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questions of fact. The court found no reason to disturb the conclusions reached by the trial courts.

SUCCESSIONS, DONATIONS AND COMMUNITY PROPERTY

*Harriet S. Daggett**

In the *Succession of Combre*,¹ since decedent and his family had continued in possession after an act of sale reciting a cash consideration, the presumption of simulation placed the burden of proof upon the alleged vendee to show that consideration had been paid. Since this burden was not sustained, the administrator of the succession secured the annulment of the act of sale.

In the *Succession of Montegut*² the will of Amelie Montegut contained a clause of doubtful meaning; and after consideration by the supreme court, the case was remanded in order that evidence might be heard bearing upon the intention of the testatrix.³ It was indicated that a presumption prevails that a testator intends to dispose of all property. When this case again reached the supreme court, the majority took the position that this presumption is not as strong in the jurisprudence as is the preference in case of ambiguity for following as closely as possible the legal order of distribution. Upon rehearing the court adhered to the judgment on first hearing after the remand, particularly since the extrinsic evidence adduced did not convincingly disclose the intention of the testatrix.

In *Gregory v. Hardwick*⁴ a testatrix made the following bequest: "I hereby will and bequeath all the rights, title and interest which I may have in any property whatsoever in equal proportions, share and share alike to" four named persons. The court found this provision to be a universal legacy under Article 1606 and *Shane and Withers v. Withers' Legatees*,⁵ rather than a legacy under universal title. Thus, seizin was given to these legatees under Articles 1609 and 884, and they had a right of action for an accounting and other relief against decedent's husband. Moreover, the testamentary executrix, one of the legatees,

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1. 217 La. 955, 47 So. 2d 734 (1950).

2. 217 La. 1023, 47 So. 2d 898 (1949) (rehearing 1950).

3. *Succession of Montegut*, 211 La. 112, 29 So. 2d 583 (1947).

4. 218 La. 346, 49 So. 2d 423 (1950).

5. 8 La. 489 (1835).

was not precluded from bringing the action because of Article 1660.

Having weighed the evidence in the *Succession of Evans*,⁶ the court found decedent's second marriage valid and the issue therefrom legitimate. Thus, the two daughters of the second marriage shared equally with the daughter of the first marriage in their father's estate.

In *Succession of Pizzati*⁷ the olographic will of Mrs. Toro was attacked by her brother on four counts. The evidence did not support the pleas of forgery and duress, nor was there sufficient evidence to rebut the presumption of mental capacity at the time the will was written, though the testatrix was later suffering from senile dementia, which may have been in its early stages at the date of the will. The plea which necessarily gave the court difficulty was under Articles 1489 and 1491, since the testatrix had left her entire estate to the minor son of her friend and physician. Our courts had not previously been called upon to determine what constitutes the "illness of which [a donor] dies" during which period the attending physician may not receive a gift from the sick person. The testatrix died of pneumonia induced by disabilities attendant to arteriosclerosis and associated difficulties. French authorities were consulted and while they were not in entire agreement, there was a consensus that the illness designated by the prohibitory article was only the "final painful period" in the case of a progressive disease like tuberculosis or cancer. This idea was adopted by our court with the safeguard that "all cases of this nature must be decided on their own facts and circumstances."⁸ Since the father of the legatee had not attended the testatrix during the prohibited period, the child was not a person interposed and so could receive the legacy. The father of the minor was properly appointed testamentary executor under Articles 1042, 1665, 1044, 883 and 977.

In *Barnsdall Oil Company v. Applegate*⁹ a tacit acceptance by certain heirs of the estate of their father was found because they had mortgaged the property. Justice McCaleb dissented on this point, as he was not convinced by the evidence that the mortgagors knew the property to be that of their father and unconditionally accepted it with intent to bear burdens as well as receive

6. 218 La. 397, 49 So. 2d 738 (1950).

7. 218 La. 549, 50 So. 2d 189 (1950).

8. 218 La. 549, 570, 50 So. 2d 189, 196 (1950).

9. 218 La. 572, 50 So. 2d 197 (1950).

benefits at the time of the mortgage. Acceptance having been found by some of the heirs, however, during the thirty year period prescribed by Article 1030, the other heirs were held to have lost their right by failure to accept during this period.

In *Demoruelle v. Allen*¹⁰ the court held that a community, like a succession, was an "ideal being" and that a partition sued for concurrently with a plea for divorce should be within the jurisdiction of the court granting the divorce regardless of the situation of the property. In a concurring opinion it was indicated that if partition of community was not requested in the proceeding for separation of bed and board or divorce, the rule of situs, as in ordinary suits, might prevail as is true after a succession is closed and heirs become mere co-owners.

On first hearing in *Succession of Dupre*¹¹ a transfer of land was found to have been a dation en paiement to which the articles governing donations did not apply. On the second hearing Article 2480 was examined and, since usufruct had been reserved, the parties were put to their proof as to the reality of the transaction in order that the presumption of simulation might be overcome. Proof of a debt for services rendered having failed, the court found the transaction to have been a donation in disguise, made to an interposed person under the prohibition of Articles 1481 and 1491. To the argument that only forced heirs might attack the donation under Article 2239, the court found the exception of public policy which made it possible for parties interested, as collateral heirs, to show the transfer as a nullity and an attempted fraud upon the law.

In *Key v. Salley*¹² the court held a judgment of court placing a widow and heir in possession of decedent's property with reservation to the widow of administration and claim for allowance in necessity an absolute nullity under Article 986 prohibiting conditional acceptances or renunciations of successions. Thus, the lower court had jurisdiction of administrative proceedings and could properly order sales of the succession property. Purchasers were not bound to look beyond the court's order and received good titles.

In *Fontenot v. Vidrine*¹³ a wife in community left the usufruct of her property to her husband, who inherited the naked owner-

10. 218 La. 603, 50 So. 2d 208 (1950).

11. 218 La. 907, 51 So. 2d 317 (1950) (rehearing 1951).

12. 218 La. 922, 51 So. 2d 390 (1951).

13. 218 La. 979, 51 So. 2d 597 (1951).

ship under the rule of Article 915, in effect at the wife's death. The fact that the husband had not had himself put into possession preceding his death did not estop his collateral heirs from claiming to the exclusion of her collateral heirs.

In *Fried v. Bradley*¹⁴ executors of the will of decedent, domiciled in Mississippi, sold land in Louisiana without compliance with any Louisiana safeguards or procedures. After ten years this sale was attacked by the heirs. It was held that the sale was an absolute nullity but subject to the prescription of Article 2221, since the transfer was not "in derogation of public order and good morals." On rehearing, the majority of the court found further that, since the matter of the wife's half of this community property sold in its entirety by the executors of the husband's succession had not been raised in the trial court, the issue was not properly before the supreme court. In concurring opinions Justices Fournet and McCaleb differed with the majority on the propriety of the court's considering the issue. However, Chief Justice Fournet believed this claim also to be barred by lack of right to attack after ten years under theory of tacit ratification. Justice McCaleb believed the claim barred by Article 2221 and ratification by acceptance of the proceeds of the sale, and further that the defendants had acquired the land under good faith *acquiriti* prescription after the defect of form had been cured by failure of the heirs to enter their claim within the first ten year period under 2221.

The case of *Sun Oil Company v. Tarver*,¹⁵ second¹⁶ in this resumé to consider Article 1030, is of particular interest because after a great deal of jurisprudence and comment was reviewed, the "predicate" of *Generes v. Bowie Lumber Company*¹⁷ was rejected as incorrect. In that case the court found that an heir will lose in thirty years that which he has; and hence, since a regular heir is seized of the succession upon the instant of death of his relative, he loses the right to renounce. The corollary, of course, is that the irregular heir, having but a right to claim or accept, loses this right after thirty years. The instant case finds this theory incompatible with the provision that no one can be forced to accept a succession¹⁸ and with the "suspension" of the application of the doctrine of *le mort saisit le vif* until the

14. 219 La. 59, 52 So. 2d 247 (1950) (rehearing 1951).

15. 219 La. 103, 52 So. 2d 437 (1951).

16. *Barnsdall Oil Co. v. Applegate*, 218 La. 572, 50 So. 2d 197 (1950).

17. 143 La. 811, 79 So. 413 (1918).

18. Art. 977, La. Civil Code of 1870.

regular heir decides whether he will accept or renounce.¹⁹ Thus, the doctrine of *Tillery v. Fuller*,²⁰ clearly in conflict with the reasoning of the *Generes* case, was maintained; and the claim of regular heirs who had not accepted during the thirty years was rejected since co-heirs during the period had accepted. It would appear that from a presumption of acceptance after thirty years or loss of the right to renounce the reverse rule is now announced of loss of right to accept. The court states that the simple meaning of 1030 is that of loss of "the right of election or choice to do one of two things," yet as applied the loss is not of one but of both things as, being unable to accept, certainly renunciation becomes unnecessary. However, it is indicated that if some co-heirs have recognized the inheritance as not having vested fully in themselves but in part in other co-heirs, then the latter might be held to have accepted after thirty years. What happens if no one does anything for thirty years was not at issue and is not outlined. Where the title to the part of one heir is, after another has accepted, until thirty years have passed is another puzzling question.

The article²¹ stating that acceptance is presumed until renunciation, which must be expressly²² made, is not discussed. The article dealing with suspension²³ would seem to indicate that the heirs' right to accept, renounce, or accept with benefit of inventory is in suspense, not his acquisition of the estate, which may only be defeated by his renunciation. The origin of the harsh doctrine of barring regular heirs after thirty years in cases where co-heirs have accepted is obscure since it does not appear to be announced in the code. Article 1031 permits heirs to accept after having *renounced* if other heirs have not accepted in the interim. It may be that the original dicta in the jurisprudence referred to this situation and was later picked up and evolved into doctrine without referenc to 1031.

In *Girven v. Miller*²⁴ an attack on grounds of prohibited substitution and fidei commissum and reference to another document not in olographic form was made on the following will:

"New Orleans, La. Jan. 3, 1946. This is my will. I leave all I die possessed of to Rev. William A. Miller, CSSR. to be dis-

19. Art. 946, La. Civil Code of 1870.

20. 190 La. 586, 182 So. 683 (1938).

21. Art. 1014, La. Civil Code of 1870.

22. Art. 1017, La. Civil Code of 1870.

23. Art. 946, La. Civil Code of 1870.

24. 219 La. 252, 52 So. 2d 843 (1951).

posed and administered according to my typed instructions, and I name Father William A. Miller, CSSR., Executor of my estate with full seizin and without bond. (Signed) Joseph A. Girven CSSR."

The majority of the court found the will valid as having definitely vested full title in the legatee under the initial words of the testator. The further statement might be regarded as not written under the directive of Article 1519, or considered as merely precatory. Thus, the typewritten material was unimportant as the legatee was bound only in conscience to follow the wishes of the testator. Two dissents were registered, one with opinion, where the strong point was made that the typewritten instructions had to be considered in order to determine whether the statement in the will constituted a prohibited bequest or not, thus making the form of the will invalid. Furthermore, the intention of the testator was defeated instead of being fulfilled, as indicated by the majority, since the typewritten material showed a desire that a brother should benefit.

In *Succession of Francke*²⁵ an opposition to the homologation of a final account by a testamentary executor was filed. A claim for personal services to the deceased, performed by a daughter, was examined with a view to establishing its value on a quantum meruit basis. A three year period of nursing services, in connection with cancer of the rectum, was proved. During this period the daughter also took care of the house, prepared the food, washed clothes, carried wood, et cetera. Two hundred and ten dollars per month was allowed. The author of the majority opinion stated the rule to have been settled that a child of a parent not "in a penurious condition" could not receive compensation for services unless there had been "an express or implied promise to pay" by the parent. Justice LeBlanc, while concurring in the decree, registered his continued disagreement with the holding in *Muse v. Muse*,²⁶ relied upon in the majority opinion.

In *Kranz's Succession v. Wetmore*²⁷ a testator after making specific bequests stated that he wanted certain movables sold and "such money added to the remainder of my estate and to be distributed to Charity." Obviously, this attempted bequest fell under the language of 1573 of the code and the undisposed remainder went to his sole legal heir, a sister, regardless of what his inten-

25. 219 La. 288, 52 So. 2d 855 (1951).

26. 215 La. 238, 40 So. 2d 21 (1949).

27. 219 La. 450, 53 So. 2d 230 (1951).

tion may have been. A certain ring was mentioned in an undated codicil as having been intended by the wife of the testator for a previously deceased person. On several counts this bequest also failed.

*Succession of Schmidt*²⁸ registers an attack on the mental capacity of a testator. The rule of presumption of capacity was reiterated and the proof found to be insufficient to overcome this presumption. *Succession of Lanata*²⁹ was cited for the proposition that even "interdiction, standing alone, would not ipso facto incapacitate the interdict from making a will, but would only have been evidence of her incapacity, to be considered with all the other evidence."

TORTS

Dale E. Bennett*

RES IPSA LOQUITUR

The res ipsa loquitur exception to the general rule, that the plaintiff must establish the fact of defendant's negligence by a preponderance of the evidence, has been applied by our Louisiana courts to a wide variety of situations.¹ In *Allen v. Shreveport Theatre Corporation*² the plaintiff (theatre patron) was suing for injuries sustained when the theatre ceiling fell during a performance. In *Mayerhefer v. Louisiana Coca-Cola Bottling Company*³ the doctrine was applied to another of the innumerable bottling cases.⁴ The plaintiff's cause of action arose out of the drinking of a bottle of Coca-Cola that contained a harmful quantity of free iodine.

Both of these cases squarely met the requirements of the doctrine. First, the accidents occurred under circumstances where common experience strongly suggested negligence. Secondly, the instrumentality (theatre) or process (bottling) causing the

28. 219 La. 675, 53 So. 2d 834 (1951).

29. 205 La. 915, 18 So. 2d 500 (1944).

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1. For a complete analysis of this problem, see Malone, *Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases*, 4 LOUISIANA LAW REVIEW 70 (1941).

2. 218 La. 1008, 51 So. 2d 607 (1951).

3. 219 La. 320, 52 So. 2d 866 (1951).

4. For a summary of this group of cases, see Note, 4 LOUISIANA LAW REVIEW 606 (1942).