

# Applicability of Article 1592 to the Statutory Will

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775. Article 775<sup>29</sup> specifies those situations in which a mistrial may be declared without breaching the guarantee against double jeopardy. These situations are essentially the same as those which the United States Supreme Court has traditionally held to justify the declaration of a mistrial without the defendant's consent. In light of the restricted interpretation of "manifest necessity" applied in *Jorn*, article 775 should cover virtually every situation in which a mistrial can validly be declared.<sup>30</sup> It should be noted, however, that article 775 must necessarily be read in light of the "manifest necessity" requirement of *Jorn*, the latter obviously controlling should there be a conflict between the two.

*Carl Grant Schlueter*

#### APPLICABILITY OF ARTICLE 1592 TO THE STATUTORY WILL

A statutory will, which named the plaintiff the universal legatee, was declared formally invalid on the ground that the plaintiff had acted as one of the two attesting witnesses, contrary

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29. *Id.* art. 775: "A mistrial may be ordered, and in a jury case the jury dismissed, when:

"(1) The defendant consents thereto;

"(2) The jury is unable to agree upon a verdict;

"(3) There is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law;

"(4) The court finds that the defendant does not have the mental capacity to proceed;

"(5) It is physically impossible to proceed with the trial in conformity with law; or

"(6) False statements of a juror on voir dire prevent a fair trial.

"Upon motion of a defendant, a mistrial shall be ordered, and in a jury case the jury dismissed, when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized by Article 770 or 771.

"A mistrial shall be ordered, and in a jury case the jury dismissed, when the state and the defendant jointly move for a mistrial."

30. The categories of article 775 provide certainty in the existing guidelines as to ordering a mistrial, but the inflexible nature of this article may pose problems. One such problem is that it is impossible to define all of the circumstances in which it may become necessary to declare a mistrial without the consent of the defendant. Thus there may arise situations in which it would be advisable to declare a mistrial without the defendant's consent, yet which may not fit into any of the circumstances listed in Article 775. In such an event a mistrial would be invalid under article 775, and article 591 would preclude retrial for the offense.

One such situation which article 775 would not cover is when a mistrial must be declared without the defendant's consent due to prejudicial conduct within or without the courtroom. It is well settled that bias and prejudicial conduct may justify a mistrial in certain circumstances, yet article 775 states that such a mistrial may be declared only upon motion of the defendant.

to Louisiana Civil Code article 1592.<sup>1</sup> The plaintiff did not appeal from this judgment but subsequently brought suit for damages against the attorney who had confected the will. The district court dismissed the suit on exception of no cause of action. In remanding the case, the Court of Appeal for the Fourth Circuit held, article 1592 does not apply to statutory wills, and the will was therefore valid. *Woodfork v. Sanders*, 248 So.2d 419 (La. App. 4th Cir. 1971), *cert. denied*, 252 So.2d 455.

The Civil Code of 1870 presents an integrated scheme by which all dispositions *mortis causa* are to be governed. This scheme charts rules of general applicability representing public policy considerations pertinent to testamentary dispositions<sup>2</sup> and, more explicitly, enumerates the formal requirements for each of the four types of wills established therein.<sup>3</sup> Included in the general rules are the articles which create attestative incapacities for certain groups of persons, *i.e.*, disqualifications which affect them without regard to the type of testament they seek to witness.<sup>4</sup> Article 1592, read together with the exception contained in article 1593 concerning mystic testaments, establishes the sole relative incapacity with regard to attestation.<sup>5</sup>

The purposes of requiring witnesses to a will are both to assure faithful compliance with the legal requisites and to have available, if necessary, persons capable of testifying as to what transpired in their presence.<sup>6</sup> In pursuance of these policy goals, the Louisiana courts gave early recognition to the importance of maintaining the standards of attestative competence prescribed

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1. LA. CIV. CODE art. 1592 provides: "Neither can testaments be witnessed by those who are constituted heirs or named legatees, under whatsoever title it may be."

2. See, *e.g.*, *id.* arts. 1572, 1573, 1595.

3. *Id.* arts 1574-1589. See Note, 15 LOYOLA L. REV. 362 (1969).

4. LA. CIV. CODE arts. 1591-1593.

5. 21 DEMOLOMBE, COURS DE CODE NAPOLÉON, TRAITÉ DES DONATIONS ENTRE-VIFS ET DES TESTAMENTS IV, n° 198 (1878).

6. 3 AUBRY ET RAU, CIVIL LAW TRANSLATIONS no. 670 (La. St. L. Inst. transl. 1969). That witnesses to the statutory will are expected to fulfill substantive duties is indicated by LA. CODE CIV. P. art. 2887, which concerns probate procedures. Under its provisions, the available witnesses are required to swear to the fact of signature by the testator. Moreover, the importance of attestative witnesses under the statutory scheme has recently been recognized in *Succession of Reeves*, 224 So.2d 502, 504 (La. App. 3d Cir. 1969): "We conclude, therefore, that the principal function of the witnesses is to provide a source of proof that the testator signed what he formally indicated to be his testament." (Court's emphasis.)

by the Code.<sup>7</sup> Strict observance of article 1592 has seemed especially advisable in view of the inadmissibility of proof of captation in an action to void a testamentary disposition.<sup>8</sup>

Articles 1591-1593 must be read, however, as exceptions to the general rule of full capacity declared by the Code.<sup>9</sup> For this reason the courts have applied them with great circumspection.<sup>10</sup> Exemplary of the narrowness with which they have been interpreted is the judicial construction of article 1592, whose ban the courts have refused to extend so as to include relatives of the legatee.<sup>11</sup> Furthermore, the jurisprudence is to the effect that the mere presence of the legatee at the confection of the will does not, for that reason alone, render it null.<sup>12</sup>

In 1952, a new type of will, enacted as R.S. 9:2442-2443, was injected into Louisiana's self-contained plan of testamentary order. The so-called statutory will, which traces its origin to the English Statute of Frauds of 1677,<sup>13</sup> introduced into Louisiana a simplified procedure for drawing up a testament.<sup>14</sup> Regret has been expressed that the new type of will was not made explicitly subject to the Code's regime;<sup>15</sup> however, the Louisiana Supreme Court had indicated in at least one instance that, where the stat-

7. *See* *Hebert's Heirs v. Hebert's Legatees*, 11 La. 361, 365 (1837): "This wise precaution, and strongest barrier which the law interposes for the protection of the testator, would be vain and nugatory if the witnesses were incompetent to the trust they were called to fulfill."

8. LA. CIV. CODE art. 1492 provides: "Proof is not admitted of the dispositions having been made through hatred, anger, suggestion or captation." *See* *Succession of Hernandez*, 133 La. 134, 70 So. 63 (1915); Comment, 34 TUL. L. REV. 585 (1960).

9. LA. CIV. CODE art. 25 provides: "Men and women are capable of all kinds of engagements and functions, except where the law declares to the contrary, and unless disqualified by reasons and causes applying to particular individuals."

10. *See, e.g.*, *Succession of Koerkel*, 226 La. 560, 76 So.2d 730 (1954); *Keller v. McCalop*, 12 Rob. 639 (La. 1846).

11. *Segur's Heirs v. Segur*, 12 La. 25 (1838).

12. *Succession of Guglielmo*, 158 La. 917, 105 So. 12 (1925).

13. Comment, 28 TUL. L. REV. 288 (1954).

14. *See* *Succession of Morgan*, 257 La. 380, 385, 242 So.2d 551, 552 (1970); "A primary purpose of our statute authorizing this type of will is to afford another and simplified means of making a testament whereby the authenticity of the act can be readily ascertained . . ."

15. *Louisiana Legislation of 1952*, 13 LA. L. REV. 21, 33 (1952): "It is both unexpected and unfortunate that this legislation was not enacted as an amendment or addition to the Civil Code, which contains the other methods for making a will and the body of rules governing these methods."

ute was silent, specific articles of the Civil Code—in that case the very article 1592—would be applicable.<sup>16</sup>

Nonetheless, the statutory will suffers from an ambiguity born of extraneousness. Underscoring this defect is a recent decision, *Succession of Gordon*,<sup>17</sup> in which the Louisiana Supreme Court hesitantly indicated that common law sources are to serve as guides in the interpretation of R.S. 9:2442-2443.<sup>18</sup> The language of the opinion carries with it the potential effect, if not the intention, of liberating the statutory will from firm moorings in either body of law.

Indeed, such was the effect when the court in the instant case cited *Gordon* in support of the contention that a statutory will can be declared invalid only if an explicit commandment of R.S. 9:2442-2443 is violated. The court emphasized the language of R.S. 9:2442<sup>19</sup> in concluding that the legislative intent was to preclude the requirement of any formalities other than those expressly stated within the statute itself. The court indicated that, because article 1592 would impose an additional formality on the statutory will, its application to the instant case would be impossible.<sup>20</sup> Such an argument, however, ignores the distinction, long recognized in Louisiana jurisprudence,<sup>21</sup> between rules of formality and those of capacity.<sup>22</sup> The language of R.S. 9:2442, explicitly addressed to form alone,<sup>23</sup> is clearly inapposite to the question of attestative capacity and thus cannot support the court's conclusion. Furthermore, by declaring the statute's independence from code provisions in a matter not pertaining to

16. *Succession of Eck*, 233 La. 764, 774, 98 So.2d 181, 185 (1957). The opinion is praised in Oppenheim, *The Testate Succession*, 36 TUL. L. REV. 1, 14 (1961): "The court quite correctly integrated the statutory will into the Civil Code in this matter instead of attempting to set forth the qualifications of the attesting witnesses."

17. 257 La. 1086, 245 So.2d 319 (1971).

18. *Id.* at 1092, 245 So.2d at 321.

19. *Woodfork v. Sanders*, 248 So.2d 419, 423 (La. App. 4th Cir. 1971), quoting from LA. R.S. 9:2442 (Supp. 1952): "In addition to the methods provided in the Louisiana Civil Code, a will shall be valid if the statute's requirements are met." (Court's emphasis.)

20. *Id.* at 424.

21. See *Succession of Murray*, 41 La. Ann. 1109, 1116, 7 So. 126, 129 (1889): "Article 1591 is in the same category, and it is clear to our minds that it does not specify any formality to which testaments are subject, but simply declares what persons are absolutely incapable of being witnesses to testaments, in general."

22. A general discussion of capacity and formality and their respective roles in civilian theory is found in S. LITVINOFF & W. TÊTE, *LOUISIANA LEGAL TRANSACTIONS: THE CIVIL LAW OF JURIDICAL ACTS* (1969).

23. LA. R.S. 9:2442 (Supp. 1952) is entitled "Statutory will; form."

form alone, the court casts doubt on whether any of the other Civil Code rules expressive of public policy with regard to testaments are applicable to the statutory will.

A second argument advanced by the court is that, because of the parallel between the mystic and the statutory will, the latter comes within the exception to article 1592 established by article 1593.<sup>24</sup> What makes the two types of wills so analogous is never properly demonstrated by the court. Although the statutory will need not be read aloud before the witnesses, it certainly does not follow that knowledge of the contents will, or can, be kept from either the notary or the witnesses. Thus, secrecy, which is the basis for the exception in favor of the mystic testament,<sup>25</sup> is not an essential element of the statutory will; therefore, article 1593 should not be extended to apply to the instant case on this basis alone.

The court mentioned, but did not develop, the notion that the legislature, by amending R.S. 9:2443 in 1964,<sup>26</sup> intended to establish the inability to read or to sign one's name as the sole cause, to the exclusion of the Code's regime, for disqualification of witnesses. By invoking this proposition, the court was able to circumvent the earlier decisions to the contrary,<sup>27</sup> both of which concerned testaments drawn up before 1964. It is doubtful, however, that the legislature would express so indirectly an intent to overrule the jurisprudence in such an important matter. At the time of amendment it was thought that its purpose was to overrule a line of decisions unrelated to the instant case,<sup>28</sup> and, after 1964, at least one author expressed the belief that the code provisions would be fully applicable to the statutory will.<sup>29</sup> Moreover, in assessing the legislative intent, it is well to remember that article 1592 is similarly modified in the Civil Code by

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24. LA. CIV. CODE art. 1593: "Mystic testaments are excepted from the preceding article."

25. 3 PLANIOL, CIVIL LAW TREATISE no. 2722 (La. St. L. Inst. transl. 1959): "Since the content of the will is secret, the notary has no means how to know the legatees or their relatives, and how to prevent them from witnessing."

26. LA. R.S. 9:2443 (Supp. 1952), *as amended*: "[T]hose 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 . . . be attesting witnesses thereto."

27. Succession of Eck, 233 La. 764, 98 So.2d 181 (1957); Succession of Hackett, 187 So.2d 485 (La. App. 4th Cir. 1966).

28. *Louisiana Legislation of 1964—Successions and Donations*, 25 LA. L. REV. 18, 20 (1964).

29. *The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Successions and Donations*, 27 LA. L. REV. 442, 444 (1967).

requirements that a certain number of the attesting witnesses be able to sign their names, the number being tailored to the type of will.<sup>30</sup> The additional requirements do not exclude application of article 1592 to testaments governed by the Civil Code, so it may well be doubted that the amendment should be construed as having that effect with regard to statutory wills.

The court advanced each of the arguments discussed above but neglected to mention on which of the three it based its holding. Although none of the lines of reasoning seems adequate to justify the decision, the court may reasonably have concluded that its result was in accordance with a liberal interpretation of the statutory will. Nonetheless, the decision is regrettable in that it denies effect to an important safeguard for the proper confectio of testaments and casts doubt on the applicability of the Civil Code's scheme to the statutory will.

*W. Marshall Shaw*

AN UNLOADED AND UNWORKABLE PISTOL AS A DANGEROUS  
WEAPON WHEN USED IN A ROBBERY

The defendant was charged with armed robbery. While conceding that the revolver he used in the robbery was unloaded and not capable of being fired, the state argued that it was nevertheless a dangerous weapon. In affirming the conviction, the supreme court *held*, one who commits robbery by pointing an unloaded and unworkable pistol<sup>1</sup> at the victim can be found guilty of armed robbery. *State v. Levi*, 250 So.2d 751 (La. 1971).

R.S. 14:64(A) defines armed robbery as "the theft of anything of value . . . while armed with a dangerous weapon."<sup>2</sup> A dangerous weapon is defined in R.S. 14:2(3) as any "instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm."<sup>3</sup>

In the instant case the supreme court has, for the first time, interpreted R.S. 14:2(3)<sup>4</sup> in relation to the commission of an

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30. LA. CIV. CODE arts. 1580, 1582, 1587.

1. The court in reaching the decision makes no distinction between a gun which is unloaded and one which is unworkable, but rather treats these conditions as being equivalent. The courts of other states have handled this problem in a similar manner. See note 11 *infra*.

2. LA. R.S. 14:64 (1950).

3. *Id.* 14:2(3).

4. *Id.*