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SUCCESSIONS AND DONATIONS

*Carlos E. Lazarus**

As in the case of testamentary dispositions, form is of the essence in all donations inter vivos. Donations inter vivos of immovables or of incorporeals, for example, must be made in authentic form;¹ the donation of corporeal movables must likewise be made by authentic act, except when it is accompanied by real delivery of the thing given.² Another requirement is that it must be accepted by the donee "in precise terms."³ The acceptance may be made during the lifetime of the donor by a posterior act, but in that case it has effect with regard to the donor, only from the day notice of the acceptance is given to him.⁴ A donation duly accepted, however, "is perfect by the mere consent of the parties; and the ownership of the object given is transferred to the donee, without the necessity of any other delivery."⁵ The requirement of an express acceptance, however, is dispensed with in all cases where the donee has been put in corporeal possession of the thing given.⁶ When the donation comprises immovables,⁷ article 1554 of the Civil Code requires that, in order to affect third persons, the donation, as well as the acceptance thereof, must be recorded in "a separate book kept for that purpose by the register of mortgages".⁸ Article 3388 of the Civil Code requires the recorder of mortgages for the Parish of Orleans to keep two separate registers, one in which to record conventional or legal mortgages and privileges, and the other in which to record all donations "which

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1. LA. CIVIL CODE art. 1536 (1870).

2. *Id.* arts. 1538, 1539.

3. *Id.* art. 1540.

4. *Id.* art. 1540.

5. *Id.* art. 1550.

6. *Id.* arts. 1539, 1541; *Sisters of Charity v. Emery*, 144 La. 614, 81 So. 99 (1919).

7. Although article 1554 of the Civil Code uses the term "property which may legally be mortgaged," only immovable property was susceptible of mortgage when the Code was adopted.

8. LA. CIVIL CODE art. 1554 (1870): "When the donation comprehends property that may legally be mortgaged, the act of donation, as well as the act of acceptance, whether the acceptance be made by the same or a separate act, must be registered, within the time prescribed for the registry of mortgages in a separate book kept for that purpose by the register of mortgages, which book shall be open to the inspection of all parties requiring it."

That the recordation requirement is for the protection of third parties only is evident, for under the article 1557, the donation is effective as between the parties thereto, even without recordation.

have to undergo that formality." But no similar provision is contained in the Code respecting the recorders of mortgages of the other parishes; and consequently, in many instances, the recordation of donations in parishes other than Orleans had been made in the general conveyance records of the parish where the immovable donated was situated.

It was no doubt to cure these "defective" recordations that in 1962 the legislature enacted a statute to provide that the recordation of acts of donation of property which could be legally mortgaged and of the acts of acceptance thereof would be valid if made as provided in article 1554 of the Civil Code, or if recorded in the conveyance records of the parish where the immovable was situated.⁹ It was quite evident, however, that the statute went much further: It was sufficiently broad to apply to all kinds of property,¹⁰ and because the act of donation, as well as the act of acceptance, had to be recorded in order for the donation to be effective between the parties to the donation, it would follow that (a) the manual gift of corporeal movables would no longer be permissible; (b) donations of movables had to be recorded to have any effect at all; (c) article 1541 of the Civil Code dispensing with an express acceptance when the donee is put into corporeal possession of the immovable donated would no longer be operative; (d) lack of registration, which previously could only be pleaded by third parties, and then only with regard to immovables, could also be pleaded by the parties to the donation; and (e) a donation would no longer be perfect by the mere consent of the parties and article 1550 of the Civil Code would be rendered ineffective.

Fortunately, the 1964 legislature has now adopted the necessary curative legislation by adding a new provision to the Revised Statutes,¹¹ the effect of which is to repeal retroactively the 1962 act,¹² and at the same time to carry into effect the

9. La. Acts of 1962, No. 22. See *Louisiana Legislation of 1962: Civil Code And Related Legislation* 23 LA. L. REV. 41, 53 (1962).

10. By adopting the language of article 1554 of the Civil Code, viz., "No donation inter vivos of property which may be legally mortgaged shall be effective as to donees or to third persons unless and until the act of donation, as well as the acceptance thereof is registered" the 1962 statute is made applicable to movables as well as to immovables, since at the time of its adoption all such property is susceptible of mortgage.

11. LA. R.S. 9:2371 (Supp. 1964).

12. The statute provides: "A. Donations of immovables or of rights thereto and of the acts of acceptance thereof shall be recorded in accordance with the requirements of Article 1554 of the Civil Code or in the conveyance records of

original purpose of the act to validate recordations made alternatively in the conveyance or in the mortgage records of the parish wherein the immovable donated is situated.

By providing that the testator must *sign his name* on every page of the statutory will,¹³ and by stating in unequivocal terms that "those who know not how or are not able to sign their names" are incapable of making dispositions in the form of the statutory will,¹⁴ the legislature has overruled the interpretation of the statutory wills statute given in *Succession of Butler* to the effect that the testator's "X" mark constituted a valid signature.¹⁵ Act 123 of 1964, which amends R.S. 9:2442 and R.S. 9:2443, will prevent any future judicial extension of the *Butler* decision.

Prior to the adoption of the Code of Civil Procedure by Act 15 of 1960, the probate of the statutory will was made in accordance with R.S. 9:2444, under which proof that the will had been signed by the testator was required to be made by the declaration on oath of the notary and one of the witnesses, or of the two witnesses present when the will was made. If the notary or any of the witnesses were dead or absent from the state, or could not be located, proof of the signature of the testator could be made by the declaration of the notary or of the witness who was living and present in the state. But if the notary and all of the attesting witnesses were all dead, absent or unavailable, it was sufficient for the proof of the testament if two credible persons made a declaration on oath that they recognized the signature as being that of the testator. This section of the

the parish where the immovable is situated.

"B. Failure to have complied with the recordation provisions of Act 22 of 1962 shall not affect the validity of any donations inter vivos as between the parties thereto; provided that any person claiming to be adversely affected by this Sub-section has six months from the effective date of this Act to assert his claim."

13. *Id.* R.S. 9:2442: "In addition to the methods provided in the Louisiana Civil Code, a will shall be valid if in writing . . . and signed by the testator . . . in the following manner:

"(1) In the presence of the notary and both witnesses the testator shall signify to them that the instrument is his will and shall sign his name on each separate sheet of the instrument. . . ." (Emphasis added).

14. *Id.* R.S. 9:2443: "Except as provided in R.S. 9:2442 with respect to a testator who is physically unable to sign his name, those who know not how or are not able to sign their names, and those who know not how or are not able to read, cannot make dispositions in the form of the will provided for in R.S. 9:2442, nor be attesting witnesses thereto." (Emphasis added).

15. See *Succession of Butler*, 152 So.2d 239 (La. App. 4th Cir. 1963), cert. den., 244 La. 668, 153 So.2d 153 (1963), noted in *The Work Of The Louisiana Appellate Courts For The 1962-1963 Term—Successions And Donations*, 24 LA. L. REV. 184 (1964).

Revised Statutes, however, was superseded by article 2887 of the Code of Civil Procedure, which is primarily an editorial revision of the former provision. The article of the Code, however, provides that when the notary and all witnesses are dead, absent or unavailable, the will can nevertheless "be proved by the testimony of two credible witnesses who recognize the signature of the testator, or of the notary, or the signatures of two of the subscribing witnesses."

Despite its implied repeal, R.S. 9:2444 was amended by the 1964 legislature¹⁶ by adding a new subsection providing that where declarations on oath are required for the proof of the testament, it suffices if such declarations are in the form of affidavits executed in authentic form. Aside from the question of the validity of an addition to a section of the statutes which has been impliedly superseded by subsequent legislation,¹⁷ the wisdom of such a provision is questionable in view of the possible fraudulent use that can be made of it.¹⁸ Its effect, however, has been minimized by the proviso that the court may in its discretion require the attendance of the witnesses, and by the further provision that proof by affidavit cannot be made when the validity of the will has been judicially attacked.

16. The *Butler* decision was followed in *Succession of Anderson*, 159 So.2d 776 (La. App. 3d Cir. 1964). In that case, the testament contained the following declaration: "I declare that I do not know how to sign my name and that I sign this my last will and testament by affixing my mark thereto with the assistance of the undersigned Notary Public." Said the Court: "We think an "X" mark placed on the will by the testator, with the intent that the affixing of that mark constitutes a signing of the will, fulfills the requirement that the will be signed by the testator. This is particularly true in a case such as this where the testator does not know how or is not able to sign his name. See *Succession of Butler*, La. App. 4 Cir., 152 So.2d 239. . . ." *Id.* at 777.

16. La. Acts of 1964, No. 437. See LA. R.S. 9:2444 (Supp. 1964): "Where declarations on oath are required by this Section, it shall be sufficient for such declarations to be in the form of affidavits executed before a notary public and two witnesses, which affidavits shall be filed in the probate proceedings and shall constitute full compliance with the provisions of this Section, unless the court, in its discretion, shall require the attendance in person of one or more of the witnesses to the will, in which case proof shall be made as provided elsewhere in this Section.

"This subsection shall not apply to any will the validity of which has been judicially attacked."

17. The reference made is of course to the "declarations" required by R.S. 9:2444 as originally enacted. The superseding article of the Code of Civil Procedure speaks of the "testimony of the notary and . . . of the witnesses," and nowhere is there any reference to any "declarations" for which the authentic affidavit is to be substituted.

18. It may well be that in certain cases the probate of the statutory will might be facilitated, especially in cases where the attesting witnesses are doctors or nurses who would be unavailable at the time of probate. But if such was the purpose of the statute, it might have been expressly limited to such and similar cases.