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Private Law: Successions and Donations

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striction against the construction of a church had been waived by all the parties. However, the injunction against them was sustained. The earlier waiver was only a single instance of departure from the residential covenant out of several hundred lots in the subdivision; this could certainly not be evaluated as substantially defeating the general plan.

In *Leonard v. Lavigne*,[40] there was a recorded lease in which the landowner bound himself, and his heirs and assigns, not to make competitive use of any of his adjacent property. This stipulation was breached, and the question was whether the restriction was a covenant running with the land or merely a personal obligation. The trial court said it was merely a personal obligation; the court of appeal held it was a covenant running with the land. The Supreme Court affirmed the judgment of the district court, finding that the court of appeal had relied on common law sources. The Supreme Court stressed the reminder that "while these rules of common law jurisprudence are sometimes persuasive, they are not controlling under our system of civil law, particularly since we have codal provisions that are to the contrary."[41]

There is the "real obligation" which attaches to immovable property under Civil Code article 2010, but the lease provision in the case under discussion was clearly a personal obligation. Building restrictions are recognized as limitations on the use of land and are likened to servitudes, but real servitudes constitute relationships between estates belonging to different owners and cannot exist between a lessor and lessee.

SUCCESSIONS AND DONATIONS

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VALIDITY OF TESTAMENTS

In *Succession of Anderson*[1] the validity of a statutory will was contested on the ground that it had not been signed by the testator. The testament contained the testator's declaration that

40. 245 La. 1004, 162 So. 2d 341 (1964), *reversing* 153 So. 2d 544 (La. App. 1st Cir. 1963).

41. *Id.* at 1007, 162 So. 2d at 343.

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1. 159 So. 2d 776 (La. App. 2d Cir. 1964).

he did not know how to sign his name and therefore affixed his mark thereto with the assistance of the undersigned notary. Basing its decision on *Succession of Butler*,[2] the Third Circuit Court of Appeal held that it was not sacramental to the validity of the testament, which was otherwise executed in accordance with the statute,[3] that the testator should literally write his name on the instrument, and that the "X" mark placed thereon by the testator, with the intent of making it his signature, fulfilled the requirements of the law.[4] This decision, as well as the rule of the *Butler* case, has been effectively overruled legislatively by Act 123 of 1964[5] which amends R.S. 9:2442 and R.S. 9:2443 to provide that "those who know not how or are not able to *sign their names*" lack the capacity to make dispositions in the form of the statutory will. (Emphasis added.)

In *Succession of Guidry*,[6] the court held that a will which is otherwise confected in accordance with the provisions of the statutory wills act is not invalid because it has not been dictated to the person who typed it or in the presence of the notary and the witnesses, or because the testator failed to express verbally his signification that the instrument was his last will and testament. The statutory wills act does not require the observance of these formalities which apply chiefly to nuncupative wills by public or private acts.

A much more interesting question arose in *Succession of Maltese*,[7] wherein a testament, initially intended as a statutory will and invalid as such because of the incapacity of the testator to make such a will,[8] was offered for probate as a nuncupative will by private act. For the proponents, it was shown that the will contained the signatures of four witnesses, including the notary; that the fifth witness required by article 1582 of the

2. 152 So. 2d 39 (La. App. 4th Cir. 1963), *cert. den.*, 244 La. 668, 153 So. 2d 153, noted 24 LA. L. REV. 184 (1964).

3. LA. R.S. 9:2442-9:2443 (Supp. 1962).

4. But the question seems to be, not whether the "X" mark of the testator constitutes a valid signature but whether the testator who does not know how to sign his name has the capacity to make this type of a will. *Cf.* Succession of Guidry, 145 So. 2d 613, 616 (La. App. 4th Cir. 1962), *cert. den.*, where the court states: "The contention of appellees that the cross or X mark . . . satisfies the requirement of signature . . . is clearly without foundation under the laws of this state."

5. Discussed in *Louisiana Legislation of 1964*, 25 LA. L. REV. 18-19 (1964).

6. 160 So. 2d 759 (La. App. 3d Cir. 1964).

7. 155 So. 2d 208 (La. App. 4th Cir. 1963).

8. The testimony showed conclusively that the testator had never known how to read or write.

Civil Code had been present during the entire making of the will, and that he was ready, able, and willing now to subscribe his name as a witness. The court properly holds that under the clear and unambiguous language of the code article, the mere presence of the witness is not sufficient. To permit such a witness to sign after the confection of the will, the court pointed out, would open the doors wide to fraud, substitution and imposition.[9]

In *McGuffin v. Jones*,[10] the question at issue was whether the name of the testator, appearing at the end of the olographic testament and as a part of the last sentence of the dispositive provisions, should be considered as the signature of the testator.[11] Referring to and distinguishing previously adjudicated decisions,[12] the court had no difficulty in inferring from the position of the testator's name, which was centered in a separate line, that the testator clearly intended it as his signature.[13]

The testamentary capacity of the testatrix was at issue in *Succession of Turner*.[14] The evidence and testimony showed that shortly after the confection of the will the testatrix had been admitted to the North Louisiana Sanitarium and later committed to the Central Louisiana State Hospital on the complaint that she was "forgetful of most recent events; worries a great deal; talks to herself; . . . wanders around the house all night

9. It is doubtful whether a will *initially* intended as a statutory will could be probated as a nuncupative will by private act even if subscribed to by the necessary number of witnesses in view of the other requirements of articles 1581 and 1582 of the Civil Code as to dictation, presentment, and reading of the will, which are not necessarily or usually observed in the making of a statutory will.

10. 157 So. 2d 256 (La. App. 3d Cir. 1963).

11. The will was as follows:

Feb. 18-1952

"I am writing my will, of my personal belonging and real estate
At my death my brother Claude Jones, gets my personal and real estate property,
the court house record shows as Larry Jones, same as
"Lowery Fornie Jones."

12. *In re* Poland's Estate, 137 La. 219, 68 So. 415 (1915); Succession of Dyer, 155 La. 265, 99 So. 214 (1924); Succession of Fitzhugh, 170 La. 122, 127 So. 386 (1930).

13. "Our view of the jurisprudence . . . convinces us that in order for there to be a compliance with the requirement of article 1588 . . . that an olographic will be signed, it is necessary (1) that the testator in writing his name on the will must have intended to sign it; and (2) that the signature of the testator must appear at the end of the will, or it must have been affixed at such a place on the document and in such a manner as to indicate clearly that the name as written was intended by the testator to be his signature to the entire completed will." McGuffin v. Jones, 157 So. 2d 256, 258 (La. App. 3d Cir. 1963).

14. 157 So. 2d 740 (La. App. 2d Cir. 1963).

and wants to come to town, says she has business to attend to; talks incessantly; . . . does not recognize her own clothing." Yet the opinion of her personal physician, and that of the notary who executed the will, was that she was mentally competent at the time the will was made. Under these circumstances, the court found that the evidence adduced by the opponents was insufficient to establish testamentary incapacity.

In *Succession of Shows*,[15] the olograph of the decedent offered for probate was in the following form: "Dec. 3-61. All to My Sister" followed by the signature of the testatrix. Although it was admitted that the paper in question was entirely written by the deceased, and that in all probability she intended it as her last will, the First Circuit Court of Appeal, two judges dissenting, concluded that it lacked the necessary animus testandi, and refused to admit it for probate. In affirming the decision,[16] the Supreme Court states: "A mere perusal of the instrument sought to be probated in the case at bar discloses it totally lacks any language to indicate the animus testandi of the decedent and the *necessary words* to constitute a valid will."[17]

SIMULATED TRANSACTIONS — RIGHTS OF FORCED HEIRS

Both in *Succession of Clark*[18] and in *Succession of Lewis*,[19] the rights of forced heirs to annul the simulated transactions of those from whom they inherit, were at issue. In the *Lewis* case, the Fourth Circuit Court of Appeal had no difficulty in concluding that, since the transactions complained of were clearly simulations, the plaintiff forced heir had a perfect right, under article 2239 of the Civil Code, to have the transactions declared absolute nullities and to treat them as such. But in the *Clark* case, the meaning and application of article 2239 raised doubts in the same court. In that case, the plaintiff alleged that his father, who had died intestate, had "purportedly" sold a

15. 158 So. 2d 293 (La. App. 1st Cir. 1963).
16. Succession of Shows, 246 La. 652, 166 So. 2d 261 (1964).
17. 166 So. 2d at 263. The court of appeal had relied on Succession of Foggard, 152 So. 2d 627 (La. App. 2d Cir. 1963) from which it quoted approvingly as follows: "Nor does the instrument contain the words 'give' 'donate' 'will' 'bequeath' 'devise' or any other word establishing or even indicating that it is a dispositon of a last will." Is the court being unduly technical in requiring "words of disposability" for the validity of a testamentary disposition? *Cf.* Succession of Ehrenberg, 21 La. Ann. 280 (1869), in which the olograph admitted to probate was as follows: "Mrs. Sophie Loper is my heiress."
18. 155 So. 2d 37 (La. App. 4th Cir. 1963).
19. 157 So. 2d 321 (La. App. 4th Cir. 1963).

piece of property to the plaintiff's grandfather, which transaction he sought to set aside as a simulation under the express terms of the code article. Alternatively, the plaintiff also alleged a donation in disguise, the price of the thing sold having been less than one-fourth the real value thereof.[20] The exception of prescription to the action of nullity based on the principal allegation of simulation was properly overruled since the action is imprescriptible.[21]

The exception of no cause of action was maintained against the alternative demand that the transaction was a donation in disguise, since article 2442 of the Civil Code applied only to sales made by parents to their children, and not to sales by children to their parents.[22] But the exception of no cause of action against the alleged simulation seemed to have confused the court somewhat, for it concluded that the petitioner had a right to "annul or *reduce* the transfer of which he complains *only if such transfer exceeds the disposable portion* and thus impinges upon the legitime."[23] (Emphasis added.) The court took the position that "where the act of transfer recites a consideration even though there is none, the act may be considered as and given the effect of a valid gratuitous donation *if the transferor had the right to make the donation,* i.e. if the same does not impinge upon the legitime."[24] (Emphasis added.) Obviously, the question is not whether the "sale" exceeds the disposable portion, but whether there is animus donandi on the part of the "vendor," for if the latter intends to part with title, a donation subject to reduction results, whereas in the absence of any

20. LA. CIVIL CODE art. 2444 (1870): "The sale of immovable property made by parents to their children, may be attacked by the forced heirs, as containing a donation in disguise, if the latter can prove that no price has been paid, or that the price was below one-fourth of the real value of the immovable sold, at the time of the sale."

21. Guilbeau v. Thibodeau, 30 La. Ann. 1099 (1878). Nevertheless the court prefers to overrule the exception on the ground that the prescriptive period had not accrued: "Aside from the question of whether or not an action against the vendee to annul a simulated sale is prescriptible . . . the simple answer to the argument . . . is that such prescription, even if applicable did not run the required 10 years. It is clear that prescription cannot run against a cause of action which has not accrued . . . . Here the petitioner did not have a cause of action while his father was alive and the latter's death occurred less than 3 years prior to the time the petition was filed." Succession of Clark, 155 So. 2d 37, 39 (La. App. 4th Cir. 1963).

22. *Id.* at 40: "The article specifically refers to sales by parents to their children, mentions no other, and applies only to such sales. See Dare v. Myrick, 226 La. 732, 737, 77 So. 2d 21, 23. It has no application to the instant case which involves a sale by a child to his parent and it cannot be so extended."

23. *Ibid.*

24. *Ibid.*

intention on his part to make a gratuitous disposition or to part with title, the transaction is only a sham and can have no effect whatsoever, because there has never been an actual divestiture of title. This is the reason why the action is imprescriptible, and why under article 2239 the heirs of the "vendor" are permitted by parol to have such transactions declared null and void, and are not "restricted to the legitime." Since, the allegations of the petition must be taken as true for the purposes of the exception of no cause of action, the transaction should have been considered as a simple simulation and as such void in its entirety.[25]

UNITED STATES SAVINGS BONDS

In line with the Louisiana Supreme Court decision in *Winsberg v. Winsberg*,[26] which announced the rule that the designation by a purchaser of United States savings bonds of a beneficiary to whom the bonds are payable upon the purchaser's death constitutes an additional method of disposing mortis causa, the Fourth Circuit Court of Appeal held that the designation of an alternative payee by the purchaser of such bonds, constitutes a new method of executing a donation inter vivos of such bonds.[27] But the court also made the significant statement that, although federal savings bonds are governed exclusively by federal law, problems such as the extent to which these bonds figure in the calculation of inheritance taxes, or of the legitime of forced heirs and the rights of children born subsequent to the designation of the beneficiary or alternative payee, are matters which are governed by state law.[28]

USUFRUCT UNDER ARTICLE 916

In *Succession of Norton*,[29] Mrs. Norton died survived by her husband and four children of her marriage to Mr. Norton. When

25. Perhaps the error in which the court seems to have fallen is attributable to the ambiguous, and therefore, faulty allegations in the plaintiff's petition in which he sets forth two mutually exclusive allegations, viz.: that the "purported" sale was "false, unreal and [a] simulated sale;" and in the same breath that it was in fact "an attempted donation in disguise." This could have been overlooked, however, in view of the positive alternative allegation of a disguised donation, if the court found that a price had been actually paid.

26. 220 La. 398, 56 So. 2d 730 (1952).

27. Succession of Weis, 162 So. 2d 791 (La. App. 4th Cir. 1964).

28. "It is to what extent those bonds figure in calculating the inheritance tax or a legitime or an interference with the rights of a child born subsequently to the naming of a payee on death that the state law governs." *Id.* at 794.

29. 157 So. 2d 909 (La. App. 1st Cir. 1963).

her succession was judicially opened, the four children renounced her succession which consisted of her one-half interest in the pre-existing community, whereupon Mr. Norton petitioned to be recognized as the sole surviving heir of his deceased wife.[30] In a novel decision, the majority of the court took the position that in determining the inheritance tax due by the surviving spouse, the value of the usufruct under article 916 should be deducted from the value of the property because the surviving spouse did not acquire such usufruct by inheritance. The dissenting judge, who in the opinion of this writer is eminently correct, clearly points out the error in which the majority of the court seems to have fallen. The usufruct of article 916 attaches only to the share which is inherited by the issue of the marriage. When the latter renounce their share of their parent's succession, the succession accrues to the surviving spouse in the same manner as if there had never been any issue. Therefore, the surviving parent takes the property in full ownership, and consequently there should be no occasion to deduct the value of the usufruct for inheritance tax purposes.

In *Succession of Heckert*,[31] the plaintiffs were recognized as heirs of their mother, and as such sent into possession of her one-half interest in certain corporate shares acquired by their father during his marriage to the deceased. The judgment also recognized their father as surviving spouse in community, and as such entitled to the usufruct on the stock in question. About a year later the father married the defendant, but failed to deliver to the plaintiffs their one-half of the corporate shares, the certificates of which he continued to hold in his name. During his marriage to the defendant, which lasted until his death some twenty-one year later, the father made gratuitous dispositions of the majority of this stock in the defendant's favor. Upon the father's death the plaintiffs instituted an action against the defendant individually and in her capacity as testamentary executrix, seeking, among other things, to recover the stock which their father had disposed of to their prejudice. To this action the defendant interposed the exception of ten years prescription liberandi causa, based on the proposition that

30. LA. CIVIL CODE art. 915 (1870): "When either husband or wife shall die, leaving neither father nor mother nor descendants, and without having disposed by last will and testament of his or her share of the community property, such undisposed of share shall be inherited by the surviving spouse in full ownership."

31. 160 So. 2d 375 (La. App. 4th Cir. 1964).

the plaintiffs' action was in the nature of an accounting for the imperfect usufruct which their father had on the stock. The court held that the usufruct on corporate stock is not an imperfect but a perfect usufruct since the usufructuary need not sell, alienate, or change the substance of the property in order to enjoy it, the usufructuary being entitled to the fruits in the form of dividends. Accordingly, the court held, the alienation of the stock in question was in breach of the usufructuary's fiduciary obligation, and their rights to recover the same could not prescribe, for under the provisions of article 3510 prescription cannot run in favor of the usufructuary as against the rights of naked owners.[32]

COMMUNITY PROPERTY

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Article 2408 of the Civil Code is the only Louisiana legislation on accounting between the separate and common interests of the spouses on the termination of the community of acquets and gains and it foresees only one type of case, the increase in the value of a separate asset of either spouse by their "common labor, expenses, or industry." Here the "other spouse" is entitled to receive one-half of the increase in value. *Tooley v. Pennison*[1] presented the case of one spouse's separate asset, acquired before marriage on credit, being paid for in part after marriage with common funds. Clearly there is no question in this instance of the augmentation of the value of the asset, but rather a payment of a separate obligation with common funds, and thus the court properly decided that the spouse whose separate obligation had been paid should reimburse the common or community fund for the amounts so expended.[2]

32. "As relates to the facts in the present case, were this Court to say that since the petitioners did not assert their rights to the stocks within ten years after the termination of the usufruct, their rights have prescribed; we would actually be saying that there can be acquisitive prescription under a usufruct. Such a holding would be directly contrary to the clear and express provision of Civil Code Art. 3510." *Id.* at 381.

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1. 157 So. 2d 628 (La. App. 4th Cir. 1963).

2. The same decision also declared that land in a separate property state, bought in the husband's name with common funds, belonged to the husband, but that the husband must reimburse the common fund. *Id.* at 630. This questionable solution is discussed in the *Conflict of Laws* portion of this Symposium.