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Unreal Appraisements In Louisiana Estates

LEON SARPY*

A recognized division of the main trunk of the law separates substantive law from adjective law or procedure,¹ and makes the latter depend upon the former for subsistence.² No argument is needed to show that unless a precept of adjective law is necessary to preserve substantive rights, its existence stands unjustified. The machinery of any judicial system is but an auxiliary body of law³ which can only serve as a means to an end, and never as an end in itself;⁴ or as it has been aptly described, procedure is the hand-maid rather than the mistress of justice.⁵ It logically follows then, that if certain formulas of adjective law fall short of playing their part in the administration of justice, such inefficiency should be rectified.

With the foregoing in mind, it is the purpose of this article to focus the searchlight of *raison d'être* upon the regulations of the law and the present practice of inventory appraisements in succession⁶ procedure in Louisiana, to expose their injurious consequences, and to propose a cure for the evil.

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1. Gray, *The Nature and Sources of Law* (2 ed. 1927) 291; Rodenbeck, *The Anatomy of the Law* (1925) 215, 221.

2. Substantive law has been described as rights at rest, positive and static; adjective law as rights in motion and dynamic. Rodenbeck, *The Anatomy of the Law* (1925) 217. See also 2 Austin, *Lectures on Jurisprudence* (1874) §§ 1033, 1821.

3. Rodenbeck, *The Anatomy of the Law* (1925) 217; Carter, *Law: Its Origin, Growth, and Function* (1907) 238.

4. Clark, *Handbook on the Law of Code Pleading* (1928) 28; cited in McMahon, *Louisiana Practice* (1939) 143.

5. *Ibid.*

6. Art. 871, La. Civil Code of 1870: "Succession is the transmission of the rights and obligations of the deceased to the heirs."

Art. 872, La. Civil Code of 1870: "Succession signifies also the estates, rights and charges which a person leaves after his death, whether the property exceeds the charges or the charges exceed the property, or whether he has only left charges without any property."

Art. 873, La. Civil Code of 1870: "The succession not only includes the rights and obligations of the deceased, as they exist at the time of his death, but all that has accrued thereto since the opening of the succession, as also the charges to which it becomes subject."

Art. 874, La. Civil Code of 1870: "Finally, succession signifies also that right by which the heir can take possession of the estate of the deceased, such as it may be."

NATURE AND FUNCTION OF THE INVENTORY

In liquidating estates left by deceased persons, all assets must be described individually and a monetary value placed upon them at the inception of the probate proceedings, so as to determine the nature and aggregate value of the property to be distributed. This is necessary for several practical reasons. Primarily, the person appointed as the court's fiduciary (known as the executor or administrator, depending upon whether or not the deceased left a will⁷) must in most cases post security to assure the faithful performance of his trust, in an amount commensurate with his responsibility. This sum is generally measured by the value of the assets entrusted to his care.⁸ Then the creditors should have the opportunity to acquaint themselves with the nature and value of the property in order to decide what steps, if any, they should take to protect their interests.⁹ The heirs are also entitled to know the values of the assets in order to elect whether or not to accept the succession, because the unconditional acceptance of an insolvent succession would subject their own property to seizure for the debts of the estate.¹⁰ Again the important fact that federal estate taxes¹¹ and Louisiana inheritance taxes¹² are based upon values as of the date of death cannot be overlooked. Finally, the compensation of the fiduciaries is usually fixed according to the value of the property under administration.¹³

The civil law of Louisiana meets this exigency by means of a prescribed ritual known as a formal *public inventory* to be taken by a Notary Public, in the presence of two witnesses and assisted by two appraisers appointed by the court.¹⁴ The term "inventory" is taken from the Latin *invenire*, to discover.¹⁵ The principle of the inventory is to discover and crystallize two things: first, the extent and description of the property belonging to the estate;

7. 1 Bouvier's Law Dictionary (3 rev. 1914) 1134.

8. The security to be given by every administrator, curator to a vacant succession, and dative testamentary executor, is one-fourth above the amount of the inventory, bad debts deducted. Arts. 1048, 1127, 1679, La. Civil Code of 1870. See also Arts. 927, 930, 1101, 1677, La. Civil Code of 1870.

9. In re Higgins Estate, 15 Mont. 474, 39 Pac. 506, 28 L.R.A. 116 (1895).

10. Arts. 1013, 1423, La. Civil Code of 1870.

11. 44 Stat. 70-71 (1926), 26 U.S.C.A. 411 (1935).

12. La. Act 127 of 1921 (E.S.) § 1 [Dart's Stats. (1939) § 8556]; Succession of Popp, 146 La. 464, 83 So. 765 (1919).

13. Arts. 1069, 1194, 1200-1202, 1670, La. Civil Code of 1870.

14. Art. 1105, La. Civil Code of 1870. The contents and formalities of the public inventory are prescribed by Arts. 1106, 1109, La. Civil Code of 1870.

15. 3 Massé, Le Parfait Notaire (1821) 304.

and secondly, the individual values of those assets.¹⁶ Hence the inventory procedure serves as a means to an end and is not an end in itself.

It is well here to point out the difference between the inventory proper and the performance of the appraisal, the latter being a forerunner of and not essential to the former. As an objective matter, to require a listing of certain property in the inventory without a formal appraisal is altogether proper. Accordingly, in California, if the entire estate consists of money in the hands of the executor or administrator, there need not be an appraisal, although an inventory must be made and returned as in other cases.¹⁷

The duty of the Notary Public appointed by the court to take an inventory is to describe the assets and to note their respective values.¹⁸ It is not within the province of the Notary to evaluate property, since appraisers, in theory at least, are appointed for that purpose.¹⁹ The two appraisers required by the Civil Code of Louisiana have as their sole purpose the valuation of the assets, and this information is given to the Notary for incorporation in the inventory.²⁰

The sums listed in the inventory, however, are not conclusive as to either value or ownership.²¹ They serve as an approximate norm for the purposes above outlined,²² and may be attacked and overcome.²³ For example, in determining the disposable portion of a decedent's estate the real value at the opening of the succession may be shown by evidence *dehors* the inventory.²⁴ Nevertheless it remains that the appraisements should be as accurate as possible, because experience shows that as a practical matter the values listed in the inventory are usually considered as proper for the purposes above outlined.²⁵

The function of the Notary in this connection is to list all

16. *Babin v. Nolan*, 4 Rob. 278, 285 (La. 1843).

17. Cal. Prob. Code (Deering, 1931) § 600.

18. 3 Massé, *Le Parfait Notaire* (1821) 304, 305, 306.

19. See Art. 1106, La. Civil Code of 1870.

20. *Ibid.*, *Babin v. Nolan*, 4 Rob. 278, 285, 286 (La. 1843). See also *infra* notes 27 and 28.

21. Cross, *Successions* (1891) 10; *Babin v. Nolan*, 4 Rob. 278, 285, 286 (La. 1843); *Succession of Dean*, 33 La. Ann. 367 (1881); *Succession of Williams*, 171 La. 151, 161-164, 129 So. 801, 805 (1930); *Succession of Vance*, 183 La. 760, 763-764, 164 So. 792, 793 (1935).

22. See *Nature and Function of the Inventory*, *supra* p. 427 et seq.

23. *Babin v. Nolan*, 4 Rob. 278, 285 (La. 1843).

24. Cross, *Successions* (1891) 11.

25. *Id.* at 10.

assets and then to incorporate the values as dictated by the appraisers.²⁶ It is clear, therefore, that the attorneys and notaries in charge of the estate are, theoretically at least, not judges of values and should refrain from fixing values.

THEORETICAL FUNCTION OF APPRAISERS

As the term indicates, the sole purpose of an appraiser in a probate proceeding is to fix the value of the goods, chattels, rights and credits of the deceased and to make a sworn return thereof;²⁷ this being done, he has discharged his trust and his duties are at an end.²⁸ Hence if any succession asset has a known value it is logical that an appraisal is not needed. For the purpose of this discussion then, property to be inventoried is naturally divided into two classes, namely, that with a universally recognized value and that with an uncertain value.

Property with a known value principally embraces cash on hand or readily available, and securities listed on established securities exchanges.²⁹ Experience has shown that such securities always have a ready market, and can be bought and sold only at the current quotations. It is well known from probate records that often a substantial portion of a decedent's property is reposed in cash and such securities. Reason dictates that it is nothing short of absurd for a court to go through the routine of appointing expert appraisers to "discover" the value of such assets. On the other hand, property with an uncertain value includes real estate, notes and unlisted securities, corporeal movables and other miscellaneous classifications of lesser import. It is fully conceded that appraisers are needed to fix values for this class of property.

QUALIFICATIONS OF APPRAISERS

Valuation of property is a problem which has provoked many books and articles, and has caused numerous lawsuits, as the vast body of reported utility rate cases prove. It is not within the scope of this article to discuss the various theories advanced for determining *true* values in the many complex problems that constantly

26. Arts. 1105, 1106, La. Civil Code of 1870.

27. *Fairbanks v. Mann*, 19 R.I. 499, 34 Atl. 1112 (1896).

28. *Ibid.*

29. Among the recognized securities exchanges are those of New York, Chicago, Philadelphia, Boston, Pittsburg, Cincinnati, Cleveland, Detroit, San Francisco, St. Louis, New Orleans, Los Angeles, Baltimore, Hartford, Richmond, Montreal, Toronto, Seattle, Spokane, Vancouver and Winnipeg. See J. S. Bache & Co., *The Investor's Manual*, January (1939) 1.

arise.³⁰ Suffice it to say that appraisers must determine just values³¹ for inventory purposes and that the proper discharge of this duty by its very nature requires at least a well rounded knowledge of proportional values. It can be said safely that the usual monetary equivalent sought in succession inventories is the probable sum which can be realized at a forced sale, and none other. Thus the determination can only be a matter of conjecture based on experience in the traffic of the particular articles to be appraised and on a plausible knowledge of the local economic situation at the time of the testator's death. It is obvious then that only properly skilled persons should be eligible as appraisers because the valuations which they must discover are certainly not based on intuition or imagination.

It follows from the above that the ordinary layman who is qualified to appraise every class of property of conjectural value is indeed rare. Furthermore, it does not appear that one person could reasonably be expected to display an intimate familiarity with the current values of widely diversified succession assets represented by real estate, unlisted securities, equities in partnerships and proprietorships, and tangible movables including among others, vehicles, furniture, and jewelry. Likewise, persons engaged in business dealing with one of the above articles can have no expert aptitude with respect to the values of other property. Thus, if the procedure is to be realistic and adequate, it is patent that only experts should be permitted to appraise succession property.

CURRENT PRACTICE IN LOUISIANA

The prevalent practice in Louisiana will now be examined in the light of the previous discussion. Its feasibility will be considered first from an objective viewpoint, and then as to actual results.

At present, appraisers go through the motions of *fixing* values on all assets of every nature belonging to the succession. For the reasons previously outlined, this is largely unreal and superfluous because the "appraisement" includes cash, listed securities, as well as government, state and municipal bonds. It has already been shown that, objectively, such formalities are idle gestures.³² On the other hand, although the court has already appointed two so-called appraisers for a succession composed of real estate, un-

30. For an exhaustive work on valuation, see Bonright, *Valuation of Property* (1927).

31. 3 Massé, *Le Parfait Notaire* (1821) 306.

32. See *Theoretical Function of Appraisers*, supra p. 429.

listed securities and an interest in a partnership, the attorneys and notaries are (for reasons stated later herein) constrained to seek actual appraisements by recognized experts. Accordingly, a reputable real estate agent is retained to appraise the immovables, a securities broker to inquire into the market value of the unlisted securities, and an accountant to make an audit of the partnership in order to determine the value of the decedent's interest. Not only are such persons qualified, but they have the proper facilities which enable them to provide the desired information. These persons often charge a fee to which they are justly entitled, thus entailing for the heirs a double outlay for appraisers. The underlying reason for this supplemental but real appraisal is to establish values that will stand up before the Estate Tax Division of the United States Department of Internal Revenue. Experience again shows that the agents of this division check up on the values and regard as fictitious the inventory appraisements under the present Louisiana practice. It is not urged that the requirements of the United States Collector of Internal Revenue be recognized as paramount, but they must at least be respected as genuine.

The most lamentable feature of the Louisiana practice lies in the fact that the persons appointed as "appraisers" are often paid for doing nothing in the way of benefit to the estate, as is obviously the case where, for example, only cash is involved. Moreover, in the parish of Orleans, under a prevailing agreement among the majority of the judges of the Civil District Court, the fees bestowed upon such appraisers are based on the face value of the inventory, and for this reason are out of all proportion to the pretended values of the services rendered.⁸³ It is astounding

33. Under two local laws applying only to the parish of Orleans, La. Act 311 of 1936 [Dart's Stats. (1939) §§ 1602.14-1602.15] and La. Act 337 of 1936 [Dart's Stats. (1939) §§ 1602.16-1602.22], inventories are mandatory in all estates of gross value of \$10,000 and over; the appraisers are appointed by the district judges, without restriction as to relationship, and their fees are fixed by the judge. The prevailing rates which are not created by law but exist purely by agreement of the majority of the judges of the Civil District Court sitting *en banc* in the parish of Orleans follow (The Official Daily Court Record, Oct. 20, 1936):

Amount of Inventory	Appraisal Fee, one- half to Each Appraiser	Amount of Inventory	Appraisal Fee, one- half to Each Appraiser
\$ 4,000	\$ 20.00	\$150,000	\$295.32
10,000	50.00	200,000	358.32
25,000	87.50	250,000	420.82
35,000	112.50	300,000	483.32
50,000	150.00	400,000	650.00
75,000	191.66	500,000	818.66
100,000	233.32		

Although the constitutionality of these two statutes has not been tested by

that an inventory of \$500,000.00 composed of cash, listed stocks and bonds, and United States Government, State and Municipal bonds, would yield \$816.66 to the appraisers, or one-half to each, for the idle gesture of "appraising" the property. It is interesting to consider what the fees of the appraisers would have been had the late Senator Couzens of Michigan died a resident of the parish of Orleans with an estate popularly estimated at the time of his death several years ago at \$32,000,000.00, all represented by United States Government Bonds.

Although these exorbitant gratuities apply only in the parish of Orleans, they nevertheless affect successions opened elsewhere if any of the property is situated in the parish of Orleans. Under the law,³⁴ notaries have jurisdiction only within the parish of their appointment, and therefore when the property of a succession is distributed over several parishes a separate inventory is taken in each parish by a notary therein qualified.

The only possible conclusion is that this system is unwarranted and constitutes an extravagant drain on the portion to which only the heirs are entitled. When attorneys render their accounts to the heirs in a succession, they are often forced to muster the highest of magical diplomacy in explaining the high cost of such appraisements.

It is irrefutable that the present system of inventory appraisements in Louisiana is unreal in principle and burdensome in result, and badly in need of improvement.

PROPOSED REMEDY

Although not by any means extolled as bullet proof, the following plan is suggested as a substantial improvement over the present situation.

Where there is cash on hand (or readily available), listed

the appellate courts, many members of the New Orleans bar have expressed to the writer their opinion that both statutes are unconstitutional for violating La. Const. of 1921, Art. IV, § 4, which provides: "The Legislature shall not pass any local or special law on the following specified subjects . . . Changing the law of descent or succession. . . . Regulating the practice or jurisdiction of any court . . ." Some attorneys insist that the statutes in question change the law of descent and succession by curtailing the portion of the heirs as a result of the heavy increase of inventory costs in Orleans parish over the other parishes. They argue also that the probate practice is considerably changed in the parish of Orleans by requiring an arbitrary inventory formality in all cases over \$10,000 and by permitting the judge to fix the fees of the appraisers. Whether these statutes be constitutional or unconstitutional, the writer suggests their outright repeal.

34. La. Rev. Stats. of 1870, §§ 2491, 2492 [Dart's Stats. (1939) §§ 6285, 6286].

stocks and bonds, United States Government, State and Municipal bonds, no appraisal should be made thereof. The notary should describe these items as usual and state the amount of cash and the market value of listed securities (together with the authority for such valuation). This change alone would eliminate waste charges perceptibly.

Where property has a conjectural value, the problem may be somewhat unwieldy but is nevertheless susceptible of relative correction. The appointment of one qualified appraiser for each class of unique property would contribute appreciably toward attaining reality. The applicant for the inventory should be required to state in his petition each of the general categories of property present; such as immovables, notes and unlisted securities, interest in businesses, tangible movables and miscellaneous. The last two categories are of less importance than the other classes of property because they are not usually of large value in relation to the other assets. The judge could then appoint the appraisers, and they would be required to make a personal inspection of the property to which they are assigned. Their remuneration should be commensurate with the amount of time devoted to the work and should not be based on the value of the property.³⁵

A further improvement would be an adoption of the provision of the California Probate Code³⁶ that no employee, court attachee or relation of the judge is eligible for appointment as appraiser.

As a cure for the evils above set forth, the following statute is proposed:

AN ACT

To regulate practice in the District Courts of Louisiana;
to provide for the manner of selecting and appointing appraisers when an inventory is ordered by the court; to prescribe the qualifications and duties of

35. The sum of \$3.00 per hour would probably be considered as proper by all concerned. It is interesting to note again that in California the appraisers receive \$5.00 per day, Cal. Prob. Code (Deering, 1931) § 609. Under La. Act 33 of 1870 [Dart's Stats. (1939) § 1354], appraisers are entitled to \$4.00 for each vacation. In most parishes of Louisiana other than the parish of Orleans, this rate is generally followed, as a personal investigation by the writer bears out.

36. Cal. Prob. Code (Deering, 1931) § 606: "No clerk of the court or deputy clerk, or partner or employee of the judge, or person related to the judge or to his wife within the third degree, or who is married to a relative of the judge within the third degree, shall be competent to act as appraiser."

such appraisers; and to provide for the manner of fixing their fees and taxing same as costs.

Be it enacted by the Legislature of Louisiana

SEC. 1. That whenever in any proceeding whatever, an inventory is requested, the applicant shall set forth in the petition the general classification of property to be inventoried under the following titles: (1) Cash, (2) Listed Securities, (3) Immovable Property, (4) Notes and Unlisted Securities, (5) Business Interests, (6) Tangible Personal Property, and (7) Miscellaneous.

SEC. 2. That for the purpose of this act the term cash shall include currency on hand or readily available. Listed securities shall include stocks and bonds listed on any recognized securities exchange, domestic or foreign, and bonds issued by the United States Government and by any state of the United States as well as by any foreign country and by any municipality, domestic or foreign.

SEC. 3. That no appraisalment shall be made by any appraisers of cash and listed securities. The notary shall incorporate such values in the inventory, stating the source of information.

SEC. 4. That where property other than cash and listed securities is present, the district judge shall appoint an expert appraiser for each class of property other than cash and listed securities. After having been sworn by the Notary Public before entering upon his duties, the appraiser shall personally study the value of the property to which he has been assigned, and shall then report his findings to the Notary who shall in turn incorporate them in the inventory. Provided, that one person shall be eligible for appointment to appraise more than one class of property in any inventory.

SEC. 5. That the said appraisers shall be of full age of majority and residents of the territorial jurisdiction of said court. No clerk or deputy clerk of court, minute clerk, crier or employee of the judge, or relative of the judge or of his wife within the third degree, or person married to a relative of the judge within the third degree, shall be competent to act as appraiser.

SEC. 6. That each appraiser so appointed shall receive as compensation for his services the sum of three dollars for

every hour devoted to such appraisements, provided that no appraiser shall receive less than three dollars. Such fees shall be taxed as costs in said proceedings.

SEC. 7. That all laws or parts of laws in conflict with the provisions hereof are hereby repealed, particularly Acts 33 of 1870, 311 of 1936 and 337 of 1936.

CONCLUSION

The fact can no longer be ignored that the present expenses involved in judicial administration of estates are highly excessive and should be curtailed. A carefully planned regulation of the duties and costs of appraisers will serve as an excellent starting point in remedying this condition. The proposal outlined above does not increase but on the contrary considerably decreases inventory costs. Although this article has been directed against inventories in the administration of estates of deceased persons, the same is rationally true of all inventories ordered by the courts regardless of whether they are taken in tutorship,³⁷ curatorship,³⁸ succession,³⁹ or other proceedings, and for this reason the proposed statute is not limited to successions.

37. Art. 316, La. Civil Code of 1870.

38. Art. 415, La. Civil Code of 1870.

39. Art. 1101, La. Civil Code of 1870.