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Private Law: Successions and Donations

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the insusceptibility of navigable waterbeds to private ownership argument, derived from Article 453 of the Civil Code and the famous public policy against private ownership of navigable waterbottoms.[33]

There are probably 500,000 or more acres of school or in lieu lands in Louisiana and unknown quantities of other types of land which may have been severable from state sovereignty other than by patents under the pot pourri of ancient laws on sales or grants of state lands. Undoubtedly, this poses much chance for technical deficiencies in numerous ancient state transfers, even though a large majority of school lands may have not been sold. Have our courts, in the course of protecting state titles to waterbottoms, created unreasonable headaches for dry land title examiners, and a happy hunting ground for title or lease busters? This writer trusts that our courts will understand this hazard to the public interest in stability of titles, and in any case where navigable waters are not involved, refuse to extend or reverse a regretable decision.

Given the probable paucity or antiquity of jurisprudence, and resultant uncertainty in interpreting these old laws, the unfamiliarity of the bar with their requirements for valid sales by the state, the economic cost of investigating ancient transactions, the complications of gathering and the unreliability of ancient evidence, the probable constitutional impossibility of any new prescriptive statute to quiet titles insofar as mineral rights are affected, the abundance of caution which title examiners must employ, and the simple injustice of divesting or clouding numerous long-recognized titles, there are ample policy reasons to reverse the decision, or at least not extend it to dry land titles. There are equally sound legal reasons.[34]

SUCCESSIONS AND DONATIONS

*Carlos E. Lazarus**

In *Succession of Young*,[1] and *Succession of Ramp*,[2] the court was again called upon to inquire into the nature and concept of

877 (La. App. 1st Cir. 1966), still it seems ironic that a presumption contrary to this reasoning was employed to support the state title in the *Scott* case. Moreover, the basic logic employed by Judge Tate on this point was rejected by the majority in California Co. v. Price, 225 La. 706, 74 So.2d 1 (1954).

33. *See e.g.*, Miami Corp. v. State, 186 La. 784, 173 So. 315 (1937).

34. See notes 29-33 *supra*.

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1. 205 So.2d 791 (La. App. 1st Cir. 1967).

2. 205 So.2d 86 (La. App. 4th Cir. 1967), 252 La. 600, 212 So.2d 419 (1968).

the légitime of forced heirs, and it again reasserted the proposition that a forced heir is entitled to his forced portion in full ownership, free from any charges, conditions or restrictions.[3] It suffices to read articles 1493-1496, 1498, 1502, and 1710 of the Civil Code to confirm the correctness of this pronouncement.[4] Under these articles, the forced heir's right *to inherit* the portion reserved to him by law in the inheritance of the deceased is protected and guaranteed by limitations imposed upon the faculty of making gratuitous dispositions, the reserved portion being, therefore, but the necessary consequence of these limitations. From which it follows that the légitime is a *part of the succession* which is essentially inalienable, for it is protected against gratuitous dispositions inter vivos or mortis causa, and more emphatically, because the gratuitous alienation thereof to the detriment of forced heirs is expressly prohibited. Thus, the right to the légitime has always been recognized as a right of succession, that is to say, as a right to inherit the forced portion *ab intestato*.[5]

Nevertheless, it has recently been advocated that the légitime is a *money value* that may be satisfied either in naked ownership or in usufruct.[6] This is not only contrary to the basic concepts as above summarized,[7] but there appears to be no visible basis

3. An exception is made where a usufruct is granted by law on the légitime of the forced heir, and which may be confirmed by testament. *See* LA. CIV. CODE art. 916; Winsberg v. Winsberg, 233 La. 67, 96 So.2d 44 (1957); Succession of Moore, 40 La. Ann. 531, 4 So. 460 (1888). *See also* LA. CIV. CODE arts. 1617-1624 providing for the disinhersion of forced heirs for just cause in the manner therein provided.

4. LA. CIV. CODE arts. 1493, 1494 (limiting the disposer's power of disposition to a *proportion of his property*), 1495 (providing that the donor cannot deprive the forced heirs "of the *portion of his estate* reserved for them by law"), and 1498 (forbidding the donor from disposing of the "legitimate portion"). It must be conceded that in matters of succession, the Louisiana Civil Code adopts French concepts, and it must also be recognized that under the French Code and the jurisprudence interpreting it, the reserved portion must be left to the forced heir in kind and in full ownership, and that it cannot be satisfied with a usufruct or even with a naked ownership, even if the value of the usufruct or of the naked ownership is greater than the value of the reserved portion. 11 AUBRY ET RAU DROIT CIVIL FRANÇAIS nos 679, 683 (Esmein ed. 1956); 3 COLIN ET CAPITANT, COURS ÉLÉMENTAIRE nos 1494, 1495 (Julliot de la Morandière ed. 1945); 19 DEMOLOMBE, COURS DE CODE NAPOLÉON nos 421, 426, 429 (1876); 3 RIPERT ET BOULANGER, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL DE PLANIOL nos. 1846, 1847 (1951).

5. *See* Succession of Turnell, 32 La. Ann. 1218 (1880); Clarkson v. Clarkson, 13 La. Ann. 422 (1858).

6. Yiannopoulos, *Testamentary Dispositions in Favor of the Surviving Spouse and the Légitime of Descendants*, 28 LA. L. REV. 509, 511 (1968).

7. Thus Demolombe (*op. cit supra*, note 4, No. 429, p. 425) states: "The forced heir *cannot, therefore, be forced to accept; either a right of usufruct nor a right in naked ownership;* and this even though the value of either of these rights exceeds the value of his reserved portion." Thus also Aubry & Rau (op. cit. supra, note 4, § 683, p. 34) concludes: ". . . [B]ut, as the reserved portion is due in *full ownership*, the disposer *cannot* simply leave his forced heir property either in *naked ownership or in usufruct*, even if such property includes all the property of the succession." (Emphasis added).

in the legislation to support it.[8] This assertion seems to be made on the basis of article 1499 of the Louisiana Civil Code, providing that if the deceased makes a donation of a usufruct or of an annuity the value of which exceeds the disposable portion, the forced heir has the option, either of executing the donation as made, or of abandoning to the donee the disposable portion in full ownership.[9]

It should be noted at once that although article 1499 is included in that chapter of the Code dealing with reduction of excessive donations, it actually precludes such a reduction where the donation is of such a nature that the value thereof cannot be easily or accurately ascertained, with the result that it is actually impossible to determine whether the donation has or has not exceeded the disposable portion. In such cases the law provides that the remedy of the heir is his right to exercise the alternative which best suits his convenience.[10] It should also be noted that article 1499 is limited in its application, and that it contemplates a donation of a sum of money in the nature of a usufruct or of an annuity, to be paid to the legatee, the value of which exceeds the revenues that the disposable portion could or would normally produce. It is in this sense that article 917 of the Code Napoléon, which is identical with article 1499 of the Louisiana Civil Code, is interpreted and applied.[11] In addition,

8. True it is that article 1845 of the Louisiana Trust Code provides that "an unconditional income in trust, without an interest in principal, . . . satisfies the légitime to the same extent as would a usufruct." But the difficulty is that there is nothing in the legislation nor in the jurisprudence even *suggesting* that the légitime may be satisfied with a usufruct. As a matter of fact, both the jurisprudence and the legislation clearly compel the opposite conclusion.

9. But this is precisely because the forced heir cannot, *without his consent*, be compelled to accept anything less than full ownership.

10. *Cf.* 11 AUBRY ET RAU, DROIT CIVIL FRANÇAIS no 684 *bis* (Esmein ed. 1956) ; 3 COLIN ET CAPITANT, COURS ÉLÉMENTAIRE no 1547 (Julliot de la Morandière ed. 1945) ; 3 RIPERT ET BOULANGER, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL DE PLANIOL no 2705 (1951).

11. The example given by 3 RIPERT ET BOULANGER, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL PLANIOL no 2704 (1951), is that of a succession the disposable portion of which is 400,000 francs wherein the deceased has bequeathed the sum of 30,000 francs annually, to be paid to the legatee during his life. It is obvious, he states, that the *charge imposed* on the heir of paying this legacy will exceed the revenues of the disposable portion which, if invested at 3%, will produce only 12,000 francs. But since this charge is temporary, and could terminate at any time in the near future, the law gives the forced heir the option to execute the charge or to abandon the disposable portion to the legatee.

Apparently, therefore, what is contemplated is not a double disposition of usufruct and of naked ownership in which the legatee of the usufruct becomes a usufructuary in the ordinary sense of the word, but only a single disposition of a fixed sum of money in the nature of a usufruct to be paid periodically to the legatee thereof during his life in amounts which exceed the revenues of the disposable portion. A literal interpretation of the article would so indicate, for it provides that if the donation "be of *a usufruct*, orof *an annuity*," the value of which exceeds the disposable portion . . . " Obviously, where the donor disposes of the usufruct of all

article 1499 can apply only if the disposable portion is given to the forced heir at least in naked ownership. It goes without saying that the forced heir would not be able to exercise his option of *abandoning* the disposable portion in full ownership to the legatee of the usufruct had the deceased disposed of the same or of a portion thereof in favor of others. And this, it seems, is precisely the very raison d'être of article 1499: Although the donor may not impose any charges or conditions on the *légitime*, he can always dispose of the *disposable portion* subject to any valid charges or conditions he may care to impose,[12] which the heir is always free to accept or renounce.[13] For example, the donor could make to this forced heir an additional legacy of the disposable portion of his property (or the naked ownership thereof) on condition that the heir take his légitime burdened with a usufruct, giving him the right to elect whether he will accept the bequest of the disposable portion with the charge on the légitime, or take his légitime in full ownership, but without the disposable portion.[14] And this is precisely what the law provides may be done under article 1499, but which is quite the opposite from requiring the forced heir to accept naked ownership against his will in satisfaction of his légitime. In sum, all that article 1499 provides is that, under certain circumstances, the forced heir may elect between his légitime in full ownership, or his légitime in naked ownership plus the disposable portion, subject to a right of usufruct thereon. And this makes sense, for a donation of usufruct is temporary, not permanent, and there may be instances in which it would be to the best advantage of the forced heir to accept naked ownership *temporarily*, in exchange for full and perfect ownership of the entire inheritance at the end of the usufruct.

Thus it is clear that article 1499 is exceptional in nature, and for that reason, if for no other, cannot be extended by implication and applied in reverse, as it were, as it has been suggested.[15] The same considerations are not present where the

his property, such a disposition exceeds the revenues that the disposable portion could normally produce.

12. LA. CIV. CODE arts. 1496, 1501, 1527.

13. LA. CIV. CODE arts. 946, 976, 977.

14. *See* 19 DEMOLOMBE, COURS DE CODE NAPOLÉON nº 430 (1876).

15. *See* Note, 41 TUL. L. REV. 210, 216, (1968). *But see* Succession of Williams, 184 So.2d 70, 73 (La. App. 4th Cir. 1966), noted in 27 LA. L. REV. 423, 449 (1967), in which the court states: "Article 1493 ... means that the child is entitled to one-third of the *property* of the disposer (not one-third of the *value* of such property) as a forced portion of which he cannot be deprived, and we know of no law which declares, or jurisprudence which holds, that the child's forced portion ... may be ... satisfied ... by the bequest to him of the usufruct of the estate...."

donation is a donation of naked ownership instead of a donation of a usufruct or of an annuity. It must be noted that whereas article 1499 may be in derogation of the principle that no charges or conditions may be imposed on the légitime, the condition is one imposed by the law itself, and results only in a temporary diminution of the forced heir's *right of enjoyment,* in exchange for the total inheritance at an undeterminable future date, whereas the reverse would impose a *permanent* diminution of his right, even if only partial, in exchange for nothing at the termination of the usufruct.

It should further be noted that at most, article 1499 only gives the forced heir the option of executing the donation as made, *reserving to him the right to demand* his légitime in full ownership if he so desires; article 1499 does not bestow any such alternative right on the donor or testator.

In *Succession of Young,* the testator bequeathed all his property to his daughter by a prior marriage, subject to the usufruct in favor of his second wife and widow. The court concluded that under the plain provisions of article 1752[16] regulating donations between spouses, the bequest to the widow was excessive and that it should be reduced to the usufruct of the disposable two-thirds of the testator's property.[17] The widow's contention that she was entitled either "to the usufruct of all the . . . property or to the disposable portion in *naked* (sic) ownership," was rejected.[18]

16. LA. CIV. CODE art. 1752 (as amended by La. Acts 1916, No. 116): "A man or woman who contracts a second or subsequent marriage, having a child or children by a former marriage, can give to his wife, or she to her husband, either by donation inter vivos or by last will and testament, in full property or in usufruct, all of that portion of his estate, or her estate, as the case may be, that he or she could legally give to a stranger."

17. Under the Civil Code, donations between spouses were no different from donations between other persons, except where the donor had children by a prior marriage, in which case the disposable portion was originally fixed at a child's portion *in usufruct only,* not to exceed 1/5 of the donor's estate. LA. CIV. CODE arts. 1746, 1752 (as originally enacted). In 1882, this portion was increased to 1/3 of the donor's property which could be given either in usufruct *or in full ownership.* LA. CIV. CODE art. 1752, as amended by La. Acts 1882, No. 13. As last amended by La. Acts 1916, No. 116, article 1752 *increases* the disposable portion under such circumstances to the portion that can be legally given to a stranger, which portion can be given either "in full property or in usufruct." This phrase is a remnant of the legislation as first enacted, and is now apparently inconsequential for it merely gives the donor the right of doing what he has the faculty of doing anyhow, that is, of disposing of the disposable portion in any manner he sees fit. It is evident, therefore, that it no longer makes any difference whether the donor has children by a prior marriage, or whether the disposition is made to a spouse or to a stranger. The disposable portion will always be the same in all cases and is limited only by the provisions of articles 1493 and 1494.

18. This contention was made on the authority of Succession of McLellan, 144 So.2d 291 (La. App. 4th Cir. 1962). In that case, however, the deceased had

In *Succession of Ramp,* the testator died survived by his third wife, four children of a second marriage, and a child of a first marriage, leaving a will in which he bequeathed the usufruct of all his property to his widow, and "the forced portion of my estate to all my children share and share alike, subject to the usufruct in favor of my wife." The four children of the second marriage attacked the will alleging testamentary incapacity, following which, a compromise agreement was entered into between the plaintiffs and the executrix whereby the plaintiffs agreed: (1) to dismiss the action of nullity, (2) to accept the succession of their father in accordance with the terms of the testament (thereby renouncing their légitime), and (3) to make no further opposition to the will on any grounds. Subsequently, in answer to a rule filed by the executrix to show cause why the legatees should not be sent into possession in accordance with the will, the children of the decreased filed an opposition alleging the dispositions of the will impinged upon their légitime. The court of appeal held that but for the compromise agreement, the four forced heirs of the second marriage would be entitled to their forced portion free of the usufruct in favor of the widow.[19] It concluded, however, that the agreement was in effect a partition of the succession and as such, null for lesion beyond one-fourth, under article 1402 of the Civil

bequeathed to the surviving spouse the usufruct of all his property plus *the disposable portion* of his estate which consisted solely of his one-half interest in the community formerly existing between him and his surviving widow. Thus, in effect, the bequest to the widow consisted of the *disposable portion in full ownership,* plus the usufruct of the légitime of the forced heirs, which was reduced insofar as this usufruct was concerned, and the widow was awarded the disposable portion in full ownership, apparently in accordance with the expressed intention of the testator. In ordering the reduction, however, the court used language indicating that the widow was entitled to "the usufruct of the property or to the disposable portion in naked ownership, but not both," which gives rise to the confusion. It is clear that the same result would have been reached by the simple application of article 1710 of the Civil Code, and that there was no need for the application of article 1499 since the disposable portion had already been bequeathed to the widow in full ownership, and all the forced heir was claiming was his légitime free of the usufruct given to the widow. *Cf.* Yiannopoulos, *Testamentary Dispositions in Favor of the Surviving Spouse and the Legitimate Descendants,* 28 LA. L. REV. 509, 526 (1968).

19. "The law is well settled and all parties hereto agree, that in the absence of a valid agreement to the contrary, an heir is entitled to receive his forced portion free of any usufruct whatsoever, with the exception of the usufruct of the surviving spouse provided for in Article 916 of the Civil Code. It is clear in this instance, however, that Article 916 is not applicable, and it is conceded by all of the litigants that the heirs of the decedent by his second marriage would be entitled to their forced portion free and clear of the executrix's usufruct, if they had not signed and homologated the agreement referred to hereinabove." Succession of Ramp, 205 So.2d 86, 89 (La. App. 4th Cir. 1967). After the opening of the succession, the forced heir is free to renounce his inheritance altogether, and therefore there is no reason why the plaintiffs in the above case could not have validly renounced their rights to their légitime. LA. CIV. CODE arts. 946, 976, 977.

Code.[20] The Supreme Court, although affirming the result reached by the court of appeal, held that the agreement was what it purported to be, namely, a transaction or compromise, but that, as such, it was void to the extent of the renunciations by the four forced heirs of their right to demand their légitime in full ownership, these renunciations not being responsive to the real intention of the parties.[21]

In both of these cases, therefore, the principle that the forced heir is entitled to his légitime in full ownership, free from any charges, conditions, or restrictions is clearly illustrated. Granting that in *Young* the provisions of article 1499 of the Civil Code might have been invoked,[22] nevertheless it is clear that the forced heir could not have been required to accept anything less than full ownership in satisfaction of his légitime.

The principle above discussed was also impliedly recognized in *Succession of Mulqueeny*.[23] In that case, pursuant to a prior Supreme Court decree ordering reduction of excessive legacies of homestead stock to satisfy the légitime of forced heirs, a final account was filed by the executrix showing these reductions. The plaintiff opposed the account, however, on the grounds that it failed to include the revenues accruing on that portion of the stock which formed part of the plaintiff's légitime, alleging she had become the owner thereof from the moment of the death of the *de cujus*.[24] Citing article 1515, the court of appeal ordered the executrix to restore to the plaintiff the dividends accruing

20. "In any event, the agreement obviously divided and partitioned the succession property in a manner different from that enunciated in the law of forced heirship. Under these circumstances, it is evident that the 'compromise agreement' is subject to rescission for lesion beyond one-fourth in conformity with the rationale emanating from Article 1402 of the Civil Code." Succession of Ramp, 205 So.2d 86, 90 (La. App. 4th Cir. 1967).

21. "This, then, is not a compromise between a legatee and some of the heirs, but it is simply a compromise by the succession through its representative of a suit and claim of some of the forced heirs. The compromise must therefore be reformed in order to effect the real intention of the parties as required under Article 3073 of the Civil Code." 212 So.2d 423-424 (La. 1968).

22. It should be noted that article 1499 gives the option to the *forced heir*, and not to the legatee, and that this option may be exercised only under the limited circumstances contemplated therein. Thus, it would seem that before article 1499 can apply, it would first be necessary to establish the intention of the disposer by reference to the testamentary dispositions, for if the testator intended to alienate or to burden only the disposable portion, there would be no occasion for the application of the article. *Cf.* Succession of McLellan, 144 So.2d 291 (La. App. 4th Cir. 1962).

23. 207 So.2d 216 (La. App. 4th Cir. 1968), *cert. granted*, 251 La. 1079, 208 So.2d 536 (1968).

24. "Applying the civil law doctrine of *le mort saisit le vif*, she claims that these revenues should be distributed to her as forced heir to the succession, and she prays that the final account should allow her to receive approximately 70% of the revenues. . . ." *Id.* at 217.

to the proportionate share of the stock which formed part of the forced portion of the plaintiff, and rejected the defendant's contention, based on article 1921 of the Louisiana Code of Civil Procedure, that no interest was due. Of course, the reason for article 1515 of the Civil Code is that the forced portion descends to the forced heir in full ownership *ab intestato* and he is therefore entitled to it with all the fruits accruing thereto since the death of the *de cujus*.[25]

OBLIGATIONS

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In *Minyard v. Curtis*,[1] the Housing Authority of New Orleans (HANO) entered into a contract with Pittman Construction Company for the construction of a certain section of the Desire Street Housing Project. For this purpose Pittman entered into a subcontract with Minyard whereby the latter undertook the obligation of applying caulking materials according to the terms of the general contract between Pittman and HANO. Under this subcontract, Minyard was to receive $3,000 for the work and for furnishing the materials; it is noteworthy that this agreement restated the portions of the general contract which were pertinent to the required application of caulking materials.

In order to comply with the terms of the subcontract, Minyard chose a caulking compound manufactured by Plastic Products, Inc., and distributed by a subsidiary corporation, Plastoid Products Company. A sample of this material was submitted to HANO's architects, and in transmitting to Pittman the results of the chemical and physical analysis of the compound, Minyard endorsed the properties of it and guaranteed it would comply with the specifications.[2]

Upon approval of the sample, Minyard started the caulking work, but the chosen compound did not behave according to expectations. On January 26, 1955 the clerk-of-the-works complained in writing to Pittman that "the caulking used is pulling away from wood, brick, aluminum and iron and does not

25. LA. CIV. CODE art. 1515: "The donee restores the fruits of what exceeds the disposable portion only from the day of the donor's decease, if the demand of the reduction was made within the year; otherwise from the day of the demand."

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1. 251 La. 624, 205 So.2d 422 (1967).

2. *Id.* at 631, 205 So.2d at 425.