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Civil Code and Related Subjects: Successions, Donations and Community Property

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III. CIVIL CODE AND RELATED SUBJECTS

SUCCESSIONS, DONATIONS AND COMMUNITY PROPERTY

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WILLS

The sisters of testator brought suit to set aside the will of their brother in *Lee v. Hunter*[1] because he had left his property to the wife and children of his predeceased son who was an adulterous illegitimate. The ground of attack under Article 1491 was that the legatees were "persons interposed" in lieu of the one incapable of receiving. Since the son had died before the will was drawn there could be no thought of interposition whereby he might eventually inherit. Furthermore the court pointed out that the code merely speaks of certain persons as being "reputed" interposed—a presumption which may be rebutted. No authority whatever was found to support the idea that the legitimate children of an illegitimate might not receive from the illegitimate's parent under the conditions of this case. This decision follows the modern social policy of the court in making the burdens of illegitimates no heavier than they already are.

A sister and the nieces and nephews of decedent sued to declare invalid the olographic will of their brother and uncle in *Succession of Buck*.[2] The first ground was in regard to the mental capacity of decedent at the time the will in question was made. There was a great deal of conflicting evidence and witnesses of high repute, laymen and professionals, were found on both sides of the question. The court found that the insanity was not established "with sufficient certainty to justify annulling the instrument on that ground."[3] There was also grave doubt as to the physical ability of testator to write the will and evidence of a most convincing nature was adduced to show that he had for many years been unable to write anything but his name. The definite ground upon which the will was declared invalid was that the date was uncertain, which rendered the instrument undated and hence invalid under 1588. Copious authority was cited. Justice Spofford's comment in *Johnson v. Bloodworth*[4] was reproduced by Chief Justice O'Niell, a famous French scholar, and may

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1. 208 La. 248, 23 So.(2d) 61 (1945).
2. 208 La. 556, 23 So.(2d) 215 (1945).
3. 208 La. 556, 568, 23 So.(2d) 215, 219.
4. 12 La. Ann. 699 (1857).

well be again emphasized here. After reviewing the French authorities Justice Spofford said:

" 'When jurists of a race so much addicted to theoretical speculation, and so little addicted to reverence for each other's opinions, draw a conclusion from the Code in which they unanimously concur, we may, perhaps, set it down for an obvious truth.' "[5]

Interpretation of a will is the concern of the court in *Succession of Fertel*.[6] The document appears as follows:

" '1st January 1936.

" 'My Last Will

" 'Everything I possess. I leave (the use of it to my husband during his life time, at his death it goes as following.

" 'To my 2 daughters Nettie and Annie and to my grand son Rodney Fertel Weinberg.

" 'To my son Barney Fertel I leave One hunderd dollars per month for the maintenance during his life time only to be paid out of the Estate.

" 'None of the properties cannot be sold or mortgaged, twenty years from hence.

" 'This will includes my box at the Bank of Commerce N O.

" 'Julia Fertel' "[7]

The majority of the court held that the will did not contain a substitution prohibited by Article 1520. The clause restricting sale or mortgage was reputed as not written. This decision was said by the majority to be closely analogous to that in *Succession of Blossom*.[8] Justice Fournet dissented and pointed out the many reversals in connection with this matter. He expressed the view that only by strict adherence to the articles of the code guiding interpretation of wills could this uncertainty of outcome be avoided. His thought was that Article 1712 in particular had not been adhered to and that the controlling opinion "not only rewrites the will but that this resulting version is not in keeping with the intention of the testatrix as reflected by the will."[9] The petition for rehearing, however, was denied by the whole court.

The second point of controversy after declaration of validity

5. 208 La. 556, 584, 23 So.(2d) 215, 224 (1945).
6. 208 La. 614, 23 So.(2d) 234 (1945).
7. 208 La. 614, 618, 23 So.(2d) 234, 235.
8. 194 La. 635, 194 So. 572 (1940).
9. 208 La. 614, 646, 23 So.(2d) 234, 244 (1945).

was the division of the estate. The suit had been brought by Barney Fertel, the son of testatrix to whom she had left one hundred dollars per month. The majority of the court took the position that she had intended to disinherit her son. Obviously his legitime must be protected, in which the court included the one hundred dollars per month and allocated to him his one-third of two-thirds or two-ninths or six twenty-sevenths of the whole estate. The court then said that the testatrix had intended to favor the two daughters and the grandson, not an heir, of course, since his mother, testatrix's daughter, was living. These three were each given one-third of the remaining 21/27 or 7/29 each. The chief justice while concurring in the judgment expressed doubt in regard to this division. His thought was that the two daughters should receive their legitime plus one-third of the disposable portion, particularly since that result would have been to give each daughter one-third of the estate, which the will provided and which they also would have received had the mother died intestate. Justice Fournet's view was that the will did not indicate that the testatrix intended to disinherit her son and that it was very doubtful that she intended her two daughters to receive less than they would had she died intestate, in order that the grandson should be favored.

The pertinent facts of the controversy in *Succession of Quintero*[10] were that the testatrix had established certain "particular legacies of . . . particular objects" among which was a bequest of "20 shares of stock of the Times-Picayune Publishing Co." After the will was made but before the death of the testatrix the Times-Picayune Publishing Company declared a stock dividend and twenty more shares were allocated to testatrix. The question presented was whether or not the particular legatee of the original twenty shares should have the additional shares constituting the dividend. The supreme court heard the case twice and decided twice that the testatrix's intention was for the particular legatee to have her incorporeal right against the publishing company which the certificates (regardless of their number) represented. The court was divided on both hearings and Justice Fournet twice wrote a dissenting opinion. His view was that it was clear that the testatrix intended to give but twenty shares of the stock and that the pertinent articles of the code on particular legacies had been violated by the majority decision. It was conceded that had the dividend been in cash

10. 209 La. 279, 24 So.(2d) 589 (1945).

rather than stock, the addition would not have gone to the particular legatee. This point, overwhelmingly supported by authority, was most convincingly made by Justice Fournet.

In *Artigue v. Artigue*[11] the supreme court approved the trial judge's finding that a preponderance of the evidence showed the decedent to have been insane before, during and after the making of the will in question. The author of the opinion spoke of the strong presumption in favor of validity of a will and remarked that "a review of the jurisprudence of this court discloses the evidence has been found sufficient to warrant the annullment of the will under attack in only a few instances."[12]

It appeared, however, that the decedent had been brought to the notary and had merely "repeated the words parrot-like after the notary"[13] which together with strong evidence of incurable insanity of the type devoid of lucid intervals plainly showed lack of capacity.

One of the three children sought to invalidate the mystic will of her father in *Succession of Fertel*[14] The first point of attack was that the will had not been properly sealed, namely by use of a "signet ring or other device, upon sealing wax or the like." The envelope in which the will was contained was sealed with mucilage in the ordinary manner and the flap was further secured by means of a sealing wafer. There was no evidence that the envelope had been opened or the will disturbed. The court stated that the law provided no specific manner of sealing and that the means used was sufficient. The second point of attack was that the notary's superscription stated that the will had been presented "in the presence of rather than to the witnesses." The court held that there had been a substantial compliance with the code and cited previous cases holding that an "actual manual presentation is not sacramental."

Having found the will valid in form, the court next considered the alternative pleas. One having no support in evidence or otherwise, the court considered the second which was that the computation of the forced share was improper. In short, the plaintiff wished to be relieved of collation as indicated by the testator and also have the forced share computed as though she were claiming originally her forced portion. Obviously she could

11. 210 La. 208, 26 So.(2d) 699 (1946).
12. 26 So.(2d) 699, 701 (La. 1946).
13. 26 So.(2d) 699, 703.
14. 209 La. 655, 25 So.(2d) 296 (1946).

not have both, and having claimed the advantages of the will, she could not complain of the computation of the forced share as though she was demanding her legitime in lieu of the advantage of the will.

DONATIONS INTER VIVOS

The *Succession of Gorman*[15] presents an interesting analysis in regard to the validity of a gift inter vivos. A power of attorney was granted that this agent might withdraw funds from the bank for payment of certain bills of the principal. A statement was made by the principal in the presence of a witness that the agent was to keep the balance of the fund after these bills were paid. The court held that this balance was manually donated. The decision appears to have been correctly made with no violence to the law on the form for a gift of incorporeal rights.

It was not the right to withdraw the fund that was donated manually but the gift of the corporeal, already in the hands of the donee, who gained possession by means of the power of attorney. A note on this case appears in this Review[16] and further discussion might be repetitious.

COMMUNITY PROPERTY

The court commented upon the sad situation evidenced in *Succession of Russell*[17] where a father and three children were "arrayed in the forum" against the other three children in a contest over the deceased wife and mother's half of the community. The supreme court properly relied upon the district judge's estimate of credibility of witnesses particularly where so much bitterness was displayed. Homologation of the father's final account as administrator was at issue. The community property was sold to pay debts. Court costs, administrator's fees, attorneys' fees, insurance, taxes and certain promissory notes were charged to the mass. One-half was then credited to the father. The other half was charged with the mother's succession costs such as the expenses of last illness and funeral. The remainder was credited to the children burdened with the father's usufruct. Special attorneys employed by the children were to be paid by them. The failure to advertise some of the property as directed by Article 1184 was not fatal as notice was had and contest heard on the items.

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15. 209 La. 1092, 26 So.(2d) 150 (1946).
16. Note (1946) 7 LOUISIANA LAW REVIEW 144.
17. 208 La. 213, 23 So.(2d) 50 (1945).

A testator left the naked ownership of all his property, separate and community, to his two sisters with usufruct thereof to his wife, who was made testamentary executrix. The accuracy of the final account of the executrix was at issue in *Succession of Singer*.[18] The executrix had found it necessary to sell some of the separate property and some of the community property in order to pay the debts of the succession. Public and private sales were conducted with proper legal formalities. A residue in cash was left from these sales after the debts were paid, and the executrix claimed the sum in usufruct under the will. Opponents maintained that she had waived the usufruct in her petition to sell the property. The court held that she had merely waived her usufruct of the property itself in order that it might be sold to better advantage unburdened with a usufruct. *No express* renunciation of usufruct per se as required by Article 624 of the code was found and the action of the executrix, legatee of the usufruct, was in accord with the provisions of Articles 584 and 585. Since the testator did not provide that the executrix was to receive a fee over and above her legacy she was not entitled to one under Article 1686 and settled jurisprudence. The executrix had improperly listed improvements made with community funds upon separate property as community property when the whole should have been listed as separate property. The amount of the debt due by the separate estate to the community under 2408 was indeterminable from the record so the court remanded the case that this item might be ascertained and the account recast.

Plaintiffs were the two sons of deceased by his first marriage, which had been dissolved by divorce. They sought in *Succession of Hollander*[19] to have a judgment sustaining an exception of no cause of action annulled in which they were successful in part. The plaintiffs claimed that the marriage contract between their father and his second wife was in fraud of their rights, and furthermore that since income tax returns had been made on a community basis that an estoppel had been created whereby the marriage contract declaring against a community could not be urged. The marriage contract was found to have been a lawful instrument; no fraud was proved, hence the court could not annul the contract. The matter of income tax was said to have no bearing on the issues involved. So far as real property in the name of the second wife was concerned, the plaintiffs' remedy

18. 208 La. 463, 23 So. (2d) 184 (1945).
19. 208 La. 1038, 24 So.(2d) 69 (1945).

was to sue for the return of the purchase money used by the father and not to have the realty, never in the name of the father, returned to the succession. However, the plaintiffs did have a right to use parol evidence to have the stock, personal property, bought by their father but placed in the name of the second wife, brought back into the succession if proven a simulated transaction in fraud of their rights.[20]

Rousseau v. Rousseau[21] reiterates two well established principles of community property law: one, that the wife can prove de hors the deed that realty is her separate property—two, that the husband is estopped to deny that property is separate to his wife if he has joined in the instrument which so declares. The husband was also unable to recover title under theory of mistake of fact or law and this phase of the case will be discussed under appropriate title of this résumé.

Several most interesting questions dealing with settlement between separate and community estates were discussed in *Succession of Ratcliff*,[22] having been raised by opposition to the first annual account filed by the executors of Ratcliff. The decedent was survived by his third wife and by two children, issue of the first two marriages. The first disputed item considered by the court was one month's salary paid by the company of which decedent had been president. Mr. Ratcliff had actually earned but six days of the thirty-one for which payment was made. The executors had allocated 6/31 to the community and the balance to the separate estate under the theory that the part not actually earned was a gift. The supreme court, sustaining the district court, ruled against the executor on this point, noting that withholding tax had been subtracted on the total, which was only proper in earnings, that the amount was identical with the regular monthly salary checks, that if the executors could not regard the sum as earnings they should return it to the company as having been paid in error. Certainly there was no label of gift placed upon the sum which was nevertheless unearned. In the writer's judgment the decision was correct as the unearned sum arose out of the position held by decedent and would not have been received had he not been so employed. The custom followed here by the company in making this pay-

20. See Lockhart v. Dickey, 161 La. 282, 108 So. 483 (1926); Eberle v. Eberle, 161 La. 313, 108 So. 549 (1926); Succession of Hogh, 193 La. 260, 190 So. 399 (1939).

21. 209 La. 428, 24 So.(2d) 676 (1946).

22. 209 La. 224, 24 So.(2d) 456 (1946).

ment is pursued rather generally and might almost be said to be an increment of the employment which can be anticipated. This type of payment might be classed with many kinds of pensions, bonuses, et cetera, that are now prevalent under the modern theory of recompense. If they arise solely from the job held during marriage certainly it appears logical that they should fall into the community and be differentiated from some of the old cases where under a different theory they were indeed gifts.

The second item discussed was the question of whether or not the community should have depreciation charged against the returns from the husband's estate. It was conceded that the jurisprudence was against the charge,[23] but was urged that modern accounting methods warranted the overruling of these old cases. The court refused to pass on this matter as there was no proof in the record of the actual depreciation of the separate property of the husband. It seems strange that the question was regarded as settled particularly under the cases cited. The *Viaud* case,[24] ninety years old, dealt with an item of $605.02, the value of *movables,* certain tools and furniture, separate goods of the husband at the date of his marriage thirty years before. Article 2371 of the Code of 1825 which was cited in both cases is the same as the present Article 2402 so far as concerns the first sentence containing the critical word profit. The court in the *Viaud* case was also apparently guided by Article 543, now 550, dealing with usufruct as the husband had enjoyed the usufruct of the deceased wife's half of the community for a time. The *Depas* case,[25] ninety-nine years old, dealt also with improvements made upon separate property with funds of the community and the court decided that the *cost* of the improvements was the maximum credit allowable the community estate. On this point the case dealt with Article 2408 of course and not with the interpretation of the word "profits" found in Articles 2402-2406. It is unfortunate that the court was unable to pass upon this specific item. However, in considering the next item a fine statement of one phase of the principle involved appears, which dispels any fears regarding analysis of gross income and actual profit. The court said:

"Since the profits of the separate property, under the administration of the husband, fall into the community, it is but

23. Depas v. Riez, 2 La. Ann. 30 (1847); Succession of Viaud, 11 La. Ann. 297 (1856).
24. Succession of Viaud, 11 La. Ann. 297 (1856).
25. Depas v. Riez, 2 La. Ann. 30 (1847).

> just, equitable and proper that the ordinary expenditures required in the production of such profits and in the preservation of the property should be borne by the community."[26]

Decedent had settled with his second wife upon dissolution of their marriage by divorce and in partial payment of her one-half of the community had entered into a contract with her which classified as an annuity under Articles 2793 and 2800. He promised to pay five hundred dollars per month until such time as he was ready to pay the $120,000 owed her in settlement. This rent or interest charge was properly charged against the community which had received the gross income from the separate estate and in connection with this item the clear statement above quoted was made. Obviously interest on borrowed money used to produce the gross revenue had to be deducted before an actual profit could be shown, to which the community could lay just claim.

Decedent had made substantial gifts to his relatives and to those of his wife. It was urged that gifts to his family should be charged to his separate estate, as there must be a presumption that the donor so intended. In charging them to the community since only movables were involved and no fraud shown, the court said:

> "Should a presumption exist with reference to the intention of decedent about the instant item, it, we think, would favor the charging of the disputed donations to the community rather than to the corpus of the separate estate. As pointed out above all of the net profits from decedent's separate property belonged to the community and it does not seem likely that he would have entertained the intention of diminishing the invested capital that produced those profits."[27]

Succession of Brunies[28] also dealt with settlement between separate and community estates. The claims were those of a second wife versus children of deceased by a previous marriage. The decision in the *Ratcliff* case was controlling and expenses of the separate estate of the husband were held to have been properly paid from the rents and revenues of the separate estate since only the *profit* therefrom should properly be credited to the community. The items of expense were insurance and taxes

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26. 209 La. 224, 238, 24 So.(2d) 456, 460 (1945).
27. 209 La. 224, 241, 24 So.(2d) 456, 461.
28. 209 La. 629, 25 So.(2d) 287 (1946).

on the property of the separate estate and interest and principal of loans secured by property belonging to the separate estate.

Another item in contest was rent upon the house which had been occupied by deceased and his wife which was willed to her and in which she had continued to live after her husband's death. The property belonged to the separate estate of deceased. The court held that under Articles 1627 and 1628, the widow, legatee and executrix, did not need to demand possession, that Article 1631 was inapplicable and that no rent on the house was due by the widow to the heirs.

After divorce, the former wife sued in *Baker v. Baker*[29] for a settlement and partition of community property. A piece of land was claimed by the widow as being community because it had been acquired during the marriage without any recitation in the deed to protect title in the husband's separate estate. Parol evidence was admitted to prove that, by the deed in question, the property was not *acquired,* as the transfer was merely to correct a previous error where a sale had been effected when only a security transaction was intended by both parties. *Kittredge v. Grau,*[30] where stock in a corporation was acquired during marriage but with a partnership interest owned before marriage was cited in support of the decision that the property was separate under a very proper interpretation of the word *acquire* found in Article 2402.

The court approved the findings and recommendations of the commissioner for the Civil District Court for the Parish of Orleans in *Wainer v. Wainer.*[31] The recommendations had previously been approved by the district court. Children of a first marriage had attempted to gain surrender of their mother's share of the community together with revenues therefrom accruing after expiration of the father's legal usufruct terminated upon his remarriage. Shortly before the death of his first wife, the father of plaintiffs had formed two corporations, kept entirely within his control, clearly for the purpose of avoiding succession proceedings upon the anticipated death of his wife. After her death he liquidated the corporations and later sold all property that had belonged to them. The principal objections to the commissioner's report were to his having disregarded the corporate entities involved in what the court termed an "in-

29. 209 La. 1041, 26 So.(2d) 132 (1946).
30. 158 La. 154, 103 So. 723 (1924).
31. 210 La. 324, 26 So.(2d) 829 (1946).

genious manipulation" to diminish the value of the estate of the wife and mother. The strong statement by the court in approving the commissioner's action follows:

> "We refuse to sanction and approve the method or scheme adopted by the defendant in his efforts to retain control and management of the property which rightfully belonged to his wife's estate, although such procedure may have been legal, or to sanction and approve his failure to account therefor after his usufruct had been terminated by his remarriage."[32]

The case entitled *Succession of Dielmann*[33] held that a perfect usufruct of bank stock was converted into an imperfect usufruct of the proceeds therefrom when the change was brought about by liquidation of the bank, a matter over which the usufructuary had no control. This situation was clearly distinguished from the one under discussion where the usufructuary wrought the changes himself.

MINERAL RIGTHS

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Article 552

Gulf Refining Company v. Garrett[1] arose as a concursus proceeding to determine ownership of royalties. The Court of Appeal of the Second Circuit reached a judgment in *Gulf Refining Company v. Garrett*[2] in 1943, which was reversed by the supreme court and remanded to the district court in 1946. Three dissents are listed on the first hearing by the supreme court and two upon the rehearing, the last upon the matter of remanding without request. While it might be said that no definite conclusions were reached under these circumstances, the discussions by various members of the court are most interesting and important since the underlying question is one of interpretation of the old "mine and quarry article," 552 of the Civil Code, which appears as follows:

> "The usufructuary has a right to the enjoyment and proceeds of mines and quarries in the land subject to the usufruct, if

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32. 26 So.(2d) 829, 836 (La. 1946).
33. 119 La. 101, 43 So. 972 (1907).
1. 209 La. 674, 25 So. (2d) 329 (1945).
2. 24 So. (2d) 632 (La. App. 1943).