial persons capable of contracting may form a nonprofit corporation under this Chapter.

d Scope of juridical personality

What is the extent of juridical capacity? In other words, with respect to what kinds of juridical acts and juridical facts is a juridical person considered to be capable?

(Hans Karl Nipperdey rev. 39th ed., 13th rev. 1931;
Blas Pérez Gonzalez & José Alguer trs. [German to Spanish] 1947)

The capacity of juridical persons extends to all of the private law, with the exception of those juridical relations that presuppose human individuality. Thus, as a general rule, the rights of family are excluded; nevertheless, patrimonial rights are accessible [to juridical persons], and even those personal rights that do not presuppose human individuality, for example, the right to a name or the conditions for membership in an association. In the place of a domicile, juridical persons have a “seat.”

Juridical persons are equivalent to natural persons in the patrimonial juridical order, having the active capacity to inherit and to receive legacies. In addition, it is possible to institute a juridical person as an heir The juridical person is also capable of having usufructs and limited personal servitudes [i.e., rights of use]

e Effects of juridical personality

1) Distinct patrimony (“limited liability”)

Read CC arts. 2801 & 2817 (on partnership); then read the following provision of Louisiana Revised Statutes, Title 12 (that which concerns corporations):

§ 93. Liability of subscribers and shareholders

A. . . . [A] subscriber to, or holder of, shares of a corporation . . . shall be under no liability to the corporation or its creditors with respect to such shares, other than the obligation of complying with the terms of the subscription therefor. . . .

B. A shareholder of a corporation . . . shall not be liable personally for any debt of liability of the corporation.

2) Procedural capacity

Read the following provisions of the Louisiana Code of Civil Procedure:

Art. 688. Partnership

A partnership has the procedural capacity to sue to enforce its rights in the partnership name, and appears through and is represented by an authorized partner.

Art. 689. Unincorporated association

An unincorporated association has the procedural capacity to sue to enforce its rights in its own name, and appears through and is represented by its president or other authorized officer.

Art. 690. Domestic corporation . . .

. . . [A] domestic corporation . . . has the procedural capacity to sue to enforce its rights in the corporate name.

Art. 737. Partnership: partners

A partnership has the procedural capacity to be sued in its partnership capacity.

The partners of an existing partnership may not be sued on a partnership obligations unless the partnership is joined as a defendant.

Art. 738. Unincorporated association . . .

An unincorporated association has the procedural capacity to be sued in its own name. . . .

Art. 739. Corporation . . .

. . . [A] domestic or foreign corporation . . . had the procedural capacity to be sued in its corporate name.

Finis