Louisiana Law Review

Volume 23 | Number 2
The Work of the Louisiana Appellate Courts for the 1961-1962 Term: A Symposium
February 1963

Private Law: Successions and Donations

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the buyer's rejecting title. Where the proposed buyer is a public body, does the same rule apply? The Louisiana courts have never determined whether restrictive covenants would apply against a public body which acquires and uses the land for a public purpose. The decisions in other states are conflicting.[24]

In one case which came before the Supreme Court, a school board had agreed to purchase property for use as a school site. Upon examination of title the property was found to be subject to a restrictive covenant, which would, if enforceable, restrict use of the land to residential purposes. The Supreme Court refused to decree specific performance of the purchase agreement.[25] The title was "suggestive of serious litigation," and the court would not undertake to resolve the issue of enforceability of the restrictions in a matter to which the other landowners who would be affected by its decision were not parties.

SUCCESSIONS AND DONATIONS

*Carlos E. Lazarus**

In *Succession of Gaudin*,[1] the First Circuit Court of Appeal was called upon to decide whether extrinsic evidence establishing the testator's custom of using the slash date form to indicate month, day and year, in that order, was sufficient as determinative that an olographic testament dated "9/12/55" was actually dated September 12, 1955. Although the question of whether extrinsic evidence should be admitted in the first place had already been decided in the affirmative five years previously when the case was before the court the first time,[2] it nevertheless took occasion to reaffirm its position on this question and thus held that extrinsic evidence is not only admissible to ascertain an otherwise ambiguous date, but that the evidence adduced by the proponents was sufficient to resolve the ambiguity.

24. See 2 NICHOLS, EMINENT DOMAIN § 5.73 (3d ed. 1950); 18 AM. JUR. *Eminent Domain* § 157 (1938).

25. Gremillion v. Rapides Parish School Board, 242 La. 967, 140 So.2d 377 (1962).

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1. 140 So. 2d 384 (La. App. 1st Cir. 1962).

2. Succession of Gaudin, 98 So. 2d 711 (La. App. 1st Cir. 1957), *cert. denied* 1958.

Prior to its first decision in 1957, the jurisprudence was confused and indecisive on the question. The Supreme Court had announced the rule that an olographic will in which the slash date form had been used was invalid for lack of a date certain, the date being an essential part of the testament which must be determined from the face of the will itself, and which must be so written as to leave no room for doubt or speculation.[3] Thus, in *Succession of Beird*,[4] a testament dated "9/8/18" was held invalid not only because it was impossible to determine whether the deceased had *intended* to write September 8th or the 9th of August, but also because there was no symbol to denote the century in which the testament was written.[5] And this, despite the fact that three years previously, in *Succession of Lefort*, the court had apparently adopted a position in favor of extrinsic evidence to resolve ambiguities in the date.[6] Subsequently, in *Succession of Kron*[7] the *Beird* rule seems to have

3. "Certain extrinsic evidence was offered on behalf of the proponent of the will, over the objection of the attorney for absent heirs, and the lower court at first overruled the objection and admitted the evidence, but later reversed itself and excluded all further proof on that score, holding, as we think correctly, that the sufficiency of the date must be determined from the face of the will. Heffner v. Heffner, 48 La. Ann. 1088, 20 South. 281." Succession of Beird, 145 La. 756, 758, 82 So. 881 (1919).

"This court has repeatedly and consistently applied the rule of strict interpretation to wills. It has never departed from the rule laid down in the Code, that an olographic will, to be valid, must be entirely written, dated, and signed by the hand of the testator. The date is a vital, essential part of the will. If there be uncertainty as to its date, a will is void. The date must be so written by the testator as to leave no room for doubt or speculation." Succession of Kron, 172 La. 666, 668, 135 So. 19 (1931).

4. 145 La. 756, 82 So. 881, 6 A.L.R. 1452 (1919).

5. "[W]here both the figures intended to represent the day and the month are less than thirteen, . . . it is impossible to tell whether the deceased intended to write September 8th, or the 9th of August. . . . There is no word or symbol to denote that part of the year which would tell the century in which the document was written." *Id.* at 758-59, 82 So. 881-82.

6. "There is a physical difference between a document without a date and one with an uncertain date. There is a legal difference between supplying a missing date, or any part of it, by facts outside of the will, and establishing certainty concerning an ambiguity or uncertainty or doubt in an existing date. The former cannot be done, because it is of the essence of the validity of a will that it be dated 'by the hand of the testator' (C.C. 1588 [1581]), and it cannot be 'dated' in any other way. But there is no law that prevents the courts from hearing testimony and entertaining evidence to throw light upon an obscure date, and remove all doubt, uncertainty, or ambiguity concerning it. Reason dictates it, and justice demands it, in order that the right accorded by law to make a will shall be protected, and not defeated by technicalities. Any evidence, recognized by law and not expressly prohibited calculated to convince the court and establish the certainty of the date, should be admitted and heard. The whole question resolves itself into a matter of proof. If the uncertain date can be made certain by other parts of the will or by any other means, it ceases to be uncertain and becomes certain and valid. 'Id certum est quod certum reddi potest.'" Succession of Lefort, 139 La. 51, 78, 71 So. 215, 235-36 (1916).

7. 172 La. 666, 135 So. 19 (1931).

been relaxed. In that case, although apparently honoring the rule in *Beird*,[8] the court upheld the validity of an olographic will dated "January 11th/27" by the application of the one hundred years' presumption of death.[9] For the application of this presumption, however, the court had, of necessity, to permit extrinsic evidence either of the date of birth or of death of the testator.

The first *Gaudin* decision, therefore, was regarded as apparently settling the jurisprudence once and for all, particularly since the Supreme Court had denied writs, and the question would merit no further comment but for the fact that in *Succession of Mayer*,[10] the Court of Appeal for the Fourth Circuit, although approving of the *Gaudin* cases, felt itself bound by the pronouncements of the Supreme Court in *Beird*, and held that an olographic testament dated "10/3/50" was void.[11]

Actually, there is no apparent reason why the rule against the admissibility of extrinsic evidence, assuming such a rule is a valid one,[12] should have the effect, or should be used for the purpose of excluding testimony or other evidence tending to clarify an ambiguity in the testament, be it regarding a disposition therein or the date on which it was written. As to the former, Article 1715 of the Civil Code expressly provides that "When, from the terms made use of by the testator, his intention cannot be ascertained, recourse must be had to all

8. See note 3 *supra*.

9. "The death of a person being presumed, as a matter of law, after the lapse of one hundred years from the date of his birth, it may likewise be presumed that he was born not more than one hundred years previous to the date of his death. If this will was dated in the month of January, 1827, the testator was more than one hundred years old when he died, for he could not have made the will the day he was born. Applying this legal presumption, we know therefore as a matter of law, that this will was not made in the twenty-seventh year of the century preceding the present one." Succession of Kron, 172 La. 666, 669, 135 So. 19, 20 (1931).

10. 144 So. 2d 896 (La. App. 4th Cir. 1962).

11. "As observed above, we do not feel it is within our province to resolve the instant case upon the basis of our views, but consider that we are obliged to follow the pronouncements of the Supreme Court as evidenced by the authorities above noted. In common with the members of the Light Brigade: 'Ours not to reason why; Ours but to do or die.' "*Id.* at 898-99.

12. Apparently, the rule is an adaptation of the strict French prohibition against the admissibility of extrinstic evidence to determine the intention of the testator and which is based on the theory that because of the gratuitous and unilateral nature of the disposition, it would be dangerous to resort to evidence outside the instrument itself to arrive at a fair interpretation thereof. See 5 PLANIOL ET RIPERT, TRAITÉ PRATIQE DE DROIT CIVIL FRANÇAIS, nº 18, *Interprétation des libéralités* 19-21 (1933).

But then, the French Code contains no articles corresponding to Articles 1714-1716 of the Louisiana Civil Code, and, moreover, the rule in France has

circumstances which may aid in the discovery of his intention."[13] As to the latter, it is not a question of whether the testator *intended* to date the testament on a particular month and day, or a particular day and month, but whether the date *as written* actually means one or the other, and for this purpose, no good ground either in reason or in logic can be advanced for excluding evidence tending to resolve the uncertainty or ambiguity.[14]

As the court correctly states in *Gaudin*, Article 1588 of the Civil Code does not demand that the date of an olographic testament be written by a particular method; all it requires is that it be dated in the hand of the testator, and the authority for the reception of proof necessary to ascertain the meaning thereof is clearly authorized by the Code itself.[15]

Although writs had been granted in the second *Gaudin* case, they were dismissed on joint motion so that the Supreme Court will not have the opportunity to pass upon the questions presented. In this connection, it is to be regretted also, that no writs were applied for in *Succession of Mayer*.

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been relaxed for the purpose of permitting extrinsic evidence to resolve ambiguities in an existing date. *Ibid.*

13. See also LA. CIVIL CODE art. 1714 (1870): "In case of ambiguity or obscurity in the description of the legatee, as, for instance, when a legacy is bequeathed to one of two individuals bearing the same name, the inquiry shall be which of the two was upon terms of the most intimate intercourse or connection with the testator, and to him shall the legacy be decreed."

Id. art. 1716: "A mistake in the name of an object bequeathed is of no moment, if it can be ascertained what the thing was which the testator intended to bequeath."

14. No one would dispute that if a death certificate annexed to the pleadings showed that the testator died on November 5, 1962, for example, his will, dated "6/11/62" could only have been written on June 11, 1962, for it would have been a physical impossibility for him to have written it after his death.

15. *Cf.* Sophie v. Duplessis, 2 La. Ann. 724 (La. 1847) in which the court states: "The only requisites for the validity of a nuncupative testament under private signature, are prescribed in articles 1574 and 1575 of the Code, and among these *the date and place where it is passed are not enumerated.* It is expressly declared that such testaments are subject to no other formality than those declared in those articles; and courts can require the observance of no others. Reasons have been suggested why it is important to fix the date of the testament, and place where it was received. The facts may be shown by evidence on the probate of the will." *Id.* at 726. See also Succession of Lombardo, 205 La. 261, 17 So. 2d 303 (1944) to the effect that although a nuncupative will by public act might be invalid as such if the date thereof is not made part of the body of the act, it may nevertheless be valid and upheld as a nuncupative will under private signature.

If extrinsic evidence may thus be adduced to prove the date upon a nuncupative will by private signature the date of which is incomplete, as was the situation in *Duplessis, supra*, why should the rule be any different in the case of an olographic testament bearing an ambiguous date?

It is not being suggested, however, that a testament that does not have a date should be valid. The question as to the dating of testaments will be the subject of a future article in this *Review*.

A related question was presented in *Succession of Bendily*,[16] involving an olographic testament in which there was question whether the year in which it was written was 1938 or 1958. Although the trial court had concluded that the numeral "5" had been surcharged or superimposed over the numeral "3", making the date clearly 1958, the appellate court reversed, being unable to determine from an examination of enlarged photographs whether the year was one or the other. The court was constrained to hold that the numeral in question was uncertain, undecipherable, and non-apparent.[17]

Succession of Lewis[18] involved a sample printed form of a will supplied to members of the armed forces in which the testator had completed some of the blanks designating his stepson as legatee. On the marign of the form he had also made other dispositions, written and signed in his own hand. The purported will, said the court, was clearly null and void on its face, as it failed to meet any of the requirements for any one of the various kinds of wills authorized by law. As to the olographic dispositions on the margin, the court had no difficulty in concluding that they were null for lack of form since they were undated.

In *Condon v. McCormick*,[19] a nuncupative testament by private signature was attacked on the grounds, among others, that it was so unintelligible as to show no testamentary intent or disposition, and that it was not signed or executed as required by law. It appeared from the testimony that, prior to the execution of the will, the testator had suffered a stroke, as a result of which he was left partially paralyzed and unable to speak; that the instrument had been confected by one of the witnesses who elicited the necessary information by interrogating the testator who would nod his head in assent to the questions propounded; and that, being physically incapable of signing his name, the testator was assisted by one of the witnesses in making his mark.[20]

16. 132 So. 2d 693 (La. App. 1st Cir. 1961).

17. The court further finds, however: "There is further grounds to believe on observing the questioned date that there are two numeral 3's superimposed, one on the other. . . . *Id.* at 698-99. If this was so, could not the court have justified a conclusion that the date was "1938"?

18. 140 So. 2d 791 (La. App. 2d Cir. 1962).

19. 134 So. 2d 619 (La. App. 3d Cir. 1961).

20. See Succession of Seals, 174 La. 275, 140 So. 476 (1932) to the effect that under Articles 1581 and 1582 of the Civil Code, there is no express require-

Although the instrument was not as clear as it might have been, the court found it sufficiently intelligible and expressive of the decedent's intent to dispose of the only piece of property he owned in favor of the named legatees. As to the other grounds of attack, the court noted that the testament had been prepared by one of the witnesses in the presence of the testator and of the witnesses; that it had been read to all of them in the presence of the testator and of each other; and that the testator had assented thereto. It concluded, therefore, that there had been a substantial and sufficient compliance with the formalities prescribed by Articles 1581 and 1582 of the Civil Code, and that therefore, the testament was valid.

Innocuous as it may appear, this decision goes much further than the court possibly intended to go, for it upholds the validity of a will in the making of which one of the essential formalities required was not observed, namely, the dictation of the testament by the testator to the amanuensis, unless it can be said that the mute assent by the testator to questions propounded by the witness who wrote the testament is the equivalent of a dictation. It should be noted, however, that this point does not appear to have been raised, nor discussed by the court. Nevertheless, it is clear from the terms of Article 1581 of the Civil Code that the nuncupative will by private signature, when confected in the presence of the witnesses, must be either dictated by the testator to one of them, or written by the testator himself in their presence.[21] True it is that no other formalities than those prescribed by Articles 1581 and 1582 of the Code for this kind of testament are required. On the other hand, it is apparent that nothing short of strict compliance with these formalities will satisfy the provisions of the Code, and that substantial compliance is not enough.[22]

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ment that the testator must make his mark in case he knows not or is unable to sign his name.

21. LA. CIVIL CODE art. 1581 (1870): "A nuncupative testament, under private signature, *must* be written by the testator himself, or by any other person from his *dictation*, or even by one of the witnesses, in presence of five witnesses residing in the place where the will is received, or of seven witnesses residing out of that place.

"Or it will suffice, if, in the presence of the same number of witnesses, the testator presents the paper on which he has written his testament or cause it to be written out of their presence, declaring to them that that paper contains his last will." (Emphasis added.)

22. LA. CIVIL CODE art. 1595 (1870): "The formalities, to which testaments are subject by the provisions of the present section, *must be observed*; otherwise the testaments are null and void." (Emphasis added.)

In *Succession of Rockvoan*[23] the Court of Appeal for the Fourth Circuit extended the *Sizeler v. Sizeler*[24] rule to a retirement-system contract whereby the system undertakes to pay a specified sum on the death of the member to the beneficiary designated by him. While not holding that such a contract is a contract of insurance, the court nevertheless finds it so closely analogous as to warrant an application of the rules governing insurance contracts. Accordingly, the beneficiary of the death benefit was held to prevail over the executrix of decedent's succession who contended, inter alia, that the designation of the beneficiary in the application made by the deceased constituted a donation either inter vivos or mortis causa and as such, void for lack of form. *Winsberg v. Winsberg*,[25] on which the executrix relied, to the effect that the designation of a beneficiary by the purchaser of a United States savings bond to whom the bond was to be paid upon the death of the purchaser constituted a donation mortis causa, was properly distinguished and held inapplicable.[26]

The important point at issue in *Heintz v. Gilbert*[27] was the validity of a sale whereby the vendor conveyed to his son his one-half interest in the community previously existing between him and his deceased wife. The sale had been made for a recited consideration of $1,000 cash "and the further consideration of being allowed the right and occupancy [sic] of said property during the period of his [the vendor's] natural life." The lower court, whose opinion the appellate court adopted as its own, held that since at least part of the recited cash consideration had actually been paid, there was no simulation. It also found, however, that since the recited consideration of $1,000 was considerably less than one-fourth the appraised value of the property, the sale could, under Article 2444 of the Civil Code, properly be attacked as a donation in disguise; the court refused to attach any importance to the contention that the vendor had

23. 141 So. 2d 438 (La. App. 4th Cir. 1962).

24. Sizeler v. Sizeler, 120 La. 128, 127 So. 388 (1930), to the effect that the proceeds of a life insurance policy, when payable to a designated beneficiary, form no part of the estate of the insured but inure to the beneficiary directly and by the sole terms of the contract itself.

25. 220 La. 398, 56 So. 2d 730 (1952).

26. The essential difference being that whereas in *Winsberg*, the bonds belonged to and were at all times in the possession of the purchaser, the death benefit in question did not at any time belong to the member of the system, and only passed to the designated beneficiary, by virtue of the contract, upon the death of the member.

27. 140 So. 2d 518 (La. App. 1st Cir. 1962).

also been given the right of occupancy of the property sold.[28] Having concluded that the transaction was a donation, the court found it void not only because it was not in authentic form as required by Article 1536 of the Civil Code,[29] but also because it contained a reservation of the usufruct in favor of the donor and thus violated Civil Code Article 1533.[30]

If by the right of occupancy was meant the right of habitation which is defined by the Code as the "right of dwelling gratuitously in a house the property of another person"[31] and which is limited to what is necessary for the habitation of the person to whom the right is granted,[32] a different result might have obtained if the ascertainable value of the right which by the terms of the contract was given "as a further consideration" for the sale had been taken into account in determining the price paid for the property.[33] It is apparent, however, that the court interpreted the contract as a sale of the naked ownership minus the right of habitation, or as it summarily concluded, minus the usufruct, which was reserved in favor of the vendor. Here again, it would seem that a distinction could have been made[34] between the right of usufruct which a donor is pro-

28. "The Court doesn't attach any importance to the defendant's argument in his brief that the vendor, Charles H. Heintz was given the right of occupancy of said property during his lifetime. Charles H. Heintz did not sell the right of occupancy of said property and the Court doesn't see how this right could be part of the consideration. It could not be part of the consideration of something he did not sell. The court finds that the purported sale from Charles H. Heintz to Jared Y. Heintz, dated January 20, 1955 was in fact, a donation in disguise." *Id.* at 522.

29. LA. CIVIL CODE art. 1536 (1870): "An act shall be passed before a notary public and two witnesses of every donation *inter vivos* of immovable property or incorporeal things, such as rents, credits, rights or actions, under the penalty of nullity."

30. *Id.* art. 1533: "The donor is permitted to dispose, for the advantage of any other person, of the enjoyment or usufruct of the immovable property given, but can not reserve it for himself."

31. *Id.* art. 627.

32. *Id.* art. 641: "The right of habitation is confined to what is necessary for the habitation of the person and of the family of the person to whom the right of use or habitation is granted. . . ."

33. Although the terms of the contract are not fully set forth in the opinion, the portion thereof which is quoted indicates that the price paid for the property was the recited cash consideration, plus the value of the right of occupancy or habitation.

34. *Id.* art. 635: "The right of use of a house and that of habitation being alike, are subject to the same rules."

Id. art. 633: "That which distinguishes the usufruct of a property from the use of it, is this, that the enjoyment of the usufructuary is not confined to what is necessary for his consumption, but he takes all the fruits, and can dispose of them as he pleases.

"The person, on the other hand, who has only the use of an estate, has a right only to such fruits as may be necessary for his daily wants and those of his family."

hibited from reserving to himself, and a right of habitation which is a less extensive one, and which may well not be included within the prohibition of Article 1533 of the Civil Code.[35]

In *Smith v. Huckaby*[36] a surviving husband brought suit to annul the succession proceedings whereby the natural son of his deceased wife had caused himself to be recognized as the sole heir of his mother and, by an ex parte judgment, sent into possession of her separate property which he later sold for $3,500. Plaintiff's position was that since under Article 926 of the Civil Code the "putting in possession of the natural children shall not be pronounced without calling the relations of the deceased, who would have inherited in default of the natural children," the succession proceedings, as well as the subsequent sale of the property, were invalid. Conceding, arguendo, that the husband in this case was such a relation within the contemplation of the article cited,[37] the court nevertheless held that since he had signed the affidavit of heirship in the succession proceedings, he was effectively estopped to deny the validity of the judgment of possession.[38] Aside from the interesting

35. Under Article 949 of the Code Napoléon, which corresponds to LA. CIVIL CODE art. 1533 (1870), the donor is permitted to reserve for his own advantage the enjoyment or usufruct of movables or immovables given. The same was true in Louisiana under Article 50, p. 221, of the Code of 1808. Why the rule was changed is briefly explained by the redactors of the Code of 1825 as follows: "The reservation of the usufruct in favor of the donee [sic] would produce the disadvantage of concealing from the eyes of the public the change of property which had taken place. He who wishes to enjoy during his life a piece of property which he destines for another, can give it by last will, and it is not easy to perceive the use of a donation inter vivos, with reserve of usufruct." 1 LOUISIANA LEGAL ARCHIVES, PROJET 209 (1937). And *cf.* LA. CIVIL CODE art. 1550 (1870). See also Creech v. Errington, 207 La. 615, 21 So. 2d 761 (1945), in which a clause in a purported act of sale constituting the vendor as the agent and attorney in fact of the vendee, to have and control the property sold during the vendor's lifetime, with plenary authority to collect and disburse all income therefrom, was interpreted as giving the alleged vendor the right of usufruct. Note the language of the court: "For the donor to have and control said property during his lifetime, collecting and disbursing all income therefrom as it might seem just and right to him, means, in our opinion, that donor was to enjoy the property during his lifetime, with full power to collect or draw from the property *all the profit, utility, and advantages which it might produce;* or, in other words, to collect and disburse all income as might seem just and right to him, meaning the right to collect and disburse all income 'as he may see fit' or to collect and then disburse same to his own use, benefit and enjoyment, he being the sole and only judge as to what was 'just' and 'right.'" *Id.* at 622, 21 So. 2d 761, 763. (Emphasis added.)

36. 141 So. 2d 72 (La. App. 2d Cir. 1962).

37. The report indicates that the decedent's father and mother had predeceased her, and there is no indication whether she had any other living relations who would have excluded the husband in default of her natural child. *Id.* at 72.

38. "Conceding the necessity of calling in those relations who would inherit in default of the natural child and that the surviving spouse is such a relation within the contemplation of the codal article, defendants set up in their answers

question whether the apparently mandatory provisions of Article 926 of the Civil Code can thus be waived, the question still remains whether, had he refused, the vendee could have been compelled, in a suit for specific performance, to accept the title tendered to him by his vendor.[39]

In *Succession of Quartararo*[40] the court, for the first time, interpreted the 1948 amendment of Article 1705 of the Civil Code as meaning that a testament falls by the subsequent adoption of a person by the testator, whether the person adopted is a minor or a major. The court clearly explained that the person adopted acquires the status of an heir, no matter what his age might be, and thus dismissed as unsound the argument advanced that by the use of the word "child" in the amendment, the legislature intended to limit the article to the adoption of minors.

And in *Daigle v. Fournet*[41] the court applied Article 1740 of the Civil Code and permitted the plaintiff to recover his engagement ring from the defendant when the latter broke off their engagement to be married. This was but a clear application of the rule expressed in the article that a donation made in contemplation of marriage is void if the contemplated marriage does not take place.

CONVENTIONAL OBLIGATIONS

*J. Denson Smith**

GENERAL

If a person conditions the assumption of an obligation on a subsequent exercise of his will, he does not actually obligate himself. Article 2034 of the Civil Code recognizes this fact by stating that such an obligation is null. The potestative condition to

to plaintiff's original and amended petitions the special defense of estoppel. This defense is predicated upon plaintiff's execution of an affidavit wherein he attested to the status of Clarence Huckaby as an acknowledged natural child which affidavit was made a part of the succession proceedings and made a basis of judgment in those proceedings. This judgment of possession constituted the basis of the subsequent sale of the property to Tony Greco, co-defendant herein. Plaintiff, therefore, in effect was a party to the proceeding of which he now attacks. These factual circumstances present a clear case of sustaining the plea of estoppel." *Id.* at 74.

39. *Cf.* Wimberly v. King, 179 So. 515 (La. App. 2d Cir. 1938).

40. 139 So. 2d 277 (La. App. 4th Cir. 1962), *cert. denied*, 1962.

41. 141 So. 2d 406 (La. App. 4th Cir. 1962).

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