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

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lent to the value of the object (a refrigerator) at the time of the wrongful repossession, together with additional damages of approximately the same amount. Now that the chattel mortgage has become such a pervasive and widely used security device, and since so much has been done to protect the interest of the creditor, it is not out of place to protect the rights of the debtor as well.

## SUCCESSIONS, DONATIONS AND COMMUNITY PROPERTY

*Harriet S. Daggett\**

This resumé of the year's work of the Louisiana Supreme Court in the subjects named in the above title is the sixteenth prepared by the writer. It can scarcely be presumptuous or amiss to observe that no previous year is marked by as many cases of truly new impression, or of as grave importance in the development of the law of the state. Moreover, a clearness of factual statement, a completeness of analysis, an intellectual satisfaction to be derived from the logic of deduction whether in agreement or otherwise, characterizes the work as a whole in a manner not hitherto observed in the humble judgment of this reader. Particularly is this true in mineral rights where almost every case is a tempting invitation for a thesis. It causes the writer keen disappointment and some sense of frustration that the space, nature and purpose of this yearly article necessitate the type of brief treatment given. The civil law lends itself to a moulding by the court for the best interests of the people, as the time, the place and the social and economic conditions dictate, and encourage creative jurisprudence of the highest type. It would appear that the Louisiana Supreme Court has assumed this proper responsibility as a high privilege and a solemn duty of office.

### SUCCESSIONS

#### *Regular Heirs*

In *Bishop v. Copeland*<sup>1</sup> surviving half-brothers and sisters

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1. 222 La. 284, 62 So. 2d 486 (1952).

were permitted to claim their three-fourths interest in the deceased's half-sister's succession, although her father had been put into possession of the whole and had mortgaged it to the defendant's predecessor in title who had obtained it under foreclosure of a mortgage. The court stated that the registry provisions<sup>2</sup> do not apply when the immovable has been vested by "mere operation of law."<sup>3</sup> The principle emphasized throughout the Civil Code that in case of regular heirs, property vests immediately upon death of the one from whom the inheritance was received, was cited as clearly applicable, and under that theory no interruption occurs regardless of possession. Strong and heartening statements were made obviously in line with the articles of the code dealing with regular heirs. The "suspension"<sup>4</sup> idea, sometimes advanced, seemed to have been at variance with the doctrine and might lead to confusion. The clear expressions dealing with vesting of property by "operation of law" as related to the laws of registry strengthen and protect Louisiana's basic laws on forced heirship and community property as well as those dealing with regular heirs. Several troublesome questions may be clarified by the logical analysis of this case.<sup>5</sup>

### *Collation*

After a succession has been closed, collation may not be required. It is made only to the succession of the donor.<sup>6</sup> In *Himel v. Connely*<sup>7</sup> an executor was held to have no accounting to make as no funds were in his hands according to declarations of all heirs when asking for the succession to be closed and executor discharged. They may not later deny these allegations.<sup>8</sup>

The price<sup>9</sup> paid by a daughter to her father for a piece of property in *Taylor v. Brown*<sup>10</sup> was proved to have been more than one-fourth of its value at the time of the sale, and hence not a donation in disguise. The father's succession had not been

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2. Arts. 2251-2266, La. Civil Code of 1870.

3. Arts. 940-942, La. Civil Code of 1870.

4. See *Sun Oil Co. v. Tarver*, 219 La. 103, 52 So. 2d 437 (1951).

5. See *Humphreys v. Royal*, 215 La. 567, 41 So. 2d 220 (1949).

6. Art. 1242, La. Civil Code of 1870.

7. 221 La. 1073, 61 So. 2d 876 (1952).

8. Art. 1194, La. Civil Code of 1870; Art. 1003, La. Code of Practice of 1870.

9. Art. 2444, La. Civil Code of 1870.

10. 66 So. 2d 578 (La. 1953).

opened and hence claims for collation of this "advantage"<sup>11</sup> could not be considered because collation can only be made to the succession.<sup>12</sup>

#### *Administration*

In *Succession of Baronet, Opposition of Aubé*<sup>13</sup> no fraud, collusion or mismanagement by the administrator having been proved, a failure to file a tableau of *proposed* expenditures, and gain its approval before payment was made, was found not to be such an irregularity as to warrant the application of statutory penalties.<sup>14</sup> Sound discretion of the court is to be exercised in applying these penalties. Honest errors of judgment do not warrant such punishment.

The well-established rule that appointment of an administrator is within the sound discretion of the judge was again emphasized in *Succession of Perot*.<sup>15</sup> Thus, a brother of deceased who claimed to be a creditor was maintained in office. Here proof was found insufficient to deny his commission on grounds of negligence or wrong doing.

An order to sell succession property in *Hicks v. Hughes*<sup>16</sup> signed by a clerk of court was said to be an absolute nullity when the application by the administrator was found to have been unaccompanied by a statement of the debts as directed by law.<sup>17</sup> Powers of this nature given to a clerk are extraordinary and must be exercised only within the strict interpretation of the statute.<sup>18</sup> Cases holding that omissions of similar nature were but informalities cured by prescription of five years were distinguished as they dealt with orders signed by the judge or under statute giving the clerk jurisdiction because of absence of the judge.

A "reasonable" amount under all of the circumstances was awarded in *Succession of Twohey*<sup>19</sup> on *quantum meruit* from the succession for personal care and food for the deceased.

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11. Art. 1248, La. Civil Code of 1870.

12. Art. 1242, La. Civil Code of 1870.

13. 222 La. 1051, 64 So. 2d 428 (1953).

14. Art. 1150, La. Civil Code of 1870.

15. 223 La. 412, 65 So. 2d 895 (1953).

16. 223 La. 290, 65 So. 2d 603 (1953).

17. La. Act 204 of 1924.

18. Art. 3543, La. Civil Code of 1870.

19. 222 La. 697, 63 So. 2d 429 (1953).

## DONATIONS

*Inter Vivos*

A situation was involved in *Stipe v. Simon*,<sup>20</sup> where a daughter of deceased sued for recovery of a piece of property sold by her father to his sister. She was successful since her aunt was unable to sustain the burden of proof necessary under presumption of simulation established by facts that the transaction was other than a donation in disguise.<sup>21</sup> This being a donation, it was null as donor had reserved usufruct for himself.<sup>22</sup>

In *Sanders v. Sanders*<sup>23</sup> the court maintained that a collateral heir as the "representative"<sup>24</sup> of the deceased could attack a contract of the deceased on the ground that a fraud had been committed against the dead person. It was stated that all heirs must join to set aside on the ground of lesion;<sup>25</sup> that a collateral may not attack by parole evidence a deed on the ground of simulation, a donation in disguise;<sup>26</sup> and that collateral heirs may not attack on the ground that the deceased gave away all of his property.<sup>27</sup>

In *Succession of Gilbert*<sup>28</sup> the provision that a remunerative donation is not a real donation if the value of the services in money is but slightly less than the value of the gift was invoked and in *State ex rel. Bunkie Coca Cola Bottling Co.*<sup>30</sup> that ratification of a donation precludes complaint.<sup>31</sup>

The court declared in *Holloway v. Holloway*<sup>32</sup> that while one co-owner purchasing at a tax sale causes the title to inure to the benefit of all, the doctrine even if the facts fitted, and apparently they did not, was not applicable when the benefits were never asserted nor the duties fulfilled for more than thirty years.

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20. 66 So. 2d 330 (La. 1953).

21. Art. 2444, La. Civil Code of 1870.

22. Art. 1533, La. Civil Code of 1870.

23. 222 La. 233, 62 So. 2d 284 (1952).

24. Art. 1881, La. Civil Code of 1870.

25. *Wolfson v. Lisso's Succession*, 207 La. 67, 20 So. 2d 427 (1944).

26. Art. 2444, La. Civil Code of 1870.

27. Art. 1497, La. Civil Code of 1870.

28. 222 La. 840, 64 So. 2d 192 (1953).

29. Arts. 1513 and 1525, La. Civil Code of 1870.

30. 222 La. 603, 63 So. 2d 13 (1953).

31. Art. 2274, La. Civil Code of 1870.

32. 221 La. 875, 60 So. 2d 468 (1952).

Satisfactory proof, adduced to show a gift inter vivos of cattle by a father to his son in *Elder v. Elder*,<sup>33</sup> obviously precluded the father from claiming a community share of the animals after a divorce from his wife.

### *Mortis Causa*

*Form.* Quite a number of cases appeared during the year dealing with the form of wills. One instance was an attack in *Successions of Gilbert*<sup>34</sup> on the ground that the will, nuncupative by public act, had not been written as dictated by the notary. It was shown that the exact words of the testator were not used. The court relying upon previous expressions by the justices applied the test that "it is identity of thoughts and not of words which the law requires."<sup>35</sup> The will was upheld. In a second case in which the point was raised, *Cormier v. Myers*,<sup>36</sup> the will was shown not to have been really dictated. Words put into the mouth of the testatrix by an expectant beneficiary were merely approved and followed.

In *Succession of Muntz*<sup>37</sup> proof was adduced to show that additions to what appeared to be the beginning of an olographic testament by the deceased had been made in a hand other than that of the testator.<sup>38</sup> The will obviously fell. Since the date was superimposed in another hand, invalidity followed on a second ground, uncertainty of the date.<sup>39</sup> These two grounds of invalidity also defeated another testament in *Succession of Sarrazin*.<sup>40</sup> A will was found "written by an illiterate person on both sides of a very small piece of ragged paper"<sup>41</sup> upon which appeared June 1944. The first numeral seemed to have been a light stroke retraced by a heavy one. Proponents urged that testatrix had put in the heavy stroke herself to indicate 1st of June. Whether she did or not was "uncertain" and thus the will fell because of doubt of the handwriting and for lack of a certain date.

Perhaps the most interesting case dealing with the form

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33. 66 So. 2d 1 (La. 1953).

34. 222 La. 840, 64 So. 2d 192 (1953).

35. Art. 1578, La. Civil Code of 1870. See *Rostrup v. Succession of Spicer*, 193 La. 1087, 165 So. 307, 308 (1936).

36. 223 La. 259, 65 So. 2d 345 (1953).

37. 222 La. 689, 63 So. 2d 426 (1953).

38. Art. 1588, La. Civil Code of 1870.

39. See *Succession of Buck*, 208 La. 556, 23 So. 2d 215 (1945).

40. 223 La. 286, 65 So. 2d 602 (1953).

41. *Ibid.*

of wills was *Love v. Dawkins*<sup>42</sup> which had to do with a new situation regarding certainty of date. The instrument at the top left hand corner showed August 31, 1946, then appeared the word "will," and at the bottom of the paper a statement that the testament had been entirely written, dated, and signed in her own hand. This was said to have been done on the 30th day of August, 1946. The court noted that previous decisions had made it clear that the place of the date is immaterial. The French commentators were cited for statements approving more than one date made in sequence, the reasoning being that the testator might have taken several days to complete the writing of the document. The argument in this case was that the dates were not in sequence, the later date appearing first. The court took the position, however, that the testatrix might have inserted the later date at the top merely reaffirming her disposition that she had solemnly declared to have been made in her own handwriting on the earlier date and thus the will was upheld.

*United States Bonds.* Relying heavily upon previous expressions of the court,<sup>43</sup> claim was made in *State v. Culpepper*<sup>44</sup> that in purchase of co-owner bonds by a wife with community funds in her name and that of her husband, she had made a donation mortis causa to her husband, which prevented her legatees under her will from recovering one-half of the *value* of the bonds. Title had been vested in the husband upon the wife's death and upon the husband's death in his heirs under federal regulations governing the bond issue. The court distinguished beneficiary bonds from co-owner bonds but noted that while title must vest under federal law, even in beneficiary bonds the claim of the widow for her half of the community in *value* had been protected. In a previous co-owner bond case<sup>45</sup> the right of a forced heir to claim his legitime and to demand collation had been protected. Thus, while in a sense and as to title under the contract with the United States the bond device may seem to have the result of a will, the laws of the state may not be negated. The court made the following forceful statement in the instant case: "Any other conclusion, obviously, would greatly endanger the recognized right of the wife to

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42. 222 La. 259, 62 So. 2d 399 (1952).

43. See *Winsberg v. Winsberg*, 220 La. 398, 56 So. 2d 730 (1952).

44. 222 La. 962, 64 So. 2d 234 (1953).

45. *Succession of Land*, 212 La. 103, 31 So. 2d 609 (1947).

make disposition by testament of her vested one-half interest in the community property. Thus, a husband could invest the community funds or property in United States savings bonds of the co-ownership type and, on outliving his wife, would become the sole owner of her interest, subject only to the legal rights of forced heirs if there be any."<sup>46</sup>

*Capacity.* In *Cormier v. Myers*<sup>47</sup> lack of mental capacity of the maker at the time of confection of a will was the basic reason for failure of a testament previously referred to in the discussion regarding form. An aged person in an advanced stage of senility was put through a farcical situation purporting to produce a valid nuncupative will by public act. The affair was staged by the keeper of the nursing home in which the aged testatrix was lodged. The testament doubtless could not have been declared invalid without full proof of mental incapacity and the closely allied defect in form as "undue influence"<sup>48</sup> is not allowed as a cause of nullity under the Louisiana law. However, the court impressively and pertinently stated that while a nursing home manager is not included in the prohibition<sup>49</sup> against receipt of gifts by doctors and clergymen attending a person during the last illness the "spirit" of this policy is definitely present.<sup>50</sup>

Another case dealing with the lack of capacity, *Succession of Washington*,<sup>51</sup> appeared during the year. A negress, with the assistance of a white man, operated a house of prostitution. Upon her death, the woman left to her associate a piece of immovable property. Proof of a convincing nature, not mere rumor, established that the two had been living in "open" concubinage.<sup>52</sup> Whether or not they occupied separate rooms was considered relatively immaterial.<sup>53</sup> The legacy was not allowed, thus "giving effect to the purpose of the law of maintaining good morals and public order and preserving the best interests of society without prying into the innermost secrets and private life of the deceased."<sup>54</sup>

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46. 222 La. 962, 971, 64 So. 2d 234, 237 (1953).

47. 223 La. 259, 65 So. 2d 345 (1953).

48. Art. 1492, La. Civil Code of 1870.

49. Art. 1489, La. Civil Code of 1870.

50. 65 So. 2d 345, 350 (La. 1953).

51. 222 La. 707, 63 So. 2d 610 (1953).

52. Art. 1481, La. Civil Code of 1870.

53. See Text of Succession of Jahraus, 114 La. 456, 38 So. 417 (1905).

54. 222 La. 707, 712, 63 So. 2d 610, 611 (1953).

*Revocation.* In a most interesting case, *Smith v. Shaw*,<sup>55</sup> the court positively affirmed the proposition that intentional destruction of a testament by mutilation is a revocation. The article dealing with the matter uses the word "act,"<sup>56</sup> apparently indicating an instrument of sale or other formal paper rather than an action resulting in destruction. However, the court following expressions in previous opinions felt that intentional destruction had always been recognized as a means of revocation, and made it doubly clear in this decision that this method, whether mentioned in the code or not, was a most effective way of revoking. The testatrix had made an olographic will apparently valid but upon the advice of an attorney she then made a nuncupative will by public act. Then upon the advice of a second attorney she made a second will nuncupative by public act which was declared null after her death. The first two wills were destroyed at her request and thus she died intestate. The attempt was made to establish the first will and it was shown that the intention of the testatrix was clear since she had made the same bequests in all three of the papers to relatives of her deceased husband. A doctrine of "dependent relatives" said to obtain in England, Canada, and certain states of the United States, was unsuccessfully argued. This theory was that in such situations a previous will could only be invoked by a later valid instrument.

*Prescription.* In the case of *In re Andrus*<sup>57</sup> the time at which prescription<sup>58</sup> begins to run against the right to bring action to declare a will null was held to be the date of filing for probate. Since the will in question had never been probated, the article was applied and thus a child and children of a predeceased child were able to urge reduction and collation. The well-known principle that a will is not invalid but merely reducible by virtue of containing bequests exceeding the disposable portion was reiterated.<sup>59</sup> Moreover, it was again stated that no absolute prescriptive<sup>60</sup> period is provided for collation which is possible until the succession has been settled and the heirs placed in possession.

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55. 221 La. 896, 60 So. 2d 865 (1952).

56. Art. 1691, La. Civil Code of 1870.

57. 221 La. 996, 60 So. 2d 899 (1952).

58. Art. 3542, La. Civil Code of 1870.

59. Art. 1502, La. Civil Code of 1870.

60. Art. 3542, La. Civil Code of 1870, does not apply.

*Interpretation.* The court again ruled in *Succession of Rougon*<sup>61</sup> that a prohibited substitution<sup>62</sup> is an attempt to hold inalienable title in a donee for the latter's lifetime with necessity of transfer at death to another named person. Thus the donor would in effect be giving away the thing twice or substituting his disposition for that of the law imposed upon the first donee. A fidei commissum was again ruled in distinction to be a placement of title in the immediate donee with a charge to convey it to another person. Title having vested, the charge might be regarded as not written in a legal sense, being merely precautionary and binding on the conscience only, of the donee.

The following bequests were held to belong in the substitution category and hence, null in their entirety with no vesting in the first named donee:

"The share of Mrs. Nadege Rougon Lorio is not to be disposed and at her death my wish is that my niece Mrs. Audrey Lorio Ritter receives it.

"I desire the share Mrs. Nellie Rougon Decuir receives be divided at her death between my two nephews Thomas Gordon Neff and Edward Ray Neff."

The first bequest read as follows and the sister not given an inalienable title received her third:

"The rest of the property and money be divided among my sisters, Mrs. Alice Rougon Neff, Mrs. Nellie Rougon Decuir, and Mrs. Nadege Rougon Lorio."<sup>63</sup>

The court found the bequest non-conjoint as the testator was thought to have assigned parts, hence there was no accretion and the lapsed legacies were distributed to the legal heirs.<sup>64</sup>

*Adoption.* Proof that one adopted child had received his legitime, as recited in the olographic will of the deceased parent by adoption was found unsatisfactory by the court in *Succession of Thomson*.<sup>65</sup> Another adopted child was successful in reducing the amount left to the universal legatee by the amount of her forced portion, one-fourth of the estate. The two adopted

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61. 223 La. 103, 65 So. 2d 104 (1953).

62. Art. 1520, La. Civil Code of 1870.

63. Ibid.

64. *Succession of Rougon*, 223 La. 103, 65 So. 2d 104 (1953).

65. 221 La. 791, 60 So. 2d 411 (1952).

children were given the same rights as would have accrued to legitimate children. The constitutional provision was cited.<sup>66</sup> A donation to one adopted person was said to have been revoked by the fact that donor and donee joined in a sale to a third person. One justice dissented on this point for the sound reasons stated in his previous dissenting opinion.<sup>67</sup> A purported revocation of the adoption of this major was not honored, as there is no law providing for change of this status protected by the constitutional provision previously cited.

"Notarial act" as used in the statute providing for adoption of majors was found not to be synonymous with authentic act or private act duly acknowledged since a status and not a contract was involved. It might be thought that more rather than less formality should be necessary in creating the status of a forced heir protected by the highest law of the state and imbedded in the very fabric of the code.

These majors themselves decided that the relationship "did not work" and attempted to disavow the artificial relationship. The case as a whole while certainly correct under the law as written strengthens the writer's opinion that adoption of majors should be abolished. No safeguards whatever surround the act for protection of existing forced heirs against a malicious, angry, immoral or emotionally disturbed parent or child. When honest and affectionate motives are present, the disposable portion is available for gift, the name may be changed, the same or greater protection may be given as that furnished by adoption, which may easily be used for purely venal or vindictive purposes. The present adoption act for minors furnishes protection for both parties when this important "status" is to be created.

*Executor.* An executrix sued as such, in *Succession of Quaglino*,<sup>68</sup> seven years after her discharge to claim for the original succession a piece of property said to have been illegally transferred by the deceased. The court found that the succession having been formally closed and the executrix discharged, that judgment barred this proceeding or any other of a mortuary nature until set aside and the succession reopened.

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66. La. Const. of 1921, Art. IV, § 16. See La. Act 318 of 1944.

67. *Atkins v. Johnston*, 213 La. 453, 35 So. 2d 16 (1948).

68. 223 La. 171, 65 So. 2d 127 (1953).

## COMMUNITY PROPERTY

In *Succession of Fields*<sup>69</sup> upon a husband's death his widow was put into possession of one-half of the community property as of right, one-half as heir.<sup>70</sup> Later another "widow" of his first undissolved marriage, with two children, appeared to set aside the first ex parte judgment. The second "widow" was found to have been in good faith, so she received one-half and the widow of the first marriage got one-half. The children received nothing as their bigamist father had no share.<sup>71</sup> Insurance had been paid to the putative "widow." A quasi contractual relationship<sup>72</sup> was said to have arisen and the putative wife must pay the legal wife one-half. No necessity was said to exist to sue the insurance company or make it a party.

This rule of thumb from the Spanish law, while apparently settled by the relatively few cases when it has been applicable seems of doubtful equity to the living and certainly no punishment to the dead. The putative wife gets more than a legally married second wife would receive since the husband's share of the first community if preserved as such would be separate property as to the second wife and would be shared by the children. To punish a dead bigamist by preventing his children from receiving even a forced share safeguarded by code and Constitution while rewarding the innocent but careless or stupid adult for her "faith" appears rather illogical.

In *Leager v. Leager*<sup>73</sup> the court was forced to restate the well-known rule that the community continues until legally terminated and its debts must be paid. Thus a husband could not obtain a credit for funds so expended during the period of physical separation from his wife preceding suit for judicial separation. After court order for partition of property the judge shall refer to the recorder or to a notary the task of concluding the matter as directed.<sup>74</sup>

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69. 222 La. 310, 62 So. 2d 495 (1952).

70. Art. 915, La. Civil Code of 1870.

71. Art. 117, La. Civil Code of 1870. See *Ray v. Knox*, 164 La. 193, 113 So. 814 (1927), citing *Patton v. Philadelphia*, 1 La. Ann. 98 (1846).

72. Arts. 2293, 2294, La. Civil Code of 1870.

73. 222 La. 301, 62 So. 2d 492 (1952), 222 La. 309, 62 So. 2d 494 (1952).

74. Art. 1345, La. Civil Code of 1870.