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Substantive Law - Private Law: Successions, Donations and Community Property

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tory of this section and a full analysis of its possibilities have been set out in an earlier issue of this REVIEW.[17] In the present case, the defendant purchaser was held personally liable for the principal debt because he had not obtained the appropriate affidavit, despite the fact that the plaintiff mortgagee had not recorded the chattel mortgage, and regardless of a possible disparity between the amount of the principal debt and the current value of the automobile involved.

The result of this statute goes far beyond that contemplated by the system of mortgage. While agreeing with the purpose of protecting the chattel mortgagee and deterring fraud or abuse by third persons, one might well consider it pertinent for the Legislature to re-examine this statutory provision with a view to giving the warranted protection to one interest without unduly harming the other.

SUCCESSIONS, DONATIONS AND COMMUNITY PROPERTY

*Harriet S. Daggett**

In the *Succession of Gumbel*[1] Mr. Gumbel had made Touro Infirmary his residuary legatee. Later, at a time when he was too ill to prepare another codicil, he wrote the President of Touro Infirmary asking that certain changes be made in connection with the devolution of his property after his death. The president acceded to this request and the Board of Directors of Touro Infirmary by resolution passed after Mr. Gumbel's death confirmed the president's action. Later, the executor petitioned the court for an order to carry out all wishes of the deceased, including those mentioned in his letter to the President of Touro. All legatees joined in the petition except Touro Infirmary, which had previously passed the resolution. The court granted the order and then one of the legatees who had signed the petition attacked the order, stating that previously she had been unaware of her rights and had been mistaken in the belief that her legacy would be unaffected by the agreement with Touro Infirmary. Although the executor showed that sufficient funds had been retained to protect her legacy, she entered opposition to the executor's provisional account. Obviously the agreement was neither a will nor

17. Note, 12 LOUISIANA LAW REVIEW 516 (1952).

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1. 220 La. 266, 56 So. 2d 418 (1951).

a binding contract (even assuming that such an agreement could under certain circumstances produce the desired legal effect), for here the board did not affirm the president's action until after Mr. Gumbel's death. However, as was held by the court, the agreement entered into by the legatees was supported by a natural obligation, that of carrying out the wishes of the deceased expressed in his letter to the president. Moreover, the bequest to the opposing legatee was not altered and was well secured. It appeared that this legatee was attempting to get a cash settlement instead of the annuity which the testator desired her to have, for no other purpose could logically have been found for her opposition.

In *Carr v. Hart*[2] bequests to a "cemetery fund" fell for lack of a legally capable recipient.

In *Succession of Harrison*[3] the court held that the trial judge had the right to revoke his order to sell succession property, before sale had been effected, upon proper showing of cause.

The case of *Succession of LeJeune*[4] is of particular interest, as it purports to clarify at least one of the cloudy areas in the conflict between community property and the separate property of the wife. The *Houghton-Hall*[5] interpretation of Act 186 of 1920, amending Article 2334 of the Civil Code, established that a wife's earnings from a business, trade, occupation or industry conducted separate from that of her husband are not her separate property except when she is living separate and apart from her husband. The actual meaning of "living separate and apart although not separated by judgment of court" was never too clearly outlined. In the instant case the following statement appears:

> "It is manifest that the type of separate living contemplated by Article 2334 of the Civil Code is the same sort of voluntary separation, that is, the intentional establishment of a separate abode in different premises, which is deemed essential under Act 430 of 1938 (The so-called two year act) L.S.A. —R.S. 9:301, in an action for divorce."[6]

Since the property in question in the instant case had been purchased during the marriage, the presumption of community had to be rebutted. The sisters of the deceased wife, claiming as

2. 220 La. 833, 57 So. 2d 739 (1952).
3. 220 La. 840, 57 So. 2d 742 (1952).
4. 221 La. 437, 59 So. 2d 446 (1952).
5. 177 La. 237, 148 So. 37 (1933).
6. 221 La. 437, 59 So. 2d 446, 449 (1952).

against the husband, could not establish the property as separate by merely showing that when it was purchased the husband was living in the garage while the wife lived in the rooming house which she ran. She allegedly earned the money for the purchase of the property while actually living separate and apart, but the purchase was entirely on credit.

In *Succession of Pujol v. Manning*,[7] an olographic will was attacked on the ground of forgery. Some evidence was introduced that testator could not write, but the will was upheld on the basis of strong evidence not only of handwriting but also of testimony by persons who claimed actually to have seen the testator write the will in question.

In *Uchello v. Uchello*[8] alimony pendente lite was said to be a debt for which the husband, not the community, is ordinarily responsible. However, pleadings seemed to have contemplated that income from community property was to be used for this purpose; hence the wife was held not entitled to "double payment."

The court in *Nix v. Berniard*[9] found that an administratrix in employing an attorney had no right to contract to give him an interest in the property in litigation. The attorney's fee was fixed on a quantum meruit basis, and an estimate of one-third of the value of the property was awarded.

In *Succession of Earhart*[10] testator had imposed a trust for ten years upon his property and had purported by reference to incorporate Act 107 of 1920 into his will. This act had been repealed even at the time of the making of the will. However, Act 81 of 1938, permitting the establishment of trusts, was in effect when the will was made and at the death of the testator. Hence, the court, guided by the articles of the code dealing with interpretation of wills and honoring the intent of the testator, found that while mention of Act 107 of 1920 must be disregarded, the intent of the author of the will might be carried out under the later act. Opponents made an attack on the constitutionality of the trust act, based upon the prohibition against abolishing forced heirship. The court pointed out that in the same provision of the Constitution[11] which forbids the abolition of forced heir-

7. 221 La. 466, 59 So. 2d 456 (1952).
8. 220 La. 1061, 58 So. 2d 385 (1952).
9. 220 La. 688, 57 So. 2d 230 (1952).
10. 220 La. 817, 57 So. 2d 695 (1952).
11. La. Const. of 1921, Art. IV, § 16.

ship, authority is granted the Legislature to creat trust estates for a period not exceeding ten years after the death of the donor. It was therefore found that the framers of the Constitution contemplated that creation of trusts was not the abolishment of forced heirship.

The court held in *Succession of McGeory*,[12] citing *Doll v. Doll*[13] for a full discussion of the problem, that collation may not be sought "after the donor's succession has been closed by judgment placing the heirs in possession, thus changing their status from co-heirs to mere co-owners." An annulment of the judgment would be necessary before a plea for collation could be entertained. Ex parte proceedings to procure an order for a supplemental inventory would not suffice.

Designation of a payee by a purchaser of United States Bonds was said in *Winsberg v. Winsberg*[14] to constitute a gift made in contemplation of death, which must bear the state inheritance tax. While not a testament, such a designation is a substitute therefor and thus subject to the indirect application of Article 1705, providing that a testament is revoked by the birth of a child. Obviously, Louisiana cannot force payment to other than the named recipient in a contract with the United States, but it can insist that the beneficiary pay the equivalent sum to the estate or heir of the donor.

Principles of community property are applied in the *Succession of Schnitter*[15] in determining the nature of the deceased wife's property in contest between the husband, who in absence of ascendants or descendants would inherit the wife's share of the community, and the wife's collateral relatives, who would inherit her separate property. When proof disclosed that certain parcels of land bought by the wife in her name had been paid for with her separate funds, even though no recitation of this fact was found in the deed, the title was properly declared to rest in her separate estate. In regard to the item "Prytania Street Property," the rule laid down is less favorable to the wife, and it is stated that unless *all* of the funds applied to the purchase are proved to have been the separate property of the wife, title would rest in the community, with only a debt due from that

12. 220 La. 391, 56 So. 2d 727 (1951).
13. 206 La. 550, 19 So. 2d 249 (1944).
14. 220 La. 398, 56 So. 2d 730 (1952).
15. 220 La. 323, 56 So. 2d 563 (1951).

mass to the separate estate for the amount proved to have been separate. Moreover, it was intimated that the power of the husband as administrator of the wife's separate estate permitted investment of her separate funds in his hands to produce a community title. If that is a correct interpretation of the expressions found, this power would seem to go beyond the ordinary understanding of the word administrator.

The case of *Oliphint v. Oliphint*[16] makes a most careful review of evidence to determine whether or not a husband immediately before and after dissolution of the community had disposed of or concealed, by stock transfer or otherwise, property with a view towards depriving his wife of her proper share of the community. Moreover, the husband's account of the debts owed was reviewed and the case was remanded in order that more information on that score could be uncovered. So far as the law of community property is concerned, the most interesting point of the case had to do with Article 2404's limitation of the power of the husband to donate property of the community. The article recites among other things that the husband may not donate a "quota" of the movables. This provision has not hitherto been interpreted by the Louisiana Supreme Court. Justice McCaleb (author of the majority opinion, from which there was no dissent, except as to a point of practice) concluded that the word "quota" meant a "proportional part or share" and was synonymous with "fraction" or "percentage," and did not forbid the gift of specific movables, such as shares of stock. It would appear that this interpretation is indeed the only logical one. Thus the lack of protection of the wife's part of the community under present law is again pointed out, as it was in the *Succession of Geagan*,[17] referred to in this case. Our Supreme Court has now twice suggested that the Legislature should correct this situation. The need would seem to be particularly great at the present time, when there is such a great investment in movables and when an ever-increasing number of wives are working outside their homes with their earnings flowing to the community.

The case of *Coney v. Coney*[18] appeared before the Supreme Court for the fourth time and had to be remanded for determina-

16. 219 La. 781, 54 So. 2d 18 (1951).
17. 212 La. 574, 33 So. 2d 118 (1947).
18. 220 La. 473, 56 So. 2d 841 (1951).

tion of value of the community, for the audits submitted gave the court little assistance in connection with the issue. Many "incongruities" in the statement offered were pointed out. It was noted that a husband might give his wife a gift during marriage. Hence a $5,000 diamond ring was declared her separate property. Since the husband had not admitted certain luggage to have been a gift but contended that it was purchased during marriage with his separate funds, it was presumed to be community property.

Sonnier v. Fris[19] maintains that an attempt to effect a voluntary separation of property between husband and wife not judicially separated is null under Article 2427, as are other contracts not falling under the exceptions envisioned by Article 1790.

In *Lewis v. Clay*,[20] a mother had made an authentic "act of sale" of certain property to her son and the instrument contained a recitation of consideration. The transaction was made after the son's marriage to defendant, and before defendant obtained a judgment of separation against the son. After the community was thus dissolved, the mother and son confected an instrument labeled a "revocation of donation," wherein the parties declared that the first transaction was a donation and further that they intended now to replace title in the mother. The Supreme Court found this document inadmissible for any purpose in this litigation. The presumption of community was not rebuttable by a private act of the husband which would affect his wife's interest. Neither was parol evidence of intent to donate admissible to "substitute . . . a contract of a dissimilar nature."[21] Error was also pleaded; the contention was not that plaintiff believed the act of transfer to have been a donation instead of a sale, but that she had taken bad advice from an attorney when she had allowed the sale form to be used. This type of error was found not to fall within the protection of Article 1821.

In *Almond v. Adams*[22] the court held that an alleged donation from a father to his son and to the latter's wife fell as a radical nullity because it purported to give an immovable and reserve the usufruct. An attempt to support it as a remunerative donation failed for lack of proof.

19. 220 La. 1085, 58 So. 2d 393 (1952).
20. 60 So. 2d 78 (La. 1952).
21. 60 So. 2d 78, 81.
22. 221 La. 234, 59 So. 2d 132 (1952).