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Private Law: Successions and Donations

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questioned. Of course, common law may be perfectly competent to give remedies in most matters of tort law, but so is the civil law. Apart from the relevance of article 667 in the field of civil responsibility in general, one ought to consider its relevance in cases regarded as matters of "nuisance" in common law jurisdictions. If the intention of the majority opinion of the supreme court were to facilitate adoption of the common law of nuisance, additional questions arise as to the advisability of the court's action. The law of nuisance is perhaps the least developed branch of the common law of torts.[111] Wholesale adoption of the common law of nuisance, therefore, may not be in the best interests of Louisiana.

SUCCESSIONS AND DONATIONS

*Carlos E. Lazarus**

SUCCESSIONS

Transmission Upon Death

In *Succession of Willis v. Martin*[1] some two weeks after the death of Olan Willis, his daughter Audry, as his sole surviving heir, sold two lots formerly belonging to the deceased. This suit was instituted by the vendees to traverse the descriptive list filed by the administratrix in the succession of Olan, and to remove therefrom the two lots which were listed by the administratrix as forming part of the estate of the deceased. Although the court admitted that the property of the deceased was transmitted to the heir by operation of law, and that the heir could validly convey his interest therein, the vendee, the court stated, held

111. *See* W. PROSSER, TORTS § 87 at 592 (3d ed. 1964): "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition. Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem; . . . there has been a rather astonishing lack of any full consideration of 'nuisance' on the part of legal writers. It was not until the publication of the Restatement of Torts in 1939 that there was any really significant attempt to determine some definite limits to types of tort liability which are associated with the name."

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1. 228 So.2d 732 (La. App. 3d Cir. 1969), *cert. denied*, 225 La. 244, 230 So.2d 93 (1970).

that interest subject to the claims of creditors and, therefore, the property should remain on the descriptive list pending the administration of the succession.

The writer has difficulty with this holding. If the heir becomes owner of the property of the deceased immediately upon the death of the latter,[2] and if the act of the heir in selling the succession property constitutes an unconditional acceptance by the heir which renders him personally liable for all the debts of the deceased,[3] and if, as the court admitted, the heir could validly convey his interest, nay, his ownership, to the vendee, there seems to be no valid reason why the purchaser from the heir should be divested of title, particularly where the heir, by his unconditional acceptance, has made himself legally and personally responsible to the succession creditors for all debts of the deceased.

DONATIONS INTER VIVOS

Donations Omnium Bonorum or with Reservation of Usufruct

Article 1533 of the Louisiana Civil Code permits the donor to dispose of the usufruct of the thing given in favor of another, but he is expressly prohibited from reserving it for himself. This article was recently applied in *Taylor v. Spencer*,[4] where the plaintiffs, collateral heirs of the "vendor," sought to declare null a sale of a twenty-acre tract of land by the deceased eleven years prior to her death on the grounds that the recited cash consideration of $750 had never been paid and that, therefore, the conveyance was simply a donation which was void for the reason that the "vendor" had expressly reserved the usufruct to herself in direct contravention of the express prohibition contained in that article. In affirming the judgment in favor of the plaintiffs, the court simply followed what seems to be a well established jurisprudential rule that in such cases, the transaction is radically null, and that any party in interest may institute an action to

2. LA. CIV. CODE art. 1292: "When a person, at his decease, leaves several heirs, each of them becomes an undivided proprietor of the effects of the succession, for the part or portion coming to him, which forms among the heirs a community of property, as long as it remains undivided." *See also* LA. CIV. CODE arts. 940 and following.

3. LA. CIV. CODE arts. 989, 992, 1013.

4. 225 So.2d 98 (La. App. 2d Cir. 1969).

annul the transaction since it is not limited to the forced heirs or creditors of the donor.[5]

Under the corresponding articles in the Louisiana Civil Code of 1808 and the Code Napoléon, the donor was expressly *permitted* to reserve the usufruct for himself,[6] and provision was made for the imputation of such a donation, when made in favor of the heirs in the descending line, to the disposable portion of the donor.[7] Although the redactors of the Code of 1825 retained this latter provision as article 1487 of that Code (which was carried over into the 1870 Code as article 1500 thereof), they nevertheless elected to prohibit the donor from retaining the usufruct for himself because they feared that "[the] reservation of the usufruct in favor of the donee (sic) [donor] 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."[8]

In view of the recordation laws generally, and in particular the provisions of article 1554 of the Louisiana Civil Code of 1870 requiring the recordation of donations of immovables in order to affect third persons, the writer suggests that the fears of the redactors are no longer warranted, and that perhaps article 1533 should be restored to its original version.

In *Magee v. Stacy*[9] plaintiffs sued to set aside a purported sale of their entire property to the defendants, alleging that the recited price was not paid, that the sale was in effect a donation in disguise, and that as such, it was null under the provisions of

5. *See* Byrd v. Byrd, 230 La. 260, 88 So.2d 214 (1956) and cases cited therein; Heintz v. Gilber, 140 So.2d 518 (La. App. 1st Cir. 1962), noted in *The Work of the Louisiana Appellate Courts for the 1961-1962 Term—Successions and Donations*, 23 LA. L. REV. 266, 272-74 (1963).

6. La. Digest of 1808, bk. 3, tit. 2, art. 50 at 20: "The donor is *permitted* to reserve for his own advantage, or to dispose for the advantage of any other person, of the usufruct or enjoyment of the immovable property given." (Emphasis supplied.)

FRENCH CIV. CODE art. 949: "Il est permis au donateur de faire la réserve à son profit, ou de disposer au profit d'un autre, de la jouissance ou de l'usufruct des biens meubles ou immeubles donnés."

"The donor is permitted to reserve for his own advantage, or to dispose for the advantage of any other person, of the enjoyment or usufruct of the movable or immovable property given." (Author's translation.)

7. La. Digest of 1808, bk. 3, tit. 2, art. 24 at 214; FRENCH CIV. CODE art. 918.

8. 1 LOUISIANA LEGAL ARCHIVES, PROJET 209 (1937).

9. 223 So.2d 194 (La. App. 3d Cir. 1969).

article 1497 of the Louisiana Civil Code which prohibits a person from making gratuitous dispositions of his property without reserving enough for his subsistence.[10] Finding that no consideration was in fact paid by the defendants and that the transaction was a donation *omnium bonorum*, the court properly declared the same null by application of article 1497.

Unlike the other articles of this title in the Louisiana Civil Code, the sources of which are easily traceable to the provisions of the Code Napoléon, article 1497 was evidently taken from Spanish sources, making its first appearance in the Code of 1825, as article 1848 of that Code,[11] upon the following recommendation of the redactors: "We propose to re-establish this wise disposition which before existed and which the Code [of 1808] had abolished, wherefore we have not learned."[12]

In *Lagrange v. Barre*,[13] decided in 1845, the court, referring to Febrero and other Spanish commentators, stated that the reasons for the prohibition were, among others, that the donor would be left without the things necessary for his maintenance, that he would thus deprive himself of the right to make a testament, that the occasion could arise that the donee would plot the death of the donor with the view of taking possession of his property as soon as possible and that it was against public policy for the donor to render himself impecunious. The court concluded, therefore, that such a donation was invalid, even though made subject to the obligation of the donee to support the donor during his natural life.[14]

In view of the positive language of article 1497 (although seemingly at variance with the provisions of article 1500 of the Louisiana Civil Code which, at least impliedly, appear to permit

10. LA. CIV. CODE art. 1497: "The donation *inter vivos* shall in no case divest the donor of all his property; he must reserve enough for subsistence; if he does not do it, the donation is null for the whole."

11. The redactors indicated the source to be the Recopilacion de Castille, bk. 5, tit. 10, law 8. *See* 1 LOUISIANA LEGAL ARCHIVES, PROJET 209 (1937). *See also* Lagrange v. Barre, 11 Rob. 302 (La. 1845), which appears to be the leading case on the subject and in which other Spanish source references are given.

12. 1 LOUISIANA LEGAL ARCHIVES, PROJET 209 (1937).

13. 11 Rob. 302 (La. 1845).

14. *Id.* at 310. "It is perfectly clear from these authorities, that the mere obligation on the part of the donee to support the donor is not sufficient to make a donation *omnium bonorum* valid, and as they are in accordance with our laws on this subject, we feel no hesitation in adopting the same doctrine."

the donor to make a donation "for an annuity for life")[15] the decision in the *Stacy* case is clearly correct. Several questions, however, may arise in connection with this article. Aside from the proposition that the donor himself may bring the action of nullity, should anyone else be permitted to do so? The supreme court has held that the action may not be brought by the collateral heirs of the donor even after his death, the right to invoke the nullity being personal to, and dying with, the donor.[16] But in *Succession of Turgeau*[17] the court concluded: "We are... of the opinion that the right of attack after the death of the de cujus is of a personal character and that *only forced heirs can urge the ground to the extent of their legitime.*"[18] (Emphasis supplied.)

If this is true, then the action of the forced heirs, instituted after the death of the deceased (for no action can be instituted during the life of the donor, unless it is by the donor himself) is an action for the *reduction* of an excessive donation, and not an action of nullity. It would also appear that what the supreme court said in *Bernard v. Noel*, that the "nullity declared by article 1497 of the Civil Code is absolute only relatively to the particular persons in whose special interest it was passed,"[19] namely, in the interest of the donor himself, is more apt to be correct.

TESTAMENTARY DISPOSITIONS

Capacity

Succession of McGowan[20] was a suit to declare the testament of the *de cujus* null on the ground that at the time it was confected, the testatrix was mentally incompetent due to her habitual and excessive use of alcohol. Although there was testimony tending to prove that the testatrix used alcohol in excessive quantities, the court pointed out that "it is *acceptable* to look into the testamentary capacity of an individual *prior* to, at the *time* of, and *after* the execution of a last will and testament to determine and draw a conclusion as to the condition of the testator or testatrix at the exact moment that the last will is exe-

15. LA. CIV. CODE art. 1500.
16. Bernard v. Noel, 45 La. Ann. 1135, 13 So. 737 (1893).
17. 130 La. 650, 58 So. 497 (1912).
18. *Id.* at 655, 58 So. at 499.
19. 45 La. Ann. 1135, 1137, 13 So. 737, 738 (1893).
20. 234 So.2d 466 (La. App. 1st Cir. 1970).

cuted,"[21] (emphasis supplied) and concluded, as did the trial judge, that the evidence as a whole was insufficient to declare the testatrix incapable at the time of confection.

In *Rivette v. Moreau*[22] an appeal was taken from a summary judgment decreeing the statutory will of the testatrix an absolute nullity on the grounds that she was unable to read at the time of its execution. In view of the conflicting evidence in the record on this important issue of fact,[23] the appellate court correctly reversed the lower court, holding that it was error to grant a motion for summary judgment in such circumstances.

Form—Statutory Will

As has been previously stated, it should not be too difficult for a competent notary to observe and to comply properly with the simple and comparatively few requirements for the confection of a statutory will, particularly in view of the permissiveness of the statute regarding the attestation clause and the fact that the statute itself suggests the form to be used.[24] Yet, the question as to whether these simple formalities have been observed continues to be a source of litigation. Briefly, these formalities are as follows: the will must be in writing and signed by the testator on each page in the presence of the notary and the witnesses, after the testator has *signified* to them that the instrument is indeed his last will and testament; the notary and the witnesses must sign their names at the end of the dispositive provisions in the presence of each other; these facts must then be *evidenced in writing* in the act of superscription or attestation clause in the form suggested by the statute, as follows:

"Signed on each page . . . and declared by the testator

21. *Id.* at 467. The legislation and the jurisprudence are to the effect that capacity to make a will is tested *as of the time the will is executed.* LA. CIV. CODE art. 1472; Succession of Heineman, 172 La. 1057, 136 So. 51 (1931); Hennessey's Heirs v. Woulfe, 49 La. Ann. 1376, 22 So. 394 (1897); Kingsbury v. Whitacker, 32 La. Ann. 1055 (1880). In the *Hennessey* case, *supra*, the Supreme Court of Louisiana held that on an inquiry into the testamentary capacity of the testator as affected by drink, the test is sobriety at the time of execution. If this is true, it would seem that evidence of incapacity *prior* to and *after* the confection of the testament would be irrelevant.

22. 225 So.2d 762 (La. App. 3d Cir. 1969).

23. Medical testimony to the effect that the testatrix was blind for all practical purposes and that her eyesight would not improve, as against depositions of the notary and other witnesses that the testatrix was able to read at the time the will was executed.

24. *See The Work of the Louisiana Appellate Courts for the 1962-1963 Term—Successions and Donations*, 24 LA. L. REV. 184, 186 n. 7 (1964).

above named, in our presence to be his last will and testament, and in the presence of the testator and each other we [the testator, the notary and the two witnesses] have hereunto subscribed our names on this —— day of ———, 19——."

In *Succession of Reeves*[25] the attestation clause indicated that the testator had in fact declared that the instrument was his last will and since it was subscribed by the testator, the notary, and the witnesses, the court upheld the validity of the will after concluding that it had actually been executed in accordance with the statutory formalities.[26]

A similar question arose in *Succession of Morgan*[27] where the attestation clause was simply as follows:

"This will has been signed on each page by the Testatrix CLARICE VEAL MORGAN, after due reading of the whole, in our presence, to be her last will and testament, and in the presence of the testatrix and each other, we the undersigned Notary Public and witnesses and the Testatrix have hereunto subscribed our names on this the 14th day of June, 1967, at New Orleans, Louisiana."

The will was declared null on the grounds that the act of superscription did not evidence that the testatrix signified to the notary and the witnesses that the instrument was her will.

A more serious question was presented in *Succession of Gordon*,[28] also involving a statutory will, in which the date in the attestation was simply "October _____, 1966." In the opinion of this writer, the court of appeal correctly held the will invalid for lack of a date. The statute itself[29] leaves no doubt that in order to be valid, the statutory will must be drawn in substantial conformity with the form established by the statute, among which is the requirement that the will show the day, month, and year, in which it was executed.

25. 224 So.2d 502 (La. App. 3d Cir. 1969).

26. *Id.* at 504: "In our opinion, the attestation of this will adequately evidences in writing that the statutory formalities have been complied with. The attestation by the testator alone includes certification that the statutory formalities of execution were complied with. This attestation is above the signatures of the testator, the notary, and the witnesses. This is all that the statute requires of the attestation."

27. 230 So.2d 323 (La. App. 4th Cir. 1970), *cert. granted*, 255 La. 807, 233 So.2d 247 (1970).

28. 233 So.2d 54 (La. App. 2d Cir. 1970), *cert. granted*, 235 So.2d 950 (La. 1970).

29. LA. R.S. 9:2442 (1952), *as amended* by La. Acts 1964, No. 123, § 1.

It appears, however, that the defendants cited French authority in support of their contention that only an olographic will need be dated. The reference is to 10 *Aubry et Rau*, 3 *Civil Law Translations* section 671, page 168 (West, 1969), where it is stated that it is not generally necessary that a mystic will be dated. But the evident reason for this, as the authors themselves indicate, is that such a will is incomplete until the act of superscription is executed. Such an act must bear a date simply because it is a notarial act governed by the law of 25 *Ventôse An XI*, which is incorporated by reference into the Civil Code of France. Aubry and Rau say:

> "1. The form of testaments consists in the *aggregate* of the formalities prescribed by law for the validity of declarations of last will.
>
> "The Civil Code contains all the rules pertaining to the form of olographic testaments and of acts intended to be converted into mystic testaments. It also contains quite a number of provisions relative to the form of testaments by public act and of acts of superscription of mystic testaments. But, as these provisions do not constitute a *complete system* of legislation on the subject matter, they *must be combined* with those of the law of 25 *Ventôse An XI*, on the redaction of notarial acts in general, and both *must be observed simultaneously* . . . . "[30]
>
> "On the formalities of public testaments the Civil Code *does not contain a complete system of special legislation.* The purpose of the provisions of the Code in subjecting these testaments to particular formalities is generally to surround them with *more solemnities* than ordinary notarial acts. It results that the general rules established by the law of 25 *Ventôse An XI* on the formalities of notarial acts, must be observed in the public testament, unless the Code derogates therefrom by provisions distinctly contrary thereto. From this principle flow, among others, the following consequences:
>
> "Public testaments must, *under pain of nullity* be dated and make mention of the place where they are made . . . ." (Emphasis supplied.)[31]

30. 10 AUBRY ET RAU, DROIT CIVIL FRANÇAIS § 664 (6th ed. 1954) in LAZARUS, 3 CIVIL LAW TRANSLATIONS § 664 at 127 (1969).

31. *Id.* § 670 at 155.

It is true that the only article in the Code Napoléon that requires a date on a will is article 970, prescribing the formalities for the olographic testament. But in view of the above, the reason is clear: provision for a date had to be made because the olographic will was not governed by the laws of *Ventôse* referred to above.

It would appear that the failure of the Louisiana Civil Code to make provision for the date in wills other than the olographic will is due to the fact that these articles were taken from the French articles which, as noted, were silent on the subject. But this inadvertence is not grounds for saying that only the olographic will need be dated. As the court points out in the instant case, there are very strong reasons why a date is necessary in *all* wills.

But all this is extraneous to the question presented for adjudication in the *Gordon* case, for there is no mistake or ambiguity in requiring a complete date for validity thereof in the legislation pertaining to the statutory will.

TORTS

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NEIGHBORING LANDOWNERS—DANGEROUS ACTIVITIES

The Round Trip Excursion to Article 667 and Return

> "Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him." Louisiana Civil Code article 667.

The basic nature of the obligation imposed by Louisiana's anomalous Civil Code article 667 together with the proper ambit for the operation of that article has been the subject of lively debate among law writers for the past twenty-five years.[1] One

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1. *See, e.g.*, the discussions of Professor Joseph Dainow in faculty symposia on the Work of the Louisiana Supreme Court—Torts: 8 LA. L. REV. 236 (1948), W. MALONE and L. GUERRY, STUDIES IN LOUISIANA TORTS LAW 452 (1970); 11 LA. L. REV. 179 (1951), W. MALONE and L. GUERRY, STUDIES IN LOUISIANA TORTS LAW 456 (1970); 26 LA. L. REV. 466 (1966), W. MALONE and L. GUERRY, STUDIES IN LOUISIANA TORTS LAW 456 (1970); 27 LA. L. REV. 438 (1967), W. MALONE and L. GUERRY, STUDIES IN LOUISIANA TORTS LAW 460 (1970). The present writer has similarly held forth on the article in the same series of