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Private Law: Successions and Donations

Carlos E. Lazarus

is quite clear that when the owner sold lots in Canal Street Subdivision fronting on Martin Behrman Walk, designated as such on the recorded plan of subdivision, said owner thereby *created by title a servitude of passage* over Martin Behrman Walk in favor of those lots."[11] A public street constitutes a right of passage in favor of the public, but the sale of a lot according to a plan cannot be considered as a title which creates a private servitude in favor of certain individuals as distinguished from a public street established by statutory dedication.

SUCCESSIONS AND DONATIONS

*Carlos E. Lazarus**

VALIDITY OF TESTAMENTS

Certainty of Date

"If any principle in this most vexatious field of law is settled by the jurisprudence, it is the rule that if any part of the date appearing on an instrument purporting to be an olographic testament is doubtful or uncertain, whether as to the day, month or year, the effect of the incertitude or doubt about the date is the same as if the instrument bore no date at all."[1] So speaks the First Circuit Court of Appeal in *Succession of Koerkel*,[2] wherein specimens of the testator's handwriting offered to establish the year in which the testament had evidently been written were held inadmissible.[3] So holding, the First Circuit chose to resurrect the *Beird* case[4] which, in this writer's opinion,

11. *Id.* at 493. (Emphasis added.)

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1. Succession of Koerkel, 174 So. 2d 213, 216 (La. App. 1st Cir. 1965). It should be noted that apparently no rehearing was applied for.

2. 174 So. 2d 213 (La. App. 1st Cir. 1965).

3. The testament was dated "August 17" followed by the figures "19" and two additional ciphers not readily decipherable but which the proponents of the will, by the introduction of certain slips of paper containing figures purportedly made by the testator, successfully established as being the numeral "51" so that the year in which the will was made was proved to have been "1951" to the satisfaction of the trial judge. The decision of the court is summed up in the following language: "The date of decedent's purported olographic will being obscure, vague and uncertain and extrinsic evidence being inadmissible to resolve its dubiety, it follows that the judgment of the trial court admitting such evidence and declaring said will valid is erroneous and must be reversed." *Id.* at 221.

4. Succesison of Beird, 145 La. 755, 82 So. 881, 6 A.L.R. 1452 (1919).

had already lost much of its weight,[5] rather than to follow its former decision in the first and second *Successions of Gaudin*,[6] which had not only received the explicit approval of other intermediate courts of appeal,[7] but had also the tacit approval of the Supreme Court.[8] No useful purpose will be served by reviewing the jurisprudence on the subject. This was done by the First Circuit both in *Gaudin* and in *Koerkel*, although differing as to the meaning of the rules announced and as to their application.[9] It is unfortunate that the First Circuit appears to have abandoned the technique it had adopted in *Gaudin* in favor of a rule the effect of which is to prohibit the use of extrinsic evidence for the purpose of explaining an otherwise undecipherable symbol the meaning of which had been sufficiently estab-

5. In Succession of Lefort, 139 La. 51, 71 So. 215 (1916), although the question finally resolved by the court was whether the numeral "1913" had been actually written by the testator, the question which the appellant asked the court to determine was, as quoted in the opinion on rehearing: whether "an uncertainty or doubt as to the date appearing on the face of the instrument [may] be removed by testimony as to when the document was or *must have been* written?" See *Id.* at 78, 71 So. at 235. In answering this question the court concluded: "We think we have sufficiently shown that the nullity of the will of the deceased did not result from the possible uncertainty of the date of the will propounded, but that the date *could be made certain* in the manner we have indicated hereinabove. . . . In line with all these authorities we consulted and examined the will before us. We *noticed the lines* drawn across the paper upon which it was written *which a witness* swore had been drawn by her subsequent to 1908; we gave due weight to the date "1913", *written by the testatrix upon the envelope containing her will.* . . . We are satisfied that the figure '2' is a '6' and not a 'G,' because persons *are presumed to use numerals* and not letters in completing a date, and that the figure is really a '6'." *Id.* at 83, 71 So. at 238. It thus appears that what the court said regarding the maxim "*Id certum* . . ." was more than purely obiter. In Succession of Kron, 172 La. 666, 135 So. 19 (1931), the will dated "January 11th/27" was held to have a date certain. Said the court: "So that the words and figures to express the date make it certain that the instrument was written on the eleventh day of January in the twenty seventh year of *some century*." *Id.* at 670, 135 So. at 20. And sure it is, as the First Circuit Court states, that the century was ascertained by the application of the 100 year presumption of death after a century of life. But what seems to have been overlooked is that such presumption could not have been applied in the absence of extrinsic evidence showing either the date of birth or the date of death of the decedent. At any rate, *Succession of Kron* appears to have limited the effect of the *Beird* decision for in *Beird*, the court held the will invalid, not only because there was uncertainty as to the month and day, but also because of uncertainty as to the century as well. Said the Court: "There is no word or symbol to denote that part of the year which would tell the century in which the document was written." See 145 La. 755, 759, 82 So. 881, 882 (1919), and *cf.* dissenting opinion of O'Niell, J.

6. 98 So. 2d 711 (La. App. 1st Cir. 1957); 140 So. 2d 384 (La. App. 1st Cir., 1962), 23 LA. L. REV. 266 (1963).

7. See Hardy, J., in Succession of Mayer, 144 So. 2d 896 (La. App. 4th Cir. 1962).

8. The denial of writs in the first *Succession of Gaudin* (see note 6 *supra*), would seem to indicate tacit approval of the appellate court's conclusion that extrinsic evidence was admissible to prove the date.

9. *Cf.* the court's own analysis of its decision in *Gaudin* at 174 So. 2d at 217.

lished to the satisfaction of the judge before whom the will had been probated. Pertinent here are the following observations made by the court in the second of the *Gaudin* cases: "So often in the resolution of a difficult problem we lose ourselves in a maze of modifying and even conflicting opinions on a particular point. We become enmeshed in our own web of legalisms and frequently the only respite is a return to the Codal Articles in an attempt to get a new or at least a fresh approach. Seldom is this return without reward and the instant case is no exception. . . . Article 1588 does not demand that the date be written by a particular method.[10] That there must be certainty is understandable and right. But since this special requirement of certainty is not, as such, specifically demanded in . . . art. 1588, any judicial criteria on this point should be made in the light of Articles 1713 and 1715, concerning the intent of the testator. . . . The intent here has to do with the method the testator customarily employed in dating papers. Resort to competent proof is necessary and authorized under . . . art. 1715 which says that where the testator's intention cannot be ascertained, 'recourse *must* be had to all circumstances which may aid in the discovery of his intention.' "[11]

Testamentary Capacity

Testamentary capacity must exist at the time the will is made and therefore prior infirmities which might have impaired a person's ability to read do not disqualify him from making a statutory will if, at the time of the confection of the testament, the testator had fully recovered. It was so held in *Succession of Glynn*,[12] and in two cases, *Succession of Franks*[13] and *Miles v. Broussard*,[14] the court finds that the capacity of the testator was not impaired because he suffered from the usual infirmities of old age, including eccentricity and feebleness. In the *Broussard* case, it was further contended that the will was null because undue influence had been exerted on the testatrix by one of the legatees. After reviewing the testimony adduced, the court concluded that no undue influence had been proved. It is suggested that such proof should not have been admitted in the first place

10. *Cf.* Succession of Lombardo, 205 La. 261, 17 So. 2d 303 (1944); Sophie v. Duplessis, 2 La. Ann. 724 (La. 1847).
11. Succession of Gaudin, 140 So. 2d 384, 389-90 (La. App. 1st Cir. 1962).
12. 167 So. 2d 533 (La. App. 4th Cir. 1964).
13. 168 So. 2d 446 (La. App. 3d Cir. 1964).
14. 166 So. 2d 34 (La. App. 3d Cir. 1964).

and that it should have been given no probative weight if offered for the purpose of showing the testator's motive for making the disposition, for, under article 1492 of the Civil Code, proof is not admitted of the disposition having been made through hatred, anger, suggestion or captation.[15]

Succession of Theriot[16] was a suit to annul a statutory will written in the French language. Although the proponents of the will conceded that the testatrix could not read French, they took the position that she could read the English language, and that this was a sufficient compliance with the provisions of R.S. 9:2443.[17] The trial judge found as a fact, however, that the testatrix could read neither French nor English, nor any other language, and declared the will null. On appeal, the Third Circuit Court of Appeal, having determined that the lower court had correctly found that the testatrix could not read any language at all at the time of the confection of the will, found it unnecessary to pass upon the question raised by the appellants. It would seem, however, that unless the testator is able to read the language in which the will is written, he is legally incapable of making a statutory will, since he must be able to compare what has been written with that which he intends should be written.[18]

Conflicts of Laws

In *Succession of King,*[19] a Louisiana domiciliary who had executed his will in olographic form in the City of New Orleans died some years later at his domicile in another state, leaving movable property only in Louisiana. The probate of his will was opposed on the grounds that under the law of the testator's domicile at the time of his death the will was void as to form, and that under the rule that the validity of a will with respect to movables is governed by the laws of the testator's domicile at the time of his death the court had no alternative but to declare it a nullity. Admitting that under the United States Constitution the Louisiana court was bound to give full faith and credit to the laws of the domicile of the testator and

15. Note, 24 LA. L. REV. 925 (1964).
16. 165 So. 2d 27 (La. App. 3d Cir. 1964).
17. LA. R.S. 9:2443 (Supp. 1962): "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."
18. *Cf.* Debaillon v. Fuselier, 159 La. 1044, 106 So. 559 (1925).
19. 170 So. 2d 129 (La. App. 4th Cir. 1965).

recognizing the existence of the rule invoked, the court nevertheless held that such a rule is inapplicable where there is a statute to the contrary. Accordingly, and in view of article 10 of the Civil Code[20] providing that the form and effect of public and private instruments are governed by the laws of the place where they are executed, the will in question was valid.

Capacity to Receive

In *Succession of Glynn*,[21] article 1481 of the Civil Code[22] prohibiting those who have lived together in open concubinage from making donations to each other except under certain circumstances, is strictly construed to mean what it says, namely, that it is applicable to those who *have lived together*, and not merely to those who live together or are living together in open concubinage at the time of the donation. Accordingly, a testamentary disposition in favor of a former concubine was declared invalid although the concubinage relationship which had lasted for several years had actually terminated some twenty years before the death of the testator[23] and had never been resumed. The fact that the former concubine had married a third person many years before the testator's death did not remove the incapacity because, said the court, article 1481 only excepts "those persons who, after having lived in concubinage, marry *each other*." In other words, once a concubine, always a concubine.

CONJOINT LEGACIES — ACCRETION

Limitations of space make it impossible to give a detailed analysis of the Supreme Court's decision in *Succession of McCarron*,[24] in which the court again reviewed the jurisprudence interpreting testamentary dispositions made in favor of two or more legatees "share and share alike" or "to be equally divided

20. LA CIVIL CODE art. 10 (1870): "The form and effect of public and private written instruments are governed by the laws and usages of the places where they are passed or executed. . . ."

21. 167 So. 2d 533 (La. App. 4th Cir. 1964).

22. LA. CIVIL CODE art. 1481 (1870); "Those who have lived together in open concubinage are respectively incapable of making to each other, whether *inter vivos* or *mortis causa*, any donation of immovables; and if they make a donation of movables, it cannot exceed one-tenth part of the whole value of their estate.

"Those who afterwards marry are excepted from this rule."

23. And *presumably* some 18 years before the date of the testament. There is no indication as to when the will was executed.

24. 247 La. 419, 172 So. 2d 63 (1965). This case will be noted in a future issue of this *Review*.

between them" or containing words of similar import. In the case under consideration, the legacy was to two brothers of the testatrix "to be shared equally," and since one of them had predeceased the testatrix, the heirs of the latter contended that the one-half of the legacy that had lapsed descended to them *ab intestato* under the provisions of article 1709 of the Civil Code.[25] The surviving legatee contended, on the other hand, that the legacy in question was a conjoint legacy and that, accordingly, accretion had taken place in his favor under the provisions of article 1707 of the Civil Code.[26] In the alternative, the surviving legatee alleged that the legacy was a universal legacy and that, as the sole surviving universal legatee, he was entitled to the lapsed legacy. The court held that phrases such as "to be shared equally" are dispositive in nature constituting an assignment of parts to the designated legatees[27] and that, consequently, the legacies not being conjoint within the meaning of article 1707 of the Civil Code, on the death of one of the designated legatees the portion of the latter devolved upon the heirs *ab intestato* of the testatrix under article 1709 of the Civil Code. The alternative contention of the surviving legatee was also resolved in the negative, the court holding that, by definition, the two brothers were legatees under universal title, and not universal legatees, since aliquot parts had been assigned to them. However, the court proceeded: "But *assuming* that the testatrix's two brothers *were to be considered as universal legatees,* nevertheless, under the provisions of Revised Civil Code Articles

25. LA. CIVIL CODE art. 1709 (1870): "Except in the cases prescribed in the two preceding articles, every portion of the succession remaining undisposed of, either because the testator has not bequeathed it, either to a legatee or to an *instituted heir,* or because the heir or the legatee has not been able, or has not been willing to accept it, shall devolve upon the legitimate heirs." (Emphasis added.)

26. LA. CIVIL CODE art. 1707 (1870): "Accretion shall take place for the benefit of the legatees, in case of the legacy being made to several *conjointly.*

"The legacy shall be reputed to be made conjointly when it is made by one and the same disposition without the testator's having assigned the part of such colegatee in the thing bequeathed."

27. This is in line with what was said in Succession of Lambert, 210 La. 636, 28 So. 2d 1 (1946). *Cf.* Gregory v. Hardwick, 218 La. 346, 356, 49 So. 2d 423, 426 (1950), in which the court said: "It is true that the legatees, under additional provisions of the will, were bequeathed the entire estate *'in equal proportions, share and share alike'*. But these provisions did not serve to transform an otherwise universal legacy into a legacy under a universal title, the latter of which is one whereby a testator bequeathes a certain proportion of the effects of which the law permits him to dispose." (Emphasis added.) *Succession of Lambert* was distinguished on the ground that the primary question there considered and determined was with respect to testamentary accretion, whereas in the *Hardwick* case the question was whether the plaintiff was a universal legatee and as such, entitled to bring the suit. The writer wonders what the decision would have been if in *Hardwick,* the plaintiff had also claimed the right to the lapsed legacies?

1706 and 1709 (above quoted), one is not entitled to benefit by the inability of the other to take his portion when the legacy is not conjoint. Article 1706 reprobates accretion of a lapsed legacy unless the bequest, in which it is made, is conjoint."[28] With this dictum the writer is unable to agree. A universal legatee is entitled to lapsed legacies not by right of accretion but because of the nature of the legacy itself. A universal legacy is that which confers upon the legatee an eventual vocation to the totality of the patrimony of the deceased. It is closely akin to the institution of heir of the Roman law, and consequently, in ascertaining the universal character of the disposition, it is not the benefit received by the legatee, but his eventual vocation to the totality of the succession that must be considered.[29] Thus, in the presence of forced heirs, the universal legacy must necessarily be reduced to the disposable quantum. Similarly, if all the other legacies exhaust the succession assets, the universal legatee will receive nothing. Conversely, in the absence of forced heirs, or where other particular legacies have lapsed, the universal legatee is entitled, *by virtue of his legacy,* to receive all that may be found in the succession, including the lapsed legacies. As was said in *Succession of Burnside,*[30] articles 1706 and following of the Civil Code have no application in determining the right of the universal legatee to caducious legacies for "*it is not the right of accretion* that is invoked by the universal legatee, but that other principle by which, as legatee of the whole, he is invested with the right to whatever is not legally and validly given away."[31] Moreover, article 1709 can apply only where a portion of the testator's estate remains undisposed, which is not the case where there is a universal legatee because that which has not been validly given is included in the universality.[32]

A universal legacy may be made to one or to several persons.[33] But when it is made to two or more legatees, it must be made in such a manner as to confer upon all the same eventual right to the totality of the patrimony of the deceased.[34] And it may well

28. Succession of McCarron, 247 La. 419, 434, 172 So. 2d 63, 68 (1965).

29. See PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT FRANÇAIS nos 611, 614, at 641, 644-46 (1933).

30. 35 La. Ann. 708, 714 (1883).

31. *Id.* at 720. See also concurring opinion by Fenner, J.

32. Prevost v. Martel, 10 Rob. 512 (La. 1845). *Cf.* Compton v. Prescott, 12 Rob. 56 (La. 1845).

33. LA. CIVIL CODE art. 1606 (1870).

34. Mr. Cross in his work on Successions states that the definition of a universal legacy in article 1606 is inaccurate and offers the following: "The universal

be that where the legacy of the universality is made *conjointly* the surviving legatee may claim by accretion. But would not this be true also of a particular legacy or of a legacy under universal title made conjointly to two or more persons? The writer agrees, however, that where aliquot parts are assigned to the legatees, the latter are not universal legatees. The writer also agrees that if the disposition of the testatrix that the named legatees were to share equally in the legacy means that she intended to make an assignation of parts, and not to confer upon each of them individually an eventual right to the universality of her patrimony, then the decision is correct.[35]

MISCELLANEOUS

Collation

In *Jackson v. Jackson*,[36] one of the two surviving children of the deceased instituted an action against the other attacking a sale made to the latter by their father as being a donation in disguise,[37] and in the alternative, as a sale at a very low price

legacy is a testamentary disposition, by which a person gives to one person, or to *several persons conjointly*, the whole of the property which he may leave at his death, *either in actual or eventual right*." CROSS, SUCCESSIONS 204, § 140 (1891). (Emphasis added.) But the testator should not be required to express in sacramental terms that he intends to make a universal legacy. It should suffice if it is clear that he is conferring upon the legatee an eventual right to the totality. Thus, for example a legacy of the residuum after payment of particular legacies constitutes a universal legacy. Likewise, the legacy of all the disposable property of the testator would be a universal legacy because it contains in itself an eventual vocation to the whole, for it is possible that the testator may leave no forced heirs, and those who may be alive today may predecease him tomorrow, in which event the disposable quantum is equal to the totality.

35. In the opinion of the writer the important question is whether the court should adopt a *rule of construction* that the words or phrases appended to a testamentary disposition indicating how the legatees should share makes the legacy a legacy under universal title. It would seem that no matter whether the testator makes an assignation of parts, if it is his intention that the legatees should have an eventual vocation to the universality, they should be considered as universal legatees. *Cf.* Shane & Withers v. Withers' Legatees, 8 La. 489 (1835) in which a legacy of 1/3 to *A*, 1/3 to *B* and 1/3 to *C* was held to constitute a universal legacy. And see also Gregory v. Hardwick, 218 La. 346, 356, 49 So. 2d 423, 426 (1950) in which the court relying on the *Shane* case, stated: "Appropriate here is the case in our early jurisprudence of Shane and Withers v. Withers' Legatees, 8 La. 489, it having presented for consideration a will in which the testator, having no forced heirs, bequeathed to his wife and two sisters his whole estate in the proportion if one-third to each. The court held that the favored persons were universal legatees who succeeded to the whole of the estate of which the testator died possessed to the exclusion of all others. *The Withers decision has never been overruled; in fact, it has been reaffirmed numerous times.*" (Emphasis added.)

36. 175 So. 2d 360 (La. App. 2d Cir. 1965).

37. LA. CIVIL CODE art. 2444 (1870): "The sales of immovable property made by parents to their children, may be attacked by the forced heirs, as containing a

and consequently subject to collation to the extent of the advantage bestowed on the defendant.[38] The court found no reasonable basis for disagreement with the findings of the trial judge that the sale was not a donation in disguise inasmuch as the price actually paid by the defendant was in excess of one-fourth the stipulated value of the property at the time of the sale.[39] Plaintiff's alternative demand for collation was also dismissed, the court holding, in accord with prior jurisprudence,[40] that collation cannot be required until the succession to which it is due has been judicially opened.[41] The dismissal, however, was without prejudice, and the court reserved to the plaintiff his right to assert his demand at the proper time. Since the demand for collation can only be made in the succession proceedings, and since the right to demand collation prescribes in ten years from the death of the donor,[42] the right to demand collation will be lost unless the succession of the *de cujus* has been judicially opened and the demand for collation is made within ten years from the death of the *de cujus*.

Insufficiency of Succession Effects

In *Succession of Mulqueeny*,[43] the testator had left a will containing a number of particular legacies of realty, homestead, stock, and three particular legacies each of $5,000 in cash. The deceased was survived by one forced heir who had not been included in the testament. The inventory revealed that the succession assets consisted only of the realty and of the stock bequeathed in the testament, of $167 in cash, and of $9,000 in

donation in disguise, if the latter can prove that no price has been paid, or that the price was below one-fourth of the real value of the immovable sold, at the time of the sale."

38. LA. CIVIL CODE art. 1248 (1870): "The advantage which a father bestows upon his son, though in any other manner than by donation or legacy, is likewise subject to collation. Thus, when a father has sold a thing to his son at a very low price, or has paid for him the price of some purchase, for (*sic*) has spent money to improve his son's estate, all that is subject to collation."

39. The conveyance being a sale and not a donation, the fact that the vendor had reserved the usufruct for himself or that he might have divested himself of all his property without reserving enough for his subsistence, was not violative of articles 1533 and 1497, respectively, of the Civil Code.

40. Taylor v. Brown, 223 La. 641, 66 So. 2d 578 (1953).

41. That an action for collation cannot be brought before the death of the donor is a necessary consequence of the premise that a donation inter vivos retains its effect during the life of the donor and that the action can only be brought by and against forced heirs of the descending line of the donor. LA. CIVIL CODE arts. 1503, 1236 (1870).

42. Succession of Webre, 247 La. 461, 172 So. 2d 285 (1965), 25 LA. L. REV. 983 (1965).

43. 172 So. 2d 326 (La. App. 4th Cir. 1965).

United States Savings Bonds payable on the death of the deceased to one of the legatees. After removing the United States bonds from the succession assets[44] and after reducing the legacies in order to satisfy the legitime of the forced heir, the court held that since there were not sufficient assets to pay all the particular legacies, the cash legacies must fail.[45]

Identity of Legatee

In *Succession of Rome*[46] the court had no difficulty in determining from the testimony adduced at the probate of the testament, that the plaintiff was actually the person intended by the testatrix as her legatee. Where the legatee's name is not given in full, the court states, parol testimony is admissible under articles 1714 and 1715 of the Civil Code to remove the obscurity or ambiguity.[47]

THE COMMUNITY OF ACQUETS AND GAINS

*Robert A. Pascal**

PROOF OF ACQUISITION WITH SEPARATE FUNDS

The *Succession of Winsey*[1] is of more than usual interest. A wife had purchased immovables in her own name through authentic acts in which the husband had admitted the parapher-

44. Although the United States Savings Bonds were fictitiously added to the mass in order to determine the legitime of the forced heir, the court had already held that these bonds were governed by federal law and should therefore be paid to the beneficiary thereof. Succession of Mulqueeny, 156 So. 2d 317 (La. App. 4th Cir. 1963). The effect of excluding the bonds, therefore, is that they were not subject to reduction as were the other legacies, in order to make up the legitime of the forced heirs. See Free v. Bland, 369 U.S. 663 (1962).

45. LA. CIVIL CODE art. 1635 (1870): "If the effects do not suffice to discharge the particular legacies, the legacies of a *certain object must be first taken out.* The surplus of the effects must then be proportionally divided among the legatees of sums of money, unless the testator has expressly declared that such a legacy shall be paid in preference to the rest, or that the legacy is given as a recompense for services." *Cf.* Succession of Berdon, 202 La. 607, 12 So. 2d 654 (1943), 5 LA. L. REV. 519-520 (1944).

46. Succession of Rome, 169 So. 2d 665 (La. App. 1st Cir. 1964).

47. 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."

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1. 170 So. 2d 732 (La. App. 1st Cir. 1964).