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

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The case of *Sessum v. Hemperley*[12] went through five hearings, including rehearings in the court of appeal and Supreme Court with reversals of the original opinion at each appellate level. The last word on Article 852 is as follows. Where an incorrect boundary has been evidenced by a visible marker (e.g., fence, in present case) and there has been uninterrupted possession up to that boundary for thirty years, then this boundary becomes the legal boundary. The proprietor who has possessed beyond his actual title description will, in these circumstances, acquire full legal title to the extra strip of land, regardless of the lack of consent of the adjacent owner to the establishment of the boundary in the first place. This interpretation of Article 852 leaves the ten-year prescription of Article 853 for the situation where the visible boundary was established incorrectly but with the consent or active acquiescence of both proprietors.

This interpretation fits well into the pattern of Civil Code principles. If it sticks, it will be the marker to end the problem and let it rest in peace.

SUCCESSIONS, DONATIONS AND COMMUNITY PROPERTY*

*Harriet S. Daggett*** . . . .

SUCCESSIONS

In *Succession of Martin*[1] a resident of New York left a will appointing two residuary legatees. The testator had been named residuary legatee in the will of Newton Blanchard Smith who died possessed of property situated in Louisiana. At the time of the testator's death he had not accepted the legacy bequeathed to him and had not received any property from the executor of the Smith estate. The issue presented for decision was whether the residuary legatees who were entitled to receive the property comprised in the legacy made by Smith to the deceased would have to pay the Louisiana inheritance tax twice — once in the Smith succession and again in the testator's succession in order to receive the property once. The court held that only one tax

12. 233 La. 444, 96 So.2d 832 (1947), 18 LOUISIANA LAW REVIEW 742 (1958).

*Grateful acknowledgment is hereby registered to my student and friend Stephen J. Ledet, Jr., for his work in the preparation of these materials.

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1. 234 La. 566, 100 So.2d 509 (1958).

was due — in the succession of Smith. The Louisiana inheritance tax is levied upon the theory that the heir or legatee should have in point of fact received a benefit from the inheritance which falls to him, out of which benefit a portion is made to go to the state.[2] Thus the tax is not upon the property itself, but upon the transmission of the property to the legatee. Although under the substantive law of succession the heir succeeds to the deceased from the instant of death, the heir is seised only of right, and not in fact, until he accepts the succession and is sent into or takes possession according to law. No inheritance is exigible until the right of seisen is merged into seisen in fact of particular property.

DONATIONS

Donations Inter Vivos

In *Perot v. Arnold*[3] the administratrix of the succession of the deceased brought suit to set aside certain purported donations inter vivos by the deceased to her nephew on the ground that the deceased was at the time of the gifts mentally incompetent. The administratrix was faced with a presumption of sanity on the part of decedent and carried the burden of proving the alleged lack of capacity by strong, clear, and convincing evidence. The court held that the record amply sustained the finding of the trial judge that the deceased did not possess sufficient mental capacity to make the last two purported donations, but administratrix failed to prove with the certainty required by law decedent's total lack of capacity at the time of the first donation.

Donations Mortis Causa

In *Succession of Eck*[4] decedent's niece filed an opposition to the probate of the will asking that it be rescinded because of noncompliance with the provisions of Act 66 of 1952,[5] and because of the incompetency of one of the witnesses, who was the wife of the legatee. The will contained two attestation clauses, one immediately after the dispositive portion which was followed by the signature of the testator, and a second which was followed by the signature of the notary and two witnesses. The plaintiff contended that the will was null for lack of proper form because

2. Succession of May, 120 La. 692, 45 So. 551 (1908).
3. 234 La. 68, 99 So.2d 26 (1958).
4. 233 La. 764, 98 So.2d 181 (1957).
5. LA. R.S. 9:2442 *et seq.* (1950).

the testator had not signed along with the notary and the two witnesses after the second attestation clause which would require a showing that the dispositive portion was executed and signed at one and the same time in order to fulfill the requirements of the act. Still another ground alleged for the invalidity of the will was the fact that the signature of the testator did not appear at the literal or physical end of the will. The court held that the will was proper in form. The purpose of the statutory requirement that the testator and subscribing witnesses sign at the end of the will is to prevent fraudulent additions to a will before or after its execution. So long as all dispositive portions of the will are above all signatures and the attestation clauses, and all signatures are below the attestation clauses, and the signature of the testator is above all other signatures indicating that the testator signed first, the will is valid. The court rejected the plaintiff's contention that the wife of the legatee under the will was an incompetent witness. There are no provisions in Act 66 of 1952 with respect to who may witness a will drawn under its provisions. Under such circumstances the substantive law of the Civil Code applies and the wife of the legatee did not fall within any of the incapacities there outlined.[6]

In *Succession of Nourse*[7] the plaintiff, testamentary co-executrix in a prior will, petitioned to have declared null and void a will admitted to probate as the last will and testament of the deceased. The will was executed under the provisions of Act 66 of 1952.[8] It contained an attestation clause following the dispositive portion after which appeared the signatures of the testator, the notary, and two witnesses. The plaintiff contended that the absence of the testator's signature at the place where the dispositive portion terminated rendered the instrument null and void. According to the act, it was contended, the testator's signature should appear in two places, following the dispositive provisions and at the end of the attestation clause. In rejecting plaintiff's contention the court reaffirmed its position in *Succession of Eck*. The requirement that the testator and subscribing witnesses sign at the end of the will is to prevent fraudulent additions. The term "end" refers to that place on the will where the dispositive provisions terminate. The signatures of the witnesses are con-

6. LA. CIVIL CODE arts. 1591 and 1592 (1870).
7. 234 La. 691, 101 So.2d 204 (1958).
8. LA. R.S. 9:2442 (1950).

sidered to be at the end of the will when there is no dispositive matter intervening.

In *Jones v. Mason*[9] plaintiffs sought to have probated a carbon copy of an olographic will which had been entirely written, dated, and signed in the handwriting of the deceased. Evidence showed that the deceased had prepared several copies of his will, which he intended to distribute through the mail. After his death, two identical carbon impressions of this will came to light. One was found in the decedent's desk in an envelope addressed to himself at his home. The other was in the possession of his sister in a sealed envelope. Because no first impression of the will could be found, opponents of the will argued that there had been a tacit revocation, relying on the rule that when an olographic will, shown to have been in the possession of or accessible to the deceased, cannot be found at his death, there arises a legal presumption of revocation by destruction.[10] In finding that the carbon copy of the will should be admitted to probate, the court held this to be a case of duplicate originals, each original being of equal dignity and force with any other. Any presumption of revocation that might have arisen because one or more of these originals could not be found at the testator's death was at most a weak one and was overcome by the fact that the testator had preserved one of the duplicate originals in his possession.

In *Succession of Fisher*,[11] suit was brought by two surviving brothers of the testator to have the will declared invalid on the ground that the residuary legatee, the First Church of Christ, Scientist, Boston, Massachusetts, was an unincorporated association and hence incapable of receiving donations mortis causa under Louisiana law. The brothers also contended that because of the unusual organization and doctrines of the Christian Science religion, the Boston church, being the mother church, should be held to be incapable under Civil Code Article 1489[12] of receiving a donation made to it by the testator, a member of the Christian Science religion, during her last illness. The court found that under particular provisions of Massachusetts law the First Church of Christ, Scientist, although only an unincorporated association, had a legal right to inherit property. The

9. 234 La. 116, 99 So.2d 46 (1958).
10. Succession of Nunley, 224 La. 251, 69 So.2d 33 (1953).
11. 235 La. 263, 103 So.2d 276 (1958).
12. LA. CIVIL CODE (1870).

spirit of comity existing between the several states requires Louisiana to recognize a legal right possessed under Massachusetts law, unless by so doing it would violate the positive law or public policy of Louisiana. The court also rejected the plaintiff's second contention. While recognizing the ingenuity of plaintiff's argument, the court did not feel that the terms "doctors of physic or surgeons" or "ministers of religious worship" used in Article 1489 could be interpreted to include a religious organization such as the First Church of Christ, Scientist, Boston, Massachusetts.

In *Succession of Thilborger*,[13] collateral heirs brought suit to have a provision of the testatrix's last will declared null as constituting a prohibited substitution under Article 1520. The will provided that to "my dear husband I give and bequeath the use of . . . the Louise Plantation as long as he lives and at his death to be given to the charity hospital." It was further provided that if the testratrix and her husband should die together, all that was bequeathed to her husband was to be given to the testatrix's niece. The court held that the language of the will did not constitute a prohibited substitution, but created in charity hospital naked ownership of the property subject to a usufruct in the husband. Such a disposition is perfectly valid under the Civil Code.[14] In reaching its decision the court recognized the conflict that exists in the jurisprudence on this subject and based its finding on two recent cases[15] which held that where it is clear from the language of the will that the testator does not intend to vest title in the first named donee, then language to the effect that this same donee is to be given the *use of the property* will be construed to mean that the testator has created a usufruct in favor of the first named donee with naked ownership in the other. The court further held that the other provision in the will bequesting to the niece all that had been given to the husband if he should die at the same time as the testatrix was but a vulgar substitution permissible under Article 1521 of the Civil Code.[16]

COMMUNITY PROPERTY

In *Succession of Patti*,[17] a widow filed against the executor of her husband's estate a rule to show cause why certain deposits

13. 234 La. 810, 101 So.2d 678 (1958).
14. LA. CIVIL CODE art. 1522 (1870).
15. Succession of Rougon, 223 La. 103, 65 So.2d 104 (1953); Succession of Fertel, 208 La. 614, 23 So.2d 234 (1945).
16. LA. CIVIL CODE (1870).
17. 233 La. 723, 98 So.2d 166 (1957).

in the name of her husband and herself should not be deleted from the inventory and she be recognized as sole owner thereof in view of her claim that the money in such accounts came from her earnings — rentals from her separate property. Prior to the time the deposits were made, the parties had been judicially separated from bed and board and subsequently reconciled, but the community of acquets and gains, dissolved by the judgment of separation from bed and board, had not been reestablished.[18] The court held that, while the evidence introduced by the plaintiff did not support the claim that all of the deposits were made exclusively by her from her own personal funds, there was proof indicating that the deposits represented in part funds separately owned by her. Since the deposits were in joint accounts, the plaintiff as a partner in such joint accounts was entitled to one-half interest therein.

In *Taylor v. Dunn*[19] the court held that property acquired during the existence of the community of acquets and gains is presumed to be community property even though it is purchased in the name of one of the spouses. In the absence of evidence offered to prove otherwise, the husband as head and master of the community is the proper party to prosecute its rights and defend its interest. The wife alone can neither prosecute such a claim nor defend an action against the community and stand in judgment to bind it.

In *Ruffino v. Hunt*[20] the court held that when separate property of the husband is sold to a homestead association for cash and simultaneously resold to him with no recitation that he was acquiring property with his separate funds, such property does not fall into the community of acquets and gains existing between husband and wife. This is the same result as had been arrived at by the court previously concerning the separate property of married women involved in such transactions.[21] The court reasoned that the statutory provision[22] that such contracts shall not be considered as loans but as sales and resales was limited in application to the contracting parties and those claiming under them. The prime objective of the legislature was to have homestead associations secured by a vendor's lien. It was never its intention to produce a statutory change in the status of prop-

18. LA. CIVIL CODE art. 155 (1870).
19. 233 La. 617, 97 So.2d 415 (1957).
20. 234 La. 91, 99 So.2d 34 (1958).
21. Mayre v. Pierson, 171 La. 1077, 133 So. 163 (1931).
22. LA. R.S. 6:766 (1950).

erty from separate to community as the consequence of placing a secured loan thereon.

In *Johnson v. Johnson*,[23] several creditors sought to be paid from funds realized from a judicial partition sale of community property of husband and wife after their legal separation. The community of acquets and gains had been dissolved almost two years before the judicial sale of the property was held in order to effect the partition. During this time the husband, with the consent of the wife, continued to operate the chief community asset, a tourist business, as a going concern. Among those claiming against the fund realized from the partition sale were the attorneys who represented the husband and wife in the partition proceedings and other creditors who had furnished services to the tourist business after the community was dissolved by the judgment of separation. The attorneys contended that legal services rendered in a contested partition of community property are ordinarily chargeable against the community as costs of liquidation. The other creditors allege that debts incurred by the husband in administering the business after the judgment of separation were chargeable to the community. The court refused to recognize these claims as charges against the community. Without answering the attorneys' contention that legal services rendered in a partition of community property are chargeable against the community, the court found that the operation of the community business by the husband with the consent of the other co-owner of the assets, his wife, was in the nature of a partnership operation.[24] Since these co-owned assets were operated as a business entity, all the essential requirements for a partnership relationship were met by the mutual agreement of the former spouses that the husband should continue for their mutual profit to operate the community's tourist business.

The court held that the business relationship thus established, although not characterized as such by the parties, had the status of a partnership with all the legal incidents thereof. Under Civil Code Article 2823[25] partnership property is liable to the creditors of the partnership in preference to those of the individual partner. Therefore the claims for legal and other services, having been rendered to this partnership relationship, although not ob-

23. 235 La. 226, 103 So.2d 263 (1958).
24. LA. CIVIL CODE arts. 2801, 2805, 2806, 2809, 2811, and 2813 (1870).
25. LA. CIVIL CODE (1870).

ligations of the community were nevertheless partnership obligations, entitled to be paid from the proceeds of the partnership sale before the proceeds were distributed to the co-owners.

During the past term, the court also decided the following cases dealing with successions, donations, and community property. They are *Slater v. Culpepper*,[26] and *Succession of Stansbury*.[27] These cases have been omitted from this discussion since they involved no questions of substantial import. The court also decided the case of *Moore v. Sucher*[28] in which the vendor attacked a notarial act of sale as being a disguised donation. This case is discussed elsewhere in this symposium under the heading *Sale*.

CONVENTIONAL OBLIGATIONS

*J. Denson Smith**

There has been some question as to what extent, if any, the doctrine of anticipatory repudiation as a breach of contract obtains in Louisiana. This question was answered in *Marek v. McHardy*,[1] wherein the court said that an anticipatory breach of contract is actionable in this state. Actually plaintiff did not institute his suit in advance of the time performance of the repudiated obligation was due and the only question the court had to decide was whether, in acting on the defendant's repudiation, he had destroyed his right to the promised performance. In the meantime there had been no retraction.[2] The court might have decided, therefore, that the anticipatory repudiation dispensed with the necessity of plaintiff's continuing his own performance without expressing an opinion as to whether he would have been able to maintain suit for breach of contract, on the strength of the repudiation, prior to the time performance of the repudiated obligation was due. That is, it might have restricted its inquiry to the question of whether plaintiff, without completing his own performance, had a right to damages for the defendant's breach. In view of the reciprocal nature of a commutative contract it

26. 233 La. 1071, 99 So.2d 348 (1957).
27. 234 La. 924, 102 So.2d 218 (1958).
28. 234 La. 1068, 102 So.2d 459 (1958).

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1. 234 La. 841, 101 So.2d 689 (1958).
2. It is questionable whether under the circumstances the repudiator should have had a power of retraction. See 4 CORBIN, CONTRACTS 932, § 980 (1951).