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Private Law: Successions and Donations

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SUCCESSIONS AND DONATIONS

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DONATIONS INTER VIVOS

Formal Requirements

In order to be valid, a donation inter vivos, whether of immovables, movables or incorporeals, must be made by an act passed before a notary public and two witnesses;[1] consequently, a donation of immovables by an act under private signature is a nullity. Nevertheless, the fact that a donation has not been made in the form required by law, does not necessarily entitle the plaintiff in nullity to a summary judgment declaring the inefficacy of the donation; the particular facts and circumstances under which the donation is made may be such as to preclude the plaintiff from asserting the nullity. It was so held in *Sarpy v. Sarpy*,[2] in which a husband sought to annul two donations of immovables he had made to his wife. These donations, although appearing on their face to have been made in compliance with article 1536 of the Civil Code, were not in fact so made.[3] In reversing the summary judgment rendered in favor of the plaintiff-husband and remanding the case for further proceedings, the Fourth Circuit Court of Appeal indicated that a trial on the merits could produce sufficient

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1. LA. CIV. CODE arts. 1536, 1538. The Civil Code recognizes an exception for a donation of corporeal movables which may also be made by simple delivery of the thing given to the donee whose acceptance is implied by his taking corporeal possession of it. LA. CIV. CODE arts. 1539, 1541.

A limitation as to the applicability of article 1536 to donations of incorporeals should also be recognized by the jurisprudence as explained in the text that follows. See text at notes 5-6, *infra*.

2. 354 So. 2d 572 (La. App. 4th Cir.), *cert denied*, 356 So. 2d 436 (La. 1978) (judgment not final).

3. Parol evidence is admissible to establish that an act purporting to be in authentic form was not in fact confected in the manner provided by law. American Bank & Trust Co. v. Carson Homes, Inc., 316 So. 2d 732 (La. 1975). In the instant case the evidence established that one of the acts of donation had been executed at the same time by the donor and the donee, the notary and the witnesses having affixed their signatures thereto a day or two later; the other act had been executed by the parties in the presence of the witnesses, the notary having affixed his signature two days later.

evidence to suggest a formal defect purposely created by the donor in order to provide him a means of revoking an otherwise irrevocable act. Given the particular factual situation presented, the decision is correct.[4]

In previous issues of this Law Review, the writer has indicated the necessity for a re-examination of article 1536 of the Civil Code, particularly as it relates to its application to incorporeal rights, the transfer of which is governed by other laws.[5] Two apparently conflicting decisions from the First and Fourth Circuits indicate the urgency of adopting the suggestion made by the late Justice St. Paul in his concurring opinion in *Succession of LeRoy*[6] that article 1536 should be limited in its application and that it should not be extended to instruments the transfer and negotiation of which are governed by the commercial law. *Houston v. McCoy*[7] involved a suit on a promissory note made by the defendant payable to his order and by him endorsed and delivered to the plaintiff's wife in part payment of the price of property that defendant had purchased from the plaintiff's wife. The note was in the possession of the plaintiff, the trial court having determined that the wife had donated the same to her husband.[8] Although recognizing that a promissory note, negotiable in form, made payable to the maker's own order and by him endorsed in blank becomes

4. The court noted that the donor was a lawyer and that the notary who later signed the acts of donation was his secretary. It then proceeded to say:

> If [the donee] can prove he purposefully created a defect in the form of the donations in order to reserve a method of revoking an otherwise irrevocable donation, we would be disinclined to allow [the] use of the courts for the purpose of accomplishing such a scheme. The purpose of requiring an act of donation to be executed before a notary and two witnesses is to protect the donor from fraudulent schemes . . .; the requirement was not intended to provide the donor with a scheme for avoiding the effects of C.C. Art. 1468 . . . ."

Sarpy v. Sarpy, 354 So. 2d at 575.

5. *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Successions and Donations*, 38 LA. L. REV. 397 (1978); *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Successions and Donations*, 37 LA. L. REV. 421 (1977).

6. 157 La. 1077, 1083, 103 So. 328, 331 (1925).

7. 351 So. 2d 829 (La. App. 1st Cir. 1977).

8. "This court finds that Myrtle Houston desired to and did make a manual donation of this note to plaintiff." *Id.* at 830. "The decedent gave the note in question to the plaintiff in 1974 . . . ." *Id.* at 832.

bearer paper and is then negotiable by delivery, and that under the applicable provisions of the Negotiable Instruments Law,[9] a negotiable instrument may be effectively negotiated even though no value has been given, the First Circuit Court of Appeal reached the conclusion that because the donation of the note to the husband "was not in authentic form, the transfer was a nullity and the note was not negotiated . . . and the plaintiff was not a 'holder' of the note"[10] and, therefore, was not entitled to enforce payment from the maker. By contrast, as the writer understands the decision in *Succession of Tebo,*[11] bearer bonds (which are negotiable instruments) may be the subject of a manual gift, and the delivery thereof by the donor to the donee is a negotiation of the bonds constituting the donee the holder of the bonds.[12] The writer submits that when a negotiable instrument payable to bearer is transferred by one

9. The case arose prior to the effective date of article 3 of the Uniform Commercial Code adopted by 1974 La. Acts, No. 92, *adding* LA. R.S. 10:1-101 *et seq.*

10. Houston v. McCoy, 351 So. 2d 829, 833 (La. App. 1st Cir. 1977). With this conclusion the writer cannot agree. The error in which the court seems to have fallen is in stating that *"a negotiable instrument may be negotiated by gift as well as for value." Id.* at 833 (emphasis added). Under the applicable provisions of the Negotiable Instruments Law, a negotiation takes place when the instrument is *transferred* from one person to another in such a manner as to constitute the transferee the holder thereof. If the instrument is payable to bearer, it is negotiated by *delivery only,* and if payable to order, it is negotiated by *delivery plus the necessary endorsement* of the transferor. LA. R.S. 7:30 (1950), *repealed by* 1974 La. Acts, No. 92, §2. There can be no doubt that the note was negotiated by the wife to her husband when she transferred or delivered the note to him and that he thus became the holder thereof entitled to receive payment. LA. R.S. 7:88 (1950), *repealed by* 1974 La. Acts, No. 92. It may very well be that, having paid no value, the plaintiff was not a holder in due course (LA. R.S. 7:52 (1950), *repealed by* 1974 La. Acts, No. 92) and therefore subject to any defenses that were available as between the defendant and the plaintiff's wife. But to say that there was no negotiation because the transfer was not accompanied by a supplementary act of donation made in the form prescribed by article 1536 of the Civil Code, is to adopt a new concept of "negotiation" which is foreign to the law of commercial paper. What would have been the decision had the note been made payable to the wife and by her endorsed and delivered to the husband?

11. 358 So. 2d 337 (La. App. 4th Cir. 1978).

12. The court stated:

> Bearer bonds may also be transferred by manual gift, . . . as in any manual gift—delivery must be had to make the gift effective . . . . The delivery required by law is delivery by the donor or . . . by another acting upon the donor's orders . . . . We hold the bonds not manually given because there was no showing of delivery by the donor . . . .

358 So. 2d at 339.

person to another a negotiation takes place, and the transferee becomes the holder of the instrument; whether or not the transferee has paid value for the instrument is immaterial.

TESTAMENTARY DISPOSITIONS

Formal Requirements

It should be self-evident that the purpose of legislation prescribing the formalities that must be observed in the confection of testaments is not only to impress upon the deceased the significance of his declarations of last will, but also to guard against imposition, deception or fraud and to provide the means of establishing the authenticity of the testament and satisfactory evidence of the all-important *animus testandi* of the disposer who, after his death, is no longer present to clarify or contradict other evidence concerning the effectiveness and validity of his dispositions.[13] In the case of nuncupative testaments that have been reduced to writing, it is no idle formality, therefore, to require that the testament be executed in the presence of witnesses whose function is clearly to establish the capacity and total independence of the testator and to ensure that the other formalities required in the confection of the testament are observed.[14] And it goes without saying that this function can only be discharged by witnesses who are competent to do so at the time of the execution of the testament. Thus the Civil Code declares absolutely incapable of being witnesses to testaments: Persons who are insane; those who are blind and cannot therefore tell whether the testament was written or completed in the manner required by law; the deaf, who can neither hear the dictation by the testator nor the reading back of the testament by the notary who received it, or the reading of the testament by the testator to the witnesses or by one of the witnesses to the others; and, for the same reason, those who do not know nor understand the language in which the testament was dictated or read back to the testator.[15] It is also clear

13. This is the reason for prohibiting the purely nuncupative or verbal testament. LA. CIV. CODE arts. 1575, 1576.

14. LA. CIV. CODE arts. 1644-46; LA. CODE CIV. P. arts. 2883-86.

15. LA. CIV. CODE art. 1591; Debaillon v. Fuselier, 159 La. 1044, 106 So. 559

that a person though not otherwise incompetent to serve as a testamentary witness may nevertheless also be disqualified to perform his functions impartially because of his pecuniary interest in not disclosing vices or defects in the confection of the testament, his paramount purpose thus being to ensure that the nullity of the testament is never established. Thus the Civil Code also declares incapable of being witnesses to testaments those who are constituted legatees therein.[16] Nevertheless, in

(1925); Succession of Dauzat, 212 So. 2d 523 (La. App. 3d Cir. 1968). *See also* LA. R.S. 9:2443 (Supp. 1952 & 1964), which provides that persons who know not how or are unable to read cannot be witnesses to a testament confected under the provisions of LA. R.S. 9:2442 (Supp. 1964 & 1976).

16. LA. CIV. CODE art. 1592. *See* article 975 of the Code Napoleon which is even more extensive in providing that testaments cannot be witnessed by legatees, nor by their relations by blood or affinity up to the fourth degree, nor by the clerks of notaries by whom the testament is executed. The determination of these incapacities is to be made as of the time of the execution of the testament. 5 M. PLAINIOL, G. RIPERT, A. TRASBOT & Y. LOURSOUARN, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS n° 556, at 702 *et seq.* (2d ed. 1957). In mystic testaments the witnesses only witness the act of superscription and not the contents of the testament itself, and consequently the prohibition of article 1592 of the Civil Code does not apply to them. LA. CIV. CODE art. 1593.

Since it is no longer open to question that a so-called statutory will must be executed in the presence of "witnesses not otherwise disqualified under article 1591 and 1592 of the Civil Code," it should also follow that a legatee cannot serve as a witness to a statutory will. *See* LA. R.S. 9:2442 (Supp. 1952), *as amended by* 1974 La. Acts, No. 246, §1 and 1976 La. Acts, No. 333 §1 (legislatively overruling *Woodfork v. Sanders*, 248 So. 2d 419 (La. App. 4th Cir.), *cert. denied*, 252 So. 2d 455 (La. 1971), which had held that article 1592 of the Civil Code was inapplicable to the statutory will).

The disqualification of witnesses on account of interest is not new. It is the subject of legislation in the various states of the United States, in some of which the strict disqualification has been somewhat tempered by providing that the legacy to the legatee-witness shall be null. For a comprehensive study of these statutes, see Rees, *American Wills Statutes*, 46 VA. L. REV. 613 (1946). The prohibition seems to have originated in the English Statute of Frauds of 1676 which required the attestation of will by "three or four credible witnesses," and *Helliard v. Jennings*, 91. Eng. Rep. 1237 (K.B. 1699), where a will was declared invalid because one of the necessary witnesses was also a devisee on the theory that because he would profit by the will's being sustained, the devisee could not qualify. In the later case of *Holdfast v. Donsing*, 93 Eng. Rep. 1164 (K.B. 1746), it was held that the competency of the witnesses had to be judged as of the time the testament was confected and that the devisee's subsequent renunciation of the legacy did not restore his capacity. Said the court: "It was objected, that nothing vests till the death of the devisor, and therefore, at the time of the attestation he [the witness] had no interest. But the answer is, that he was then under the temptation to commit fraud, and that is what the Parliament intended to guard against." *Id.* at 1165.

Under section 2-505 of the Uniform Probate Code, a will is not invalid because it

Lee v. Kincaid,[17] the Second Circuit Court of Appeal upheld the validity of a nuncupative testament by private act in which one of the necessary witnesses had been named as a legatee where the latter had renounced his legacy after the death of the testator and before the testament had been offered for probate.[18] It is the considered opinion of this writer that this result could only have been reached by straining the construction of article 1592 of the Civil Code, which unequivocally states that testaments cannot be witnessed by those who are constituted legatees under whatsoever title it may be;[19] therefore, absent a sufficient number of other qualified witnesses present at the confection of the testament, the testament offered for probate should have been declared null.

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is signed by an interested witness. The official comment following this section states: "Interest no longer disqualifies a person as a witness, nor does it invalidate or forfeit a gift under the will." It also states, "[T]he purpose of this *change is not to foster the use* of interested witnesses, and attorneys *will continue to use disinterested witnesses in execution of wills.*" (Emphasis added.) Would not the opposite be true once the back door has been opened?

17. 359 So. 2d 232 (La. App. 2d Cir.), *cert. denied,* 360 So. 2d 198 (La. 1978).

18. Writs were refused by a divided court, Sanders, C.J. and Summers and Marcus, J.J., dissenting. Justice Tate, concurring with the majority, stated: "The incapacity of a witness under C.C. art. 1592 (when the witness renounces the legacy before the will is probated) is not such a formality as will make the testament null and void, C.C. Art. 1593 [1595?], such as is the competency of a witness under arts. 1578, 1581, 1591." Lee v. Kincaid, 360 So. 2d 198 (La. 1978). If the reason for the incapacity declared in article 1592 of the Civil Code is a valid one, why should the subsequent renunciation of the legacy by the witness restore his capacity when he may very well have had ulterior motives for renouncing?

19. Although admitting that the *possible intent* is to declare the invalidity of testaments that are witnessed by those who are also constituted legatees, the court found a *"more plausible construction* of the statutory language," *viz.*, that the word *named* used in article 1592 means nothing more than "identified by name," and that "the crucial determination at the probate of the will becomes the status of the witness then, i.e. whether or not any witness is in actuality a legatee at the time of probate so as to bring into operation the prohibition of C.C. art 1592 . . . ." Lee v. Kincaid, 359 So. 2d 232, 234 (1978) (emphasis added). The court made parenthetical reference to article 1959 of the Civil Code, apparently in support of its "construction" of article 1592. That article provides: "However general be the terms in which a *contract* is couched, it extends only to the things concerning which it *appears that the parties intended to* contract." (Emphasis added.) It is suggested that the provision of the Code itself is article 13, which instructs that when a law is clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

Revocation or Caducity

The Louisiana Civil Code provides for the tacit revocation of testaments or of the dispositions they contain either by (1) the confection of a new testament, valid in form, incompatible with it, or (2) by the inter vivos alienation by the testator of the thing bequeathed;[20] these two methods of revocation, whether total or partial, are based on the same concept, *viz.*, 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.[21] The alienation of the thing bequeathed imports a revocation, however, only when the alienation is made by the testator himself,[22] and the maxim *factum tutoris, factum pupilli* should not apply since the right to make or to revoke a testament is personal and incommutable.[23] Nevertheless, the alienation by another of the thing bequeathed, though not resulting in a revocation, may result in the caducity of the legacy simply because the thing bequeathed will no longer be found in the patrimony of the testator, and in such cases, therefore, the legatee will be entitled neither to the thing be-

20. LA. CIV. CODE arts. 1693, 1695, 1696.

21. For a more detailed discussion of the subject matter, see *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Successions and Donations*, 38 LA. L. REV. 313, 395-407 (1978).

22. LA. CIV. CODE arts. 1695 and 1696 speak of a donation inter vivos or of a sale *made by the testator* of the whole or of a part of the thing bequeathed. It results, therefore, that these articles are inapplicable where the thing bequeathed has been seized and sold at the instance of the creditors of the testator; where it has been sold to effect a partition by licitation; where it has been expropriated for public purposes; or where it has been sold by the tutor or curator of the testator in the course of his administration. There is some language, however, in the opinion rendered in the instant case, *Spiller v. Herpel*, 357 So. 2d 572 (La. App. 1st Cir.), *cert. denied*, 358 So. 2d 637 (La. 1978), implying that the sale of the thing by another with the consent or approval of the testator would amount to a revocation. The court states:

> Since the sale of the premises in question was accomplished by the curator of the testatrix, and *since the testatrix did not personally give her consent or approval to the sale at the time of its consumation* [how could she if she was an interdict?] it must be the holding of this Court in accordance with the above cited authorities that this action did not constitute a *revocation* as contemplated by the pertinent articles of the Louisiana Civil Code.

357 So. 2d at 575 (emphasis added). In light of the conclusion reached by the court, the above quoted language must be considered dictum.

23. This is implicit from LA. CIV. CODE arts. 1571, 1575, 1578, 1581, 1588, 1690, 1691.

queathed nor to the price of the alienation.[24] This important distinction was recognized and applied by the First Circuit Court of Appeal in *Spiller v. Herpel.*[25] In that case, the testatrix had bequeathed her residence to her nephew. Thereafter she was interdicted and her curator, in the course of his administration of the interdict's estate and with the approval of the court,[26] sold the residence. The trial court's judgment dismissing the alternative claim of the nephew against the executrix for the delivery of the legacy or of the value thereof was affirmed by the appellate court, which adopted as its own the opinion of the trial judge in which French doctrine and jurisprudence is discussed at length. The trial judge held, in accord with the cited French authorities, that, although not revoked by the subsequent sale by the curator, the legacy had nevertheless lapsed and that, as in the case of the revocation of legacies by the sale of the thing bequeathed, the legatee was not entitled to the proceeds of the sale.[27]

When the caducity results from the prior death of the legatee,[28] the legacy is without effect and will devolve either upon the universal legatee, if any, or upon the heirs of the testator.[29] Accordingly, in *Succession of Moore,*[30] in which the heirs of predeceased legatees filed suit for a declaratory judgment seek-

24. The object of the legacy to which the legatee is entitled is a determinate thing, not the estimated value thereof nor any other thing. *See* LA. CIV. CODE arts. 1700, 1701, 1702. It should follow, however, that in the case of caducity resulting from the sale by another of the thing bequeathed, the bequest would be effective if the thing sold is subsequently reacquired by the testator prior to his death.

25. 357 So. 2d 572 (La. App. 1st Cir.), *cert. denied,* 358 So. 2d 637 (La. 1978).

26. Caducity would also result even if the sale or alienation by the curator is unauthorized or fraudulently made as, for example, where there had actually been no reason or necessity for the sale. In such cases, the legatee would have his action in damages against the curator.

27. The court stated:

> It would appear that the leading authority in Louisiana and the majority of the French commentators support the view that the alienation of the thing bequeathed by the curator of an interdict observing all legal formalities and in due course of his administration caused the legacy to lapse, so that the legatee can claim neither the value thereof nor the price still due.

357 So. 2d at 575.

28. LA. CIV. CODE art. 1697.

29. LA. CIV. CODE art. 1709; Succession of Burnside, 35 La. Ann. 708 (1883).

30. 353 So. 2d 353 (La. App. 1st Cir. 1978).

ing to be recognized as the owners by representation of the bequests that had been made, the First Circuit Court of Appeal properly affirmed the judgment of the trial court[31] dismissing the plaintiffs' claims on an exception of no cause of action.

Probate—Lost or Destroyed Testaments

It has long been recognized by the jurisprudence of Louisiana that when a testament has been lost or accidentally destroyed, extrinsic evidence is admissible to prove that the testament actually existed and the contents thereof, whereupon the testament may be probated and ordered executed.[32] In *Succession of Jones,*[33] it was proper for the court, therefore, to admit to probate a photocopy of the olographic testament of the testator, the original of which had been destroyed by the appellant after the death of the testator.[34] In *Succession of Davis,*[35] the court had no difficulty in setting aside an ex parte judgment recognizing the defendants as the heirs at law of the deceased and as such sending them into possession.[36] The plaintiffs had adduced proof of the execution of a valid statutory will and of the contents thereof, notwithstanding that they produced neither the testament nor a copy thereof.[37]

31. It is submitted that the suit was frivolous to begin with. Legatees may not be represented, and in the absence of a vulgar substitution, the heirs of a predeceased legatee take nothing.

32. Jones v. Mason, 234 La. 116, 99 So. 2d 46 (1958); Succession of Nunely, 224 La. 251, 69 So. 2d 33 (1954); Succession of O'Brien, 168 La. 303, 121 So. 847 (1929). *See also* Succession of Boyd, 306 So. 2d 687 (La. 1975), and cases therein cited.

33. 356 So. 2d 80 (La. App. 1st Cir.), *cert. denied,* 357 So. 2d 1168 (La. 1978).

34. The court noted that the testament had not been revoked by the testator, but that it had been torn by the appellant once he had determined that the destruction of the testament was in his best interests. *See* Smith v. Shaw, 221 La. 896, 60 So. 2d 865 (1952), wherein an olographic testament was destroyed by the testator's attorney in the presence of and with the consent of the testator upon execution of a subsequent testament by public act.

35. 347 So. 2d 906 (La. App. 3d Cir. 1978).

36. The ex parte judgment had been rendered on the basis of an affidavit swearing that the deceased had died intestate.

37. Judge Hood dissented being of the opinion that the alleged statutory will had not been judicially recognized and probated.