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Private Law: Successions and Donations

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SUCCESSIONS AND DONATIONS

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SUCCESSIONS

Collation

In *Estate of Schwegmann v. Schwegmann*,[1] wherein the plaintiff as its succession representative attacked a sale of land by the *de cujus* to one of his children as a donation in disguise because the price paid was less than one-fourth the value of the land, the Louisiana Supreme Court remanded the case to the trial court for the purpose of ascertaining the value of the land at the time of the conveyance, to determine whether the price that had actually been paid by the vendee was sufficient to sustain the conveyance as made.[2] On remand, the trial court determined that the price paid by the vendee ($6,500) was less than one-fourth the value of the land at the time of the sale ($28,772). Accordingly it held that the conveyance was a donation in disguise and as such, subject to collation. The judgment also ordered the vendee to collate the difference of $22,272. The plaintiff appealed from this part of the judgment and the Fourth Circuit Court of Appeal reversed.[3] The decision is correct. When the donee elects to collate the immovable given in kind, the immovable returns to the succession of the donor and the value thereof is of no consequence; when the donee elects to collate by taking less, the collation is made on the basis of the value of the immovable at the time of the opening of the succession.[4]

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1. 298 So. 2d 795 (La. 1974); *see The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Successions and Donations*, 36 LA. L. REV. 365 (1976).

2. If the price paid is below one-fourth the value of the land at the time of the sale, the conveyance is characterized as a donation. LA. CIV. CODE art. 2444. On the other hand, if the price paid is more than one-fourth the value of the land, but still much below the fair value of the land, then the difference between the price actually paid and the value of the land is the *advantage* subject to collation. *Id.* art. 1248. *See* Taylor v. Brown, 233 La. 641, 66 So. 2d 578 (1953).

3. Estate of Schwegmann v. Schwegmann, 344 So. 2d 13 (La. App. 4th Cir. 1977).

4. LA. CIV. CODE art. 1269. The value of the land at the time of the sale in such cases is pertinent only for the purpose of determining whether the price then paid for it characterizes the conveyance as a sale or as a donation in disguise. For the purpose of collation, however, it is the value of the immovable at the time of the death that must be collated.

Collation should have been ordered, therefore, of the difference between the value of the land at death ($43,000) and the price paid by the donee.[5] The donee, for the first time on appeal, also invoked article 1237 of the Civil Code,[6] alleging that he had, in the interim, elected to renounce the succession of the deceased and was therefore entitled to retain the gift free of the obligation to collate, except to the extent necessary to satisfy the legitime of the other forced heirs. Over the objection of the appellants that the renunciation of the donee should not be considered on appeal because it was not raised at trial, the court, considering the judgment of the trial court to be nothing more than an adjudication that the original conveyance was a donation subject to collation, held that the donee was not thereby precluded from asserting his right to renounce, and remanded the case for further proceedings on this issue.

Effects of Renunciation

An heir who renounces a succession is considered as never having been heir.[7] His renunciation results in the termination of his hereditary seizin and all the consequences thereof,[8] and the portion of the succession that would have devolved upon him is inherited by the other heirs of the *de cujus* in the same degree, or by those in the next degree,[9] who take it in the same proportions that they take the patrimony of the deceased.[10] Upon

5. When the donation is disguised in the form of a sale for an insufficient price, whether the immovable is collated in kind or by taking less, the price paid by the donee should be returned to him in order to preserve equality among the heirs. *See* LA. CIV. CODE art. 1229. *See also id.* art. 1269 (permits the donee to deduct the "expenses incurred" by him). In the instant case, although the price of the land at the time of the sale was $28,772, the price of the land at death was $43,000. The collatable amount would thus have been the difference between the $43,000 and the $6,500 paid the donee and which had already inured to the benefit of the donor to form part of his patrimony.

6. LA. CIV. CODE art. 1237:

> If children . . . holding property . . . subject to be collated, should renounce the succession of the ascendant, from whom they have received such property, they may retain the gift . . . without being subject to any collation.
>
> If, however, the remaining amount of the inheritance should not be sufficient for the legitimate portion of the other children . . . he shall then be obliged to collate up to the sum necessary to complete such legitimate portion.

7. *Id.* art. 946(2) provides: "If the heir accept, he is considered as having succeeded to the deceased from the moment of his death; if he rejects it [the succession], he is considered as never having received it."

8. *Id.* art. 1014.

9. *Id.* art. 1022.

10. *Id.* art. 1027.

renunciation, the heir becomes a stranger to the succession and he may thus retain all donations made to him by the deceased free from the obligation to collate, subject only to the action of reduction which the forced heirs of the *de cujus* may bring.[11] It is therefore proper to conclude, as did the court of appeal in *Flanner v. Succession of Flanner*,[12] that after renunciation the heir is precluded from reopening judicially the succession of the deceased to have included in the inventory of the assets thereof United States savings bonds payable alternatively to the *de cujus* or to his surviving widow, or from claiming reduction from the survivor or from her succession.[13] As stated by the appellate court, any right which the plaintiffs as forced heirs may have had to sue for a reduction abated upon their renunciation.[14]

DONATIONS INTER VIVOS

Formal Requirements

During the last term, in *Primeaux v. Libersat*,[15] the supreme court held that a shareholder to whom the corporation had issued stock in conformity with the applicable law,[16] the price having been paid by his father with "donative intent," was the recipient of a valid donation inter vivos, without the formal requirement of an act passed before a notary and two witnesses,[17] and that the stock was therefore the shareholder's separate property. This writer suggested at the time that perhaps the court was thinking more in terms of an indirect donation of the money by the father to the son which relieved the nominal shareholder from the payment of the

11. *Id.* art. 1237.

12. 338 So. 2d 355 (La. App. 3d Cir. 1976), *writ denied*, 340 So. 2d 999 (La. 1977).

13. Although under federal regulations the surviving alternate beneficiary is recognized as the sole owner of the bonds, he is nevertheless subject to an action for reduction by forced heirs whose legitime has been impinged as a result of the disposition. Succession of Guerre, 197 So. 2d 738 (La. App. 4th Cir.), *writ refused*, 250 La. 928, 199 So. 2d 925 (1967).

14. "Here, the forced heirs did not bring an action for reduction but renounced their father's succession after being advised of their right to bring such an action. That right has now, as Aubry and Rau said, abated." 338 So. 2d at 358.

15. 322 So. 2d 147 (La. 1975); *see The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Successions and Donations*, 37 LA. L. REV. 421, 421-23 (1977).

16. Uniform Stock Transfer Act, LA. R.S. 12:621-642 (Supp. 1968).

17. "Louisiana interpretations hold the present transfer of shares of stock to the donee, valid under the stock-transfer act . . . to be valid also as donations to him [by whom?], because the consideration . . . was furnished by the donor with such donative intent." 322 So. 2d at 152.

price, which might very well occur in all cases where property is purchased *animus donandi*, in the name of another.[18] This term, in *Broussard v. Broussard*,[19] a strikingly similar case, a husband purchased savings certificates from a savings association with his separate funds, and had the same issued in his and his wife's name. The wife contended that the husband had thereby donated the purchase money to the community which entitled her to one-half of the funds thus given. The supreme court took occasion to distinguish *Libersat*, explaining the holding in that case to be that "under the Uniform Stock Transfer Act . . . no notarial act . . . was required in order to validate as a donation *the father's furnishing of the consideration to a corporation* for it to issue its stock to his son."[20] It then continued to say that although past decisions had held that the Uniform Stock Transfer Act was applicable to the stock of savings and loan associations, that conclusion "now appears doubtful because of the specific provisions governing transfer of shares or savings accounts enacted by Act No. 234 of 1970 . . . ," but that "even in a case where compliance with the stock transfer legislation may substitute for the codal formalities of a donation, the substantive requirements of a divestment and donative intent must be fulfilled in order to effect a valid donation."[21] The court then concluded that no donation had been made since the evidence disclosed no intent on the part of the husband to make a donation to his wife.[22] It is submitted that compliance with the stock transfer statute, or with any other legislation regulating the transfer of incorporeal rights, would be pertinent only where the validity *vel non* of the gratuitous transfer is at issue, i.e. in a case where the donor of the incorporeal, in conformity with the applicable legislation, makes a transfer without complying with the provisions of article 1536 of the Civil Code.[23] But the real issue both in *Libersat* and in *Broussard* was, as the court itself explains, whether the *"furnishing of the consideration"* for the issuance of the stock in the one case and of the certificates in the other, was made with the

18. *See The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Successions and Donations*, 37 LA. L. REV. 421, 422 (1977).

19. 340 So. 2d 1309 (La. 1977).

20. *Id.* at 1313 (emphasis added).

21. *Id.*

22. The husband had testified that his sole reason for placing the certificates in his and his wife's names was so that the funds would be doubly insured.

23. *Cf.* LeBlanc v. Volker, 198 So. 398 (La. App. Orl. Cir. 1940). *See also* Succession of LeRoy, 157 La. 1077, 1083, 103 So. 328, 331 (1925) (St. Paul, J., concurring) (suggesting that article 1536 of the Civil Code should apply only to incorporeal rights that are not otherwise transferable by delivery or by delivery plus endorsement).

necessary *animus donandi*—a factor which was present in the first, but found lacking in the second. There is certainly no obstacle in recognizing that when property is purchased in the name of another with the intention to confer a liberality upon the nominal vendee, the object of the donation is not the property thus purchased, but the sum of money paid for it, which is the equivalent of an indirect manual gift.[24] The decision in *Broussard* further indicates the necessity to re-examine article 1536 in light of its historical development,[25] and to recognize that valid gratuitous inter vivos dispositions may be made even without the strict formal requirements of article 1536 of the Civil Code.[26]

Article 1540 of the Louisiana Civil Code provides that for a donation inter vivos to be effective, and binding upon the donor, the acceptance of the donee must be made "in precise terms"[27] by an act passed before a notary and two witnesses.[28] In *Rutherford v. Rutherford*,[29] a donation of immovable property was declared null by the Third Circuit Court of

24. *Cf.* Cotton v. Washburn, 228 La. 832, 84 So. 2d 208 (1955) (prospective husband purchased property placing the same in his and in the name of his future bride, the act of sale having been signed only by the vendor; the court holds that a valid donation of the property in contemplation of marriage had been made although neither "vendee" had signed anything). *See also* Carter v. United States Director of Internal Revenue, 399 F.2d 340 (5th Cir. 1968) (the down payment for immovable property, purchased in Louisiana jointly in the names of husband and wife, constituted a manual gift of the money by the husband to the wife for the purchase of her share of the property).

25. *See The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Successions and Donations*, 37 LA. L. REV. 421, 421-23 (1977).

26. The sale by a father to his son at a very low price, the remission of a debt, the *stipulation pour autrui*, the payment of a debt of another, and other such dispositions exemplify this proposition.

27. The words "in precise terms" used in article 1540 are the words used in the English text of the corresponding article 1528 of the Code of 1825 which themselves appear to be an imprecise translation of the words "termes expres" contained in the French text of that article. Those words should more accurately have been translated as "express terms" as these same words are translated in the English text of article 1529 of that code as reproduced in our present article 1541 of the Civil Code of 1870.

28. *See also* LA. CIV. CODE arts. 1536, 1538. This formal requirement, however, is necessarily dispensed with in donations of corporeal movables made by delivery only which, when so made, are not subject to the formalities otherwise required by articles 1536 and 1538, because the donee's acceptance in such cases will be implied as resulting from his having taken corporeal possession of the things given. *Id.* art. 1541. *But see* Sisters of Charity of Incarnate Word v. Emery, 144 La. 614, 81 So. 99 (1919); *cf.* Cotton v. Washburn, 228 La. 832, 84 So. 2d 208 (1955); Works v. Noble, 177 La. 681, 149 So. 423 (1933).

29. 338 So. 2d 319 (La. App. 3d Cir. 1976).

Appeal because although the acceptance of the donee was made in the form required and contained his declaration that he "accepted said donation with gratitude," it nevertheless contained certain discrepancies in the descriptive portion thereof which rendered the acceptance imprecise.[30] The supreme court reversed.[31] It held that what article 1540 requires is an express and unconditional acceptance on the part of the donee, as distinguished from a tacit acceptance or an acceptance that may be inferred from circumstances.[32] Since the donee had unequivocally and without reservation accepted the donation, there had been sufficient compliance with article 1540, and the patently inadvertent clerical errors contained therein were of no consequence.[33]

In *Fontenot v. Fontenot*,[34] the forced heirs of Mr. Fontenot contended that certain United States savings bonds issued and payable to Mr. or Mrs. Fontenot were community property. The Third Circuit Court of Appeal, while recognizing the alternate payee as the owner of the bonds, nevertheless held that since the community owned a sum of money equivalent to the value of the bonds at the time of the death of the *de cujus*, one-half the value of the bonds, being the latter's interest in the community, necessarily formed part of his patrimony and should have been included in the descriptive list of the property belonging to his succession. It is suggested that the court was in error. The Louisiana jurisprudence is constant and consistent with the decisions of the United States Supreme Court to the effect that the purchase of United States bonds, whether payable upon the death of the purchaser to designated beneficiaries, or whether payable to an alternate co-owner, constitutes a valid gratuitous disposition, though not in any of the forms required for donations inter vivos or testamentary. The alternate surviving co-owner,

30. The notary before whom the act of acceptance was executed inadvertently inserted his name as the notary who had passed the act of donation, i.e. the offer. He also inadvertently referred to the date of the offer as being the date of the acceptance. 338 So. 2d at 321.

31. Rutherford v. Rutherford, 346 So. 2d 669 (La. 1977).

32. "We hold that the requirement that a donee accept the donation in 'precise terms' obligates a donee to use express, formal, and unconditional language in his acceptance. This codal provision, we think, requires an explicit acceptance. A tacit acceptance or an acceptance inferred from the circumstances will not suffice." 346 So. 2d at 671.

33. "Here the acceptance states that the donee 'accepts said Donation with gratitude.' We conclude that these words of acceptance conform with article 1540's requirement that the acceptance be in 'precise terms.' " 346 So. 2d at 672.

34. 339 So. 2d 897 (La. App. 3d Cir. 1976), *writ denied*, 342 So. 2d 217 (La. 1977).

or the beneficiary upon death, becomes the sole owner of the bonds subject only to an accounting to the surviving spouse in community whose rights may have been fraudulently impaired, or to an action for reduction by forced heirs whose legitime has been impinged as a result of the disposition.[35] Such bonds, therefore, are said to form no part of the patrimony of the deceased purchaser,[36] although the latter's interest in the bonds may be added fictitiously to the extant mass at death in order to form the active mass upon which the disposable portion and the legitime are computed.[37] Absent an allegation that the donation by the husband to the wife exceeded the disposable portion necessitating the application of article 1505 of the Civil Code, the inclusion of the donor's interest in the bonds in his patrimony at death was unwarranted.

Donations with reservation of usufruct

In *Bell v. Bell*,[38] a "sale" of realty from a father to his son for a recited cash price of $5,000 was attacked by the brothers of the "vendee" as a simulation or, in the alternative, as a donation in disguise because the price paid was less than one-fourth the value of the property, and thus void for lack of form[39] and as having been made with reservation of usufruct.[40] In a counter letter executed contemporaneously with the act of sale it was

35. Winsberg v. Winsberg, 220 La. 398, 56 So. 2d 730 (1952); Succession of Guerre, 197 So. 2d 738 (La. App. 4th Cir.), *writ denied*, 250 La. 928, 199 So. 2d 925 (1967); Succession of Videau, 197 So. 2d 655 (La. App. 4th Cir. 1967). *See also* Yiatchos v. Yiatchos, 376 U.S. 306 (1964); Free v. Bland, 369 U.S. 663 (1962).

36. But United States savings bonds payable upon death to designated beneficiaries and bonds purchased in co-ownership form that have not been reissued to the surviving alternate payee during the lives of both co-owners as provided by the applicable federal regulations, are included in the taxable gross estate of the purchasing co-owner. United States v. Chandler, 410 U.S. 257 (1973).

37. "For the reasons fully discussed by us in Succession of Guerre . . . Mr. Videau, the surviving co-owner, is recognized as the absolute owner of the bonds. The exclusion of these bonds from the descriptive list of property belonging to the succession of Mrs. Videau is proper . . . . However, for the reasons stated in Succession of Guerre, the value of Mrs. Videau's community interest in the bonds shall be included in the *total compilation of her estate for the purpose of determining the legitime to which the forced heir . . . is entitled*. Her right to bring an action . . . for a reduction of excessive donations . . . is reserved to her." Succession of Videau, 197 So. 2d 655, 659 (La. App. 4th Cir. 1967) (emphasis added).

38. 339 So. 2d 1333 (La. App. 3d Cir. 1976).

39. It appeared that the act of conveyance had not been executed before a notary and two witnesses as required by article 1536 of the Civil Code.

40. Prior to its amendment by Act 210 of 1974, article 1533 of the Civil Code prohibited the donor from reserving to himself the usufruct of the thing given under penalty of nullity.

stipulated that the true price of the sale was not the $5,000 recited in the act of sale but the "proximate (sic) value of services rendered and to be rendered" by the vendee to the vendor. The plaintiff's contention, based on article 2480 of the Civil Code, that the sale was a simulation because the vendor had reserved to himself the usufruct of the property was summarily disposed of, the court noting that the vendee had successfully discharged his burden of establishing the reality of the transaction for an adequate price in the form of the past and future services rendered.[41] The plaintiff's alternative allegation was likewise rejected. Having once determined that the conveyance had been made for services rendered, the court simply denominated the transaction a remunerative donation to which the rules of donations were inapplicable in the absence of proof, which the plaintiff failed to adduce, that the value of the property exceeded by one-half the value of the services rendered.[42]

TESTAMENTARY DISPOSITIONS

Capacity to receive

Under the scheme of the Civil Code, although the natural child is excluded from the intestate succession of his father when the latter leaves legitimate relations in the descending, ascending, or collateral lines, or a surviving spouse,[43] and although such child is declared incapable of receiving by donation inter vivos or testamentary "beyond what is strictly necessary to procure [him] sustenance, or an occupation or profession" when the father is survived by legitimate descendants,[44] he may nevertheless receive from his father a certain proportion of his estate when the latter, leaving no legitimate descendants, is survived by other legitimate relations.[45] An adulterous or incestuous child, on the other hand, has no inheritance rights,[46] and although parents of adulterous or incestuous children are prohibited from making dispositions in their favor, they may

41. "The trial court's reasoning that consideration for a conveyance of realty may take the form of past services rendered is amply supported by the jurisprudence." 339 So. 2d at 1336.

42. LA. CIV. CODE art. 1526.

43. *Id.* art. 919.

44. *Id.* art. 1483. It is apparent that what the natural child may receive under this article could be quite substantial.

45. *Id.* art. 1486. The proportion is one-fourth if the father is also survived by legitimate ascendants or brothers and sisters or descendants from these last, one-third if he has left only more remote collaterals.

46. *Id.* art. 920. But even where illegitimates are denied rights of inheritance they have the right to alimony. *Id.* arts. 918-20.

nevertheless bequeath to them "what is necessary to their sustenance, or to procure them an occupation or profession by which to support themselves."[47] The constitutionality of this legislation was attacked in *Succession of Captain*[48] and in *Succession of Robins*.[49] Limitations of time and of space preclude an in-depth examination of these cases and thus the writer will limit himself to a brief discussion of the issues involved and the decisions rendered therein. In *Captain*, the surviving mother and the brothers and sisters of the testator sought to reduce a legacy whereby the latter had bequeathed all his property to his seven natural children to the quantum established by article 1486, and prayed to be recognized as the legitimate heirs of the deceased for the remaining portion of the succession. The defendant legatees, who contended that articles 1483 and 1486 of the Civil Code violated the equal protection clause of the Constitution of the United States,[50] demanded their legacy in full. The Third Circuit Court of Appeal, holding that the principles of law expressed by the Supreme Court of the United States in *Labine v. Vincent*[51] were applicable, rejected the defendants' argument, ordered the reduction of the legacy to them to one-fourth of the estate left by the deceased, and recognized the surviving mother and brothers and sisters as his legitimate heirs for the remaining three-fourths.[52]

In the *Robins* case, the testator's bequest of all of his property to his

47. *Id.* art. 1488. Under this article, the bequest may even comprise the whole of the property of the testator if the value thereof is not excessive for the purposes contemplated by this article. Succession of Haydel, 188 La. 646, 177 So. 695 (1937); Succession of Elmore, 124 La. 91, 49 So. 989 (1909). It should also be noted that under this article, the amounts that the illegitimate may receive, as in the case of the natural child, could be quite considerable in some cases, and that the amounts that can be bequeathed are *not* limited to a certain proportion of the estate of the testator.

48. 341 So. 2d 1291 (La. App. 3d Cir. 1977).

49. 349 So. 2d 276 (La. 1977).

50. Article I, section 3 of the Louisiana Constitution of 1974 prohibiting arbitrary, capricious, or unreasonable discrimination because of birth, does not appear to have been urged.

51. 401 U.S. 532 (1968) (the Court upheld the constitutionality of articles 917 and following of the Louisiana Civil Code); *but see* Trimble v. Gordon, 430 U.S. 762 (1977).

52. No question seems to have been raised as to whether the mother, as a forced heir of the deceased, should receive her legitime of one-fourth of the entire succession before the payment of the reduced legacy. Application of LA. CIV. CODE art. 1494 and *Succession of Greenlaw*, 148 La. 255, 86 So. 786 (1920) would have resulted in a distribution of one-fourth of the entirety to the mother, one-fourth to the legatees, and one-half to the brothers and sisters.

two adulterous children[53] was challenged by his widow who contended that because the bequest was prohibited by article 1488 of the Civil Code,[54] she was entitled to his entire succession as his sole heir.[55] The supreme court[56] upheld the legacies in favor of the children[57] declaring that article 1488 constituted invidious discrimination against illegitimates conceived in adultery, thus violating article I, section 3 of the Louisiana Constitution of 1974.[58] In so holding, however, the court limited its decision to the factual situation presented in the case, its primary concern being with the legislative classifications between illegitimates *inter sese* which it simply found to be irrational.[59] In the opinion of the writer, the effect of the *Robins* decision is that all illegitimates, whether conceived in adultery or incest, or simply out of wedlock, should be treated the same.

53. One of these children was conceived and born from the illicit union between the testator and a single woman during the testator's marriage to his first wife; the other was conceived and born from the illicit union between the testator and another single woman during the testator's marriage to his second wife. It would appear that the first child could have been legitimated by the father after the dissolution of his first marriage and prior to his second marriage. LA. CIV. CODE art. 200.

54. As is indicated in the dissenting opinion, it appeared that since the legatees had occupations and were fully capable of supporting themselves, the exception to the prohibition of article 1488 would not have applied. *Cf.* Succession of Haydel, 188 La. 646, 650, 177 So. 695, 697 (1937).

55. LA. CIV. CODE arts. 919, 924.

56. Chief Justice Sanders and Justices Marcus and Summers dissented.

57. The court thus denied the widow her rights of inheritance under articles 919 and 924.

58. LA. CONST. art. 1 § 3 provides in pertinent part: "No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth . . . ."

59. In the language of the court:

> [W]e emphasize that the present issue does not arise in the context of passing upon the reasonableness of legislative classifications of legitimate versus illegitimate children for purposes of intestate heirship, Article[s] 886-88, 902, 917-20, nor even for purposes of testamentary succession, Article 1483. Nor does it arise in the context of legislative reasonableness of the intestate succession of a surviving widow to her husband's property in default of legitimate descendants, to the exclusion of the husband's illegitimate children. Articles 917, 919.
>
> Rather, the issue is narrowed to the reasonableness of a legislative classification by which, solely because his conception resulted from an adultery, an illegitimate child is deprived of any right whatsoever to receive his father's estate should the latter desire to will it to his natural child.
>
> . . . .
>
> The thrust of our analysis must be: What valid state purpose is rationally served by a legislative classification which prevents only illegitimates

This would at least require them to have the same rights of inheritance now accorded to illegitimates who have been raised to the status of natural children by acknowledgment.[60] It would also mean that there should no longer be an impediment to their acknowledgment and that their capacity to receive should be governed by the provisions of articles 1483 and 1486 of the Civil Code.

Annulment of Probated Testaments

In *Succession of Thompson*,[61] the petitioners sought to set aside the ex parte judgment of possession rendered therein on the ground that the olographic testament of the testatrix that had been admitted for probate was a forgery. Finding that the evidence adduced by the defendants, who as proponents had the burden of proving the authenticity of the testament,[62] preponderated in favor of the genuineness of the writing and of the signature of the testatrix, the court of appeal affirmed the judgment of the trial court dismissing the petition for nullity.

A similar action was brought in *Succession of Adler*,[63] in which the validity of the statutory will of the testatrix was attacked on two counts: (1) that it was null as to form because the notary had failed to print or type his name and the names of the witnesses under their respective signatures as he was required to do,[64] and (2) that the testatrix lacked mental capacity at the time of the execution of the testament. The court of appeal agreed with the trial court that it was apparent from the face of the testament itself that the formalities required by law[65] had been observed, and held that the failure of the notary to comply with the statutory directive did not have the effect of invalidating the testament.[66] With respect to the second count, the

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conceived in adultery from having the capacity to receive testamentary legacies from their father, but (save for incestuous children) does not similarly prevent other illegitimates from doing so? . . . .

We find no rational basis for this hence-invidious discrimination against illegitimates solely because their birth resulted from an adultery.

349 So. 2d at 277-79.

60. In *Robins*, it appeared that the testator had "acknowledged" his adulterous illegitimates in the testament itself.

61. 338 So. 2d 725 (La. App. 1st Cir. 1976).

62. This was because the action for nullity was instituted within three months from the date of probate. LA. CODE CIV. P. art. 2932.

63. 334 So. 2d 799 (La. App. 4th Cir. 1976).

64. LA. R.S. 35:12 (Supp. 1954). There was also an allegation that the name of the testatrix had been misspelled and that she had signed to conform with the typewritten error. In the opinion of the court this did not strike the will with nullity.

65. *Id.* 9:2442 (Supp. 1976).

66. "The failure of a notary public to comply with the requirements of L.R.S.

court simply held that, in light of the testimony adduced, the plaintiffs had failed to carry the burden of proving the mental incapacity of the testatrix.[67]

Captation

As has been very ably pointed out by Anthony J. Correro III, article 1492 of the Louisiana Civil Code prohibiting proof that testamentary dispositions have been made through hatred, anger, suggestion or captation, should be understood, interpreted and applied in light of its source and the evils sought to be remedied thereby.[68] Accordingly, neither the testator's motivation nor the acts that induced his motivation should be taken into consideration if there is an active desire by the testator to make the dispositions he has made, and this was the concept adopted by early Louisiana decisions.[69] Unfortunately, later decisions seem to have obscured the meaning and scope of this article, and dicta in other cases indicate that proof of captation may be admitted when the acts constituting the "undue influence," into which the word "captation" seems to have deteriorated, took place at the time of the execution of the testament,[70] and in other cases, proof of captation has apparently been admitted to show testamentary incapacity.[71] This trend is now apparently in reverse.[72] In *Gibson v. Succession of Gumbel*,[73] wherein the attack on the validity of the testatrix's will was based on the allegation that the attorney who had

35:12 subjects him to a fine of $100 (L.R.S. 35:13) but does not affect the validity of the document reflecting these omissions." 334 So. 2d at 800. *See also* American Bank & Trust Co. v. Michael, 244 So. 2d 882 (La. App. 1st Cir. 1971).

67. Although here again the action in nullity was instituted within three months of the date of probate, the burden of proving incompetency was upon the opponent, capacity being presumed. Lewis v. DeJean, 251 So. 2d 124 (La. App. 3d Cir.), *writ denied*, 259 La. 879, 253 So. 2d 215 (1971).

68. Note, 24 LA. L. REV. 925 (1964).

69. Zerega v. Percival, 46 La. Ann. 590, 15 So. 476 (1894); *see* Cahn, *Undue Influence and Captation: A Comparative Study*, 8 TUL. L. REV. 507 (1934).

70. Note, *supra* note 68.

71. Succession of Andrews, 153 So. 2d 470 (La. App. 4th Cir. 1963).

72. In *Guidry v. Hardy*, 254 So. 2d 675 (La. App. 3d Cir. 1971), *writ denied*, 260 La. 454, 256 So. 2d 441 (1972), a will was declared valid notwithstanding a judgment of a California court of appeal declaring the will invalid because of "undue influence," the court holding that "undue influence" was not a ground for invalidating a will in Louisiana as it is in California. Nevertheless, the court in this case still seems to adhere to the proposition that "[e]vidence of force, duress or undue influence may be admitted in attacks upon the validity of wills, but that [such] evidence should be considered only insofar as it tends to show lack of testamentary capacity." *Id.* at 681. *But see* Note, *supra* note 68.

73. 333 So. 2d 340 (La. App. 4th Cir.), *writ denied*, 338 So. 2d 111 (La. 1976).

prepared the will and who was the principal beneficiary thereunder had exercised "undue influence" on the testatrix, the court of appeal affirmed the judgment of the trial court dismissing the plaintiff's suit, holding that article 1492 of the Civil Code does not permit inquiries into the motives that may have influenced the testator to make his testamentary dispositions.

Revocation

The revocation of testaments or of particular dispositions made therein is either express or tacit.[74] An express revocation of a testament, in whole or in part, may be made only in a subsequent testament, or in another act made in one of the forms prescribed for testaments,[75] in which the testator declares that his prior testament, or any disposition therein contained, shall be revoked.[76] The renunciation is tacit when it results from other dispositions of the testator, or from an act which indicates a change of will on his part.[77] The Civil Code lists only two modes of tacit revocation: (1) the confection of a new testament incompatible with an anterior testament,[78] and (2) the inter vivos alienation by the testator of the thing bequeathed.[79] These two modes of revocation, whether partial or total, are based on the same concept, namely, the testator's change of will manifested by a new disposition of the object of the legacy either by an act inter vivos or in contemplation of death. The Code is silent regarding the physical or material destruction of a testament, and although articles 1693 and 1695 of the Civil Code have been held to be limitative in that they cannot be extended to any other tacit manifestation of intent indicating a change of will,[80] nonetheless, the destruction of the testament, or the obliteration, defacement, or the erasure of the names of the legatees or of the signature of the testator destroy the efficacy of the testament or of the legacies therein contained.[81] Whether such acts by the testator indicate a

74. LA. CIV. CODE arts. 1691, 1692.

75. *Id.* art. 1692. Hessmer v. Edenborn, 196 La. 575, 199 So. 647 (1941).

76. LA. CIV. CODE arts. 1691, 1692.

77. *Id.* arts. 1691, 1693.

78. *Id.* art. 1693.

79. *Id.* art. 1695.

80. Succession of Hill, 47 La. Ann. 329, 332, 16 So. 819, 821 (1895) ("[T]here are only two modes of revoking a valid testament—the one by a written instrument clothed with the formalities of a last will and testament; and the other by a donation inter vivos or a sale of the thing, in part or in whole, bequeathed. The acts and declarations of the testator do not come within the tacit revocation expressed in the Code."); Hollingshead v. Sturgis, 21 La. Ann. 450 (1869).

81. *Cf.* LA. CIV. CODE art. 1589. Succession of Hill, 47 La. Ann. 329, 16 So. 819 (1895); Succession of Muh, 35 La. Ann. 394 (1883).

change of will on his part,[82] or whether the inefficacy is predicated upon the non-existence of the testament, it is clear that an effective revocation must be conceded.[83] In any case, as held by the Third Circuit Court of Appeal in *Rivette v. Moreau*,[84] no tacit revocation of a testament can result where the testament alleged to have been destroyed is in existence at the time of the testator's death.[85] Nor will a tacit revocation result by the alienation of the thing bequeathed where the object of the bequest is a sum of money. In *Succession of Drumm*,[86] it appeared that the testatrix had made cash legacies to her daughters and had subsequently donated to them like sums of money. The court rejected the plaintiff's contention that the donations had the effect of revoking the legacies, pointing out that article 1695 applies only to legacies of particular "things" and not to legacies of fungibles such as money, the rationale being that although the alienation of particular objects previously bequeathed renders impossible the execution of the legacy,[87] a gift of money does not.

82. This would require an extension of articles 1693 and 1695 to any other act of the testator from which an intention to revoke is fairly and legally deducible. "So also if he [the testator] has done any act which supposes a change of will, *let that act be what it may*, . . . a tacit revocation will result from the act." Succession of Muh, 35 La. Ann. at 398 (emphasis added).

83. *Cf.* Note, 1 LA. L. REV. 464 (1939).

84. 341 So. 2d 459 (La. App. 3d Cir. 1976).

85. "Any intention Mrs. Moreau may have had to revoke her testament was not clearly expressed. The decedent executed a valid statutory will; this will was in existence at the time of her death; and, as the trial court said, the burning of the statutory will is uncorroborated." 341 So. 2d at 462.

86. 333 So. 2d 653 (La. App. 4th Cir. 1976).

87. From such impossibility the intention to revoke is necessarily implied.