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Carlos E. Lazarus

SUCCESSIONS AND DONATIONS

*Carlos E. Lazarus**

SEIZIN V. TRANSMISSION OF INHERITANCE UPON DEATH

In *Knighten v. Ruffin*,[1] the testatrix, who was the record owner of a half interest in the property involved in the litigagation, had made a testament bequeathing "all of her real property" and "the fixtures contained in [her] residence" to her son Calip and to her granddaughter Lillie, "one-half to each, share and share alike." When the testatrix died, Calip, who was the record owner of the other one-half of the property and who had no knowledge of the existence of the testament, caused himself to be recognized as the sole heir of the deceased, and as such, sent into possession of his mother's interest in the property, and, on the same day, mortgaged the same. Within four months thereafter, Lillie filed a petition for the probate of the testament[2] and afterwards filed suit against Calip to have the judgment of possession in favor of Calip amended and to be recognized as the owner in indivision of one-fourth of the property. The judgment rendered in her favor in that suit also recognized Calip as the owner of the other three-fourths. Meanwhile, the mortgagee had foreclosed on its mortgage, had bought the property at the sheriff's sale, and had conveyed the same to one Ruffin against whom Lillie filed this suit asserting her rights to her undivided one-fourth interest in the property, presumably on the theory that, as to that portion, the mortgage executed by Calip was ineffective. The court of appeal, reversing the lower court, used article 940 of the Civil Code as the basis for its decision and held that Lillie, as the universal legatee of the *de cujus*, had become "*seized of her interest*" in the property upon the death of the testatrix and that, this being the case, the defendant Ruffin could not invoke the laws of registry in his

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* Professor of Law, Louisiana State University.

1. 255 So.2d 388 (La. App. 1st Cir. 1971) *writ denied*, 260 La. 399, 256 So.2d 288 (1972).

2. This petition appears to have been filed timely under the provisions of LA. CODE CIV. P. article 2893: "No testament shall be admitted to probate unless a petition therefor has been filed . . . within five years of the judicial opening of the succession of the deceased."

favor.[3] On rehearing, however, the court recognized its error in characterizing Lillie as a universal legatee when she was actually only a legatee under universal title, but it nevertheless held that as a "testamentary heir" she was nonetheless entitled to the benefits of article 940.[4]

It would have been more correct to say that Lillie, as a legatee under universal title, acquired the ownership of her legacy immediately upon the death of the testatrix by virtue of articles 1613 and 1626 of the Civil Code for, actually, a universal legatee has no seizin in the proper signification of the term inasmuch as legatees under universal title are bound to demand the delivery of their legacies from those that have the seizin.[5] It is suggested, therefore, that Lillie became the owner of her legacy immediately upon the death of the testatrix, not because she became "seized of her interest in the property," but because of that other provision of the Civil Code providing that every legatee, regardless of the kind of legacy he receives, acquires the ownership of the thing bequeathed from the day of testator's death.[6] The difficulty seems to stem from a misconception of the meaning and of the role of "seizin" in the law of successions. Perhaps the following brief remarks might serve to shed some light in this area of the law which, in this writer's opinion, has remained much confused for too long a time.

At Roman law, a succession was regarded as a fictitious entity representing the deceased until delivery of the effects

3. The court cites and quotes with approval from *Bishop v. Copeland*, 222 La. 284, 62 So.2d 486 (1952), in which it is held that the law of registry of articles 2251-66 of the Louisiana Civil Code is not applicable when the ownership of or the claim affecting the immovable has vested in the claimant by operation of law.

4. It is interesting to note that in refusing writs, one of the justices of the supreme court stated that although the application filed by Ruffin presented a "most interesting and important question" which was res nova, and that although the majority of the court were of the "firm opinion that the legal basis of the Court of Appeal's decision was erroneous," the writs were being denied because the court was also "convinced that the result reached was correct under another theory of law," but he does not indicate what that other theory is. *See* Knighten v. Ruffin, 260 La. 399, 256 So.2d 288 (1972). The justice also indicates that the court would have "affirmed the judgment of the Court of Appeal under Code of Civil Procedure Article 2893." But if the rule announced in the *Bishop* case, *supra*, is correct and is applicable to the factual situation presented, it is difficult to see how the procedural article would have any bearing in the case since the plaintiff had timely filed her petition for probate.

5. *See* LA. CIV. CODE art. 1613.

6. LA. CIV. CODE art. 1626.

of which it was composed to the heir of the *de cujus*. It was therefore necessary for the heir to apply for and be sent judicially into possession of the inheritance.[7] This concept, which was adopted in the Digest of 1808[8] presumably through the Partidas,[9] was abrogated by the redactors of the Code of 1825 who professed to adopt and to substitute in its place the system whereby the heir would become, not only the proprietor of the inheritance at the moment of the death, but would also be invested with the possession thereof so that the heir would not need to apply to the courts for possession.[10] Such is the French system which embodies two different concepts: (1) that the heir becomes the owner of the inheritance from the moment of the the death, and (2) that the *legitimate* heir is "seized" thereof from the moment of the death. Under the French system "seizin" means, therefore, not the acquisition of the *ownership* of the inheritance, for this ownership is transmitted to the heir and is acquired by him by operation of law, whether he has the seizin or not;[11] but rather, as Marcadé expresses it, it means

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7. "Since it often falls out that the Inheritance remains for some time without a Master, either because he who ought to succeed is absent, or that he deliberates whether he shall accept or renounce the Inheritance, and that during these intervals, it may happen that some Right may accrue to the Succession, or that it may be engaged in new charges, or other affairs, the said Inheritance is therefore considered as holding the place of Master, and as representing the deceased to whom the Goods did belong." 1 DOMAT, THE CIVIL LAW IN ITS NATURAL ORDER, 561 (Strahan transl. 1772).

8. "Until acceptance or renunciation, the inheritance is considered as a fictitious being representing in every respect the deceased who was the owner of the estate." La. Digest of 1808, bk. III, tit. I, art. 74.

9. LAS SIETE PARTIDAS, bk. 6, tit. 6, L. 11, & bk. 6, tit. 14, L. 1 (1252).

10. "By the Roman law and by the Spanish, the transmission of the succession did not take effect until the acceptance of the heir; that acceptance had merely a retroactive effect from [*sic*] the death of the deceased. The heir was also obliged to apply to the judge to be put into possession, on which subject the Partidas contain a whole title. Part. 6, tit. 14.

"We have thought it best to adopt the rule which vests the rights of the heir from the moment of the death of the deceased; which is also in accordance with the other dispositions of our Code, which dispense with the necessity of the heirs applying to the judge for an order to be put into possession, and give him the right of transmitting to his heir, the succession acquired by him even if he dies before he has accepted it." Comment by Redactors, PROJET OF THE LOUISIANA CIVIL CODE OF 1825, 1 LA. LEGAL ARCHIVES 115 (1939).

11. *See* 9 AUBRY ET RAU ET ESMEIN, DROIT CIVIL FRANÇAIS § 609 (6th ed. 1954) in LAZARUS, 4 CIVIL LAW TRANSLATIONS 100 (1971). In note 14 of the text, the author has this to say: "The origin of the concept of seizin remains obscure. It seems, however, that in our ancient law the term seizin designated neither the ownership nor the possession, but the faculty of claiming and exercising possession. III RIPERT ET BOULANGER no. 2204. In any case, under the *present law*, seizin *does not signify the acquisition of the ownership* of the hereditary property, for this ownership is transmitted by

the legal investiture of possession so that, upon the death of the *de cujus* the heir with seizin, *i.e.*, the legitimate heir, is also *deemed to be* in possession thereof and is thus entitled, from the instant of death, to bring all the actions which the *de cujus* could have brought, including the possessory one.[12]

Although not as clearly formulated as they might have been, the pertinent articles of the Louisiana Civil Code do in effect make this distinction between the actual transmission of the inheritance to the heir, and the possession thereof which is rightfully deemed to be in the legitimate heir, although not actually so. Thus, article 940 speaks of the *acquisition* of the inheritance by the heir immediately upon the death of the deceased,[13] whereas articles 942 and 943 speak of the *possession* thereof which is continued in the person of the heir "with all its defects as well as all its advantages, the change of *proprietor* producing no alteration in the nature of the *possession*."[14]

In Louisiana, as in France, the seizin or constructive possession is given first to the forced heir of the deceased, in default of whom, it is given to the universal legatee, if any, and lastly, to the other legitimate heirs of the deceased in default of the

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operation of law to the successors who have no seizin as well as to those who have it. . . . Nor does it signify the transmission of the possession. . . . For those having the seizin, it consists only of the *faculty of taking the hereditary property and of exercising the actions of the deceased, without any previous authorization from other successors or from the judge.*" (Emphasis added.)

12. "To begin with, the legitimate heirs have the seizin, that is to say that they have, by operation of law, the *legal investiture of the possession*; so that, by the death of the deceased, they become, not only the owners, but also the possessors of the property left by him. Thus, from the instant of death, they are entitled to all possessory actions, and any prescriptions running in favor of the deceased continues to run for their benefit without interruption. Such was the sense of the old maxim: 'Le mort saisit le vif, son hoir le plus proche à lui succeder,' the concept of which is reproduced in our article 724 by the words 'Legal heirs are seized of right . . . .' On the contrary, irregular successors, although invested by the death of the deceased of the ownership of the property, are not so invested with its possession; it is necessary that they cause themselves to be judicially sent into possession as is prescribed by the same article 724." 3 MARCADÉ, EXPLICATION DU CODE CIVIL no. 47, at 33 (7th ed. 1873).

13. *See also* LA. CIV. CODE art. 1292 which provides: "When a person, at his decease, leaves several heirs, each of them becomes an undivided *proprietor* of the effects of the succession. . . ." (Emphasis added.)

14. LA. CIV. CODE art. 942 seems clearly to indicate that seizin means constructive possession when it provides: "The heir *being considered seized of the succession* from the moment of its being opened, the *right of possession*, which the deceased had, *continues* in the person of the heir, as if there had been no interruption, and *independent of the fact of possession.*" (Emphasis added)

first two.[15] This is the reason why under article 1607 of the Civil Code, the universal legatee is required to demand the delivery of his legacy from the forced heirs, who, being "seized of right" of the effects of the succession, are deemed to be in "possession" thereof; that is why, under the provisions of article 1613, the legatee under a universal title is "bound to demand the delivery of his legacy" first from the forced heirs and in default of forced heirs, from "the universal legatees; and in default of those, of the next heirs in the order established in the title; *Of Successions.*" This is also the reason why irregular heirs, who have no seizin, must cause themselves to be sent into *possession* of the "succession which has fallen to them. . . ."[16] But the fact that the irregular heir has not caused himself to be sent into possession does not mean that he cannot transmit to his own heirs the inheritance that has fallen to him along with the right that he had to demand the possession thereof if he should die before having been sent into possession.[17] The conclusion is, therefore, that under the scheme of the Louisiana Civil Code, an heir, whether regular or irregular,[18] acquires the ownership of his hereditary share by operation of law immediately upon the death of the *de cujus*, but that the irregular heir can-

15. *See* LA. CIV. CODE arts. 1607, 1609, 1613.

16. *See* LA. CIV. CODE art. 925.

17. *See* LA. CIV. CODE art. 949. Under LA. CIV. CODE art. 925, the irregular heir is "permitted to take possession" of the succession which has "fallen to [him]" (i.e., which he has inherited) only by the order of the court. It is suggested that he can only be "permitted" to take possession of that which is already his; since the judgment of possession is merely a recognitive act and not an act translative of ownership, *Everett v. Clayton*, 211 La. 211, 29 So.2d 769 (1947), the irregular heir can acquire nothing by the judgment that was not already his.

18. It is evident that under article 949, the irregular heir transmits to his own heir, not only the *right of action* to be sent into possession, but also the *right* which he had in and to the succession itself. The article contains the following language: "[B]ut they do not the less *transmit their rights* to their heirs if they die before having made their demand to be put into possession. The reason is, that this sort of heirs, having only a right of action to cause themselves to be put into possession of successions thus falling to them, *this right* and *this action* form part of their succession, which they transmit to their heirs." (Emphasis added.) It would be anomalous indeed to say that all the heir transmits is his right of action, without transmitting also the inheritance which has already devolved upon him by operation of law under Civil Code articles 917-24.

It is therefore suggested that, had a proper analysis been made of these articles of the Civil Code, the unfortunate expressions found in the jurisprudence to the effect that the irregular heir "succeeds neither to the ownership nor to the possession" of the inheritance would not have been made. *Cf.* Glen v. West, 151 La. 522, 92 So. 43 (1922); Succession of Wells, 184 La. 523, 166 So. 488 (1936); Wimberly v. King, 179 So. 515 (La. App. 2d Cir. 1938).

not exercise any of the rights which the deceased had because he has no seizin.

And so it is with the legatees in a testate succession who, though not "seized of their legacies" nevertheless acquire the ownership thereof, regardless of their nature, as of the date of the testator's death by operation of law.[19] In this respect article 1626 of the Civil Code could not be any more explicit.

With the abolition of "seizin" by article 3211 of the Code of Civil Procedure[20] under which the succession representative "shall be deemed to have possession of all property of the succession and shall enforce all obligations in its favor," the regular heir has been virtually placed in the same position as the irregular heir who never had any seizin. It cannot be said, however, that because he no longer has the constructive possession of the succession, that he does not acquire the ownership of his hereditary share by operation of law the instant the *de cujus* dies.

PENALTY CLAUSES

In *Succession of Kern*,[21] the testator left a will in which, after making several bequests, including a particular bequest of $10,000 to the Crippled Children Hospital of New Orleans, he bequeathed the residue of his property to his brothers and sisters, providing, however, that the legacy to the hospital was to be paid from the portion to be received by one of the sisters.[22]

19. LA. CIV. CODE art. 1626.

20. The official comment by the redactors of this article is in part as follows: "(a) This article is a departure from the law relating to seizin. The utility of the concept of seizin in Louisiana law is doubtful, since as a practical matter the succession representative has full seizin of all the property of the deceased."

21. 252 So.2d 507 (La. App. 4th Cir.) *writs denied*, 259 La. 1050, 254 So.2d 462 (1971).

22. The disposition was as follows: "The balance of my estate I leave to my brothers and sisters, except that $10,000 dollars of my sister, Beryl, inheritance [*sic*] is to be given to the Crippled Children Hospital . . . ." *Id.* at 509. It was contended that the meaning of this provision was that the $10,000 legacy previously made to the hospital was to be paid first to the sister who would then pay it to the hospital, and that it was, therefore, a prohibited substitution. The court fairly interpreted the disposition as meaning that the residuary legatees were to take the remainder of the testator's property, but that before the sister took her share, the $10,000 was to be deducted and paid over to the hospital.

It is clear, nevertheless, that even if the plaintiff's interpretation had been the proper one, the legacy would not have created a substitution prohibited by article 1520 of the Civil Code because there was no double dis-

The will also contained the following clause:

> "I asked for no help in writing this will and I have received none. Should it be challenged or protested, in any way by any heir it becomes null and void and my entire estate is to be given to the Crippled Children Hospital...."[23]

A nephew of the *de cujus*, not included in the will, attacked the dispositions in favor of the hospital contending, *inter alia*, that the effect of the penalty clause was to create a prohibited substitution with the hospital as the substitute. His specious argument seemed to be that the named legatees would receive their respective legacies and that then, upon his attack on the will, over which the legatees had no control, the legacies would devolve upon the hospital. The court took the position that an analysis of the plaintiff's argument would have been futile, since the penal clause in question was repugnant to law and therefore considered as not written by application of article 1519 of the Civil Code.

This appears to be the first time that the validity of penalty clauses appearing in testaments is judicially considered, although not completely explored. It is evident that the type of clause involved in *Kern* was, to use the language of the court, "particularly vicious," in that a stranger was to reap the benefits of a protest or challenge by a person not otherwise having any interest in the will or in the dispositions it contained.[24]

There are other types of penalty clauses, however, by which a testator, in an attempt to ensure the faithful execution of his testament in every respect, prohibits an heir or legatee from attacking all or any portion thereof under penalty of forfeiting whatever benefits he would otherwise derive under the testament. In France, such clauses are reputed valid and enforceable if the testamentary dispositions which the testator is seeking to protect from attack are only of a private and pecuniary nature; but they are reputed not written as being contrary to public

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position in full ownership to one, to be preserved and rendered to another at death. *See* Succession of Reilly, 136 La. 347, 67 So. 27 (1915). The disposition was more in the nature of a charge upon the legatee to pay over a sum of money to another, which is valid. Succession of Michon, 30 La. Ann. 213 (1878).

23. Succession of Kern, 252 So.2d 507, 509 (La. App. 4th Cir. 1971).

24. As the court pointed out, under such circumstances, the legatees can be placed in contest against the beneficiary of the penal clause by the simple act of anyone not a legatee in contesting the will in any manner.

order if they are intended as a means of giving effect to dispositions which are themselves illegal or against public policy, or if intended to protect a will from attack which is otherwise null for lack of form or for any other reason.[25] In *Kern*, the court, although holding the clause in question invalid as being against public policy, seems to indicate that if the penalty had called for the forfeiture of whatever benefits the unsuccessful attacker would have derived under the will, the clause would have been given effect, provided, of course, that the dispositions the testator intended to protect were not against public policy.[26]

TORTS

*William E. Crawford**

PRODUCTS LIABILITY

Weber v. Fidelity & Casualty Insurance Co.[1] demonstrates that the plaintiff in Louisiana who has suffered harm caused by a defective product has a cause of action as effective as any plaintiff enjoying the benefits of common law strict liability in the products liability field. The facts in *Weber* are unique. Plaintiff's cattle were allegedly killed by an application of improperly formulated cattle dip manufactured by defendant. Immediately after the disaster, the plaintiff cattle owner interred both the cattle and the ominous dip in a final resting place in the earth soon covered by the concrete strip of a highway. Neither the cattle nor the dip were available as evidence in the litigation. The trial court gave judgment for the plaintiff; the court of appeal reversed and gave judgment for the defendant; and the

25. Such would be the case, for example, where the clause is intended to make effective dispositions to persons incapable of receiving or to give effect to dispositions exceeding the disposable portion of the disposer, or dispositions contained in testaments which are null as to form. 11 AUBRY ET RAU ET ESMEIN, DROIT CIVIL FRANÇAIS § 692 (6th ed. 1954) in LAZARUS, 3 CIVIL LAW TRANSLATIONS 295 (1969); 3 COLIN ET CAPITANT ET DE LA MORRANDIÈRE, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS no. 1402 (9th ed. 1945); 3 JOSSERAND, COURS DE DROIT POSITIF FRANÇAIS nos. 1548, 1549 (1933). For a discussion of the problem, generally, see Brown, *Provisions Forbidding Attack in a Will*, 4 TUL. L. REV., 421 (1930).

26. "If the clause in question were restricted to protests or challenges by the legatees receiving a benefit from the will, there would be little problem in the absence of forced heirs. However, the clause in question prohibits protests by 'any heir,' whether or not he is a party to the will or benefits thereby. Under the circumstances, the legatees are virtually helpless and at the mercy of any heir not mentioned in the will." 252 So.2d at 510.

* Professor of Law, Louisiana State University.

1. 259 La. 599, 250 So.2d 754 (1971).