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Partition - The Effect of R.S.13:4985 On Partititons Made Without Representation of All Co-Owners

Richard B. Sadler

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rendered in a suit of which it had no notice and therefore no opportunity to defend grates against the ingrained principle that every man shall have his day in court.²⁵ It is unfortunate that the court in the instant case did not refer to the *West* rule that liability under the Direct Action Statute is fixed at the time of injury and expressly impose a limitation upon it. The decision should be so interpreted; and, as interpreted, the noted decision preserves the Louisiana policy of protecting the injured party except when that policy conflicts with the defendant insurer's fundamental right to a judicial hearing.²⁶ Thus the accident-suit distinction appears justifiable and desirable; it supports the *Hallman* decision and reconciles the *Hallman* and *West* cases.²⁷

John M. King

PARTITION — THE EFFECT OF R.S. 13:4985 ON PARTITIONS
MADE WITHOUT REPRESENTATION OF ALL CO-OWNERS

“No one can be compelled to hold property with another, unless the contrary has been agreed upon; any one has the right to demand the division of a thing held in common, by the action of partition.”¹ The Code characterizes partition as a “sort of exchange” by which one's right in part of a thing is exchanged for others' rights in the remainder which becomes his alone.²

and investigation conducted by injured party's counsel normally furnish necessary details of accident).

25. For recent statements of this ancient heritage see United States *ex rel.* TVA v. McCoy, 198 F. Supp. 716 (W.D. N.C. 1961); Baltz v. The Fair, 178 F. Supp. 691 (N.D. Ill. 1959); Beck v. Jarret, 363 P.2d 215 (1961); O'Neil v. Dux, 101 N.W.2d 588 (1960).

26. *Hansberry v. Lee*, 311 U.S. 32 (1940) (persons not parties to personam actions are not bound by the judgment therein, and enforcement of the judgment against such persons violates the due process clauses of the fifth and fourteenth amendments).

27. By the combined decisions of *West* and *Hallman*, important qualifications have been read into R.S. 22:655 (Direct Action Statute). Can it be assumed that the *Hallman* rule will also apply to R.S. 32:900(F)(1) (Motor Vehicle Financial Responsibility Act)? It has been held that a “motor vehicle liability policy” as defined in the latter act is not the same as a general liability policy under the former act. *New Zealand Ins. Co. v. Holloway*, 123 F. Supp. 642 (W.D. La. 1954). Would this case be authority for not applying the *Hallman* decision to cases falling under R.S. 32:900?

1. LA. CIVIL CODE art. 1289 (1870).

2. *Id.* art. 1382. However, all exchanges which terminate ownership of property in indivision are not necessarily partitions. *Goodwin v. Chesneau's Heirs*, 3 Mart.(N.S.) 409 (La. 1825). A sale by one heir to his coheir definitely terminates the ownership in indivision, but this would be treated as a sale rather than as a partition. LA. CIVIL CODE art. 1405 (1870).

Every partition is either in kind or by licitation, definitive or provisional, voluntary or judicial. Partition is in kind when property is physically divided among the co-owners;³ it is by licitation when property is sold and the proceeds are distributed among the co-owners.⁴ A definitive partition is one which is permanent and irrevocable; a provisional partition is one which is made of certain things before the remainder can be divided or when it is impossible to partition permanently.⁵ A provisional partition permits parties to enjoy the fruits of the partitioned things.⁶ Voluntary partitions are those accomplished among the co-owners by their mutual consent; judicial partitions are those made by the courts according to the formalities prescribed by law.⁷ If all the co-owners are of age and present, the partition may be voluntary;⁸ however, if any co-owner is an absentee, minor, or interdict, the partition must be made judicially.⁹ One co-owner, however, can sell his undivided interest to either an outsider¹⁰ or one of his co-owners¹¹ without such sale being considered a partition.

3. LA. CIVIL CODE art. 1337 (1870): "Each of the co-heirs may demand in kind his share of the movables and immovables of the succession . . ." Partition in kind is favored by the law, and in judicial partitions the judge must order a partition in kind unless the property is indivisible or its division would cause a diminution of its value. *Aucoin v. Greenwood*, 199 La. 764, 7 So.2d 50 (1942).

4. LA. CIVIL CODE art. 1339 (1870). A partition by licitation may be made just as any other partition where all co-owners are of age and are present or represented. In all other cases the partition must be made judicially and the courts are reluctant to grant partitions by licitation. *E.g.*, *Pryor v. Desha*, 204 La. 575, 15 So.2d 891 (1943); *Aucoin v. Greenwood*, 199 La. 764, 7 So.2d 50 (1942).

5. LA. CIVIL CODE art. 1295 (1870). A judicial partition in which the time for appeal has passed is a definitive partition, since it is permanent and irrevocable. Article 1296 provides: "By definitive partition is also understood the judicial partition . . ." On the other hand any partition that is not made according to the formalities prescribed by law is only provisional. Thus a voluntary partition among all the co-owners where one co-owner was a minor is provisional because the law requires partitions where a minor is involved to be made judicially. If the minor, upon reaching his majority, ratifies the partition it then ceases to be provisional and becomes a definitive partition. See *Rhodes v. Cooper*, 113 La. 600, 37 So. 527 (1904).

6. *Rhodes v. Cooper*, 118 La. 299, 42 So. 943 (1907).

7. LA. CIVIL CODE art. 1294 (1870).

8. *Id.* art. 1322.

9. *Id.* art. 1323. Articles 1324 to 1346 prescribe the form for a judicial partition — inventory, appraisal, collation, parties, procedure, and the granting of partitions by licitation.

10. In *Carway v. Hebert*, 182 So. 164, 167 (La. App. 1st Cir. 1938) the court said that a co-owner may sell his interest in the whole or in only a part of the entire thing held in common, as long as "he sells that interest subject to the rights of the other co-owners, whose rights came into existence when the thing was acquired in common ownership."

11. LA. CIVIL CODE art. 1405 (1870) provides that sale by one heir to his co-heir is not subject to rescission if the vendor remains bound for the payment of debts.

The Louisiana courts have consistently held a partition in which all of the co-owners are not represented to be absolutely null and with no effect on any party to the partition.¹² Thus any co-owner, even a party to the partition, could have it set aside upon proving that some other person with an interest in the property had not been a party to the partition.¹³ This rule undermined the stability of land titles in Louisiana. The courts have continually held that since the partition is null, any sale made under it is null and "the purchaser at such a sale is not protected by the decree for a partition."¹⁴

In an obvious attempt to remedy this situation, while at the same time protecting the rights of the unrepresented co-owner, the legislature passed Act 403 of 1952, which provided:

"Where real property is partitioned, either in kind or by licitation, by either judicial or conventional partition the fact that one or more co-owners are not parties thereto shall not affect the validity of such partition as to the co-owners who are parties thereto or their heirs or assigns; provided that the rights of any co-owner not a party to such partition shall not be affected thereby and the interest of such co-owner in the property partitioned shall remain the same as if the property had not been partitioned."¹⁵

12. *Sun Oil Co. v. Smith*, 216 La. 27, 43 So.2d 148 (1949); *Amerada Petroleum Corp. v. Reese*, 195 La. 359, 196 So. 558 (1940); *Erschine v. Gardiner*, 162 La. 83, 110 So. 97 (1926); *Latham v. Glasscock*, 160 La. 1089, 108 So. 100 (1926); *Wheeler v. Mann*, 149 La. 866, 90 So. 225 (1921); *Smith v. Smith*, 131 La. 970, 60 So. 634 (1913); *Boutte v. Executors of Boutte*, 30 La. Ann. 177 (1878); *Wright & Williams v. Cane*, 18 La. Ann. 579 (1866); *Rightor v. DeLizardi*, 4 La. Ann. 260 (1849); *Kendrick's Heirs v. Kendrick*, 19 La. 36 (1841); *Guidry v. Guidry's Heirs*, 16 La. 157 (1840). In the *Sun Oil* case the court said: "It is well settled under the jurisprudence of this state that a partition is invalid if all of the co-owners of the property partitioned are not made parties thereto, whether the partition is by conventional agreement or by judicial process, and that such a purported partition is considered as no partition at all, binds none of the parties to it and is null as to all." *Sun Oil Co. v. Smith*, 216 La. 27, 39, 43 So.2d 148, 152 (1949).

On the same question, the court in *Wheeler v. Mann*, 149 La. 866, 879, 90 So. 225, 229 (1921) said: "It is clear, then, that there is no question here presented of the right to rescind a partition, or of the prescription of an action having that purpose in view, since there has been no partition."

13. LA. CIVIL CODE art. 1412 (1870): "[F]or the partition cannot subsist for one and be annulled for another."

14. *Latham v. Glasscock*, 160 La. 1089, 1097, 108 So. 100, 102 (1926). See also *Johnston v. Burton*, 202 La. 152, 11 So.2d 513 (1942); *Scaife v. Jones*, 156 La. 5, 99 So. 890 (1924); *Succession of Poree*, 27 La. Ann. 463 (1875); *Martin v. Carroll*, 59 So.2d 158 (La. App. 2d Cir. 1952).

15. LA. R.S. 13:4985 (1950).

The act is retroactive¹⁶ and effective against all parties including interdicts, minors, and absentees.¹⁷

However, in a recent case which seemed to fall squarely within the statute, it was neither cited nor applied. The plaintiffs in *Lang v. Fornea*¹⁸ were seeking to set aside a partition among their deceased mother and her brothers, some of whom were minors at the time and not parties to the partition. In upholding the plaintiff's contention that the partition was null, the court of appeal based its decision on the jurisprudential principle that a partition binds none of the co-owners if all were not parties to the partition.¹⁹ It is submitted that the court erred in not applying the statute in this case. Possibly the court overlooked the statute as it was neither mentioned in the opinion nor urged in the briefs. Application of the statute in *Lang* would have sustained the partition since the unrepresented co-owner was not the party challenging the partition.²⁰

Louisiana courts recently took cognizance of the statute for the first time. In *Lewis v. Bell*,²¹ plaintiffs were seeking to annul a prior judgment ordering a partition sale on grounds that it would be unconscionable and inequitable because certain owners were not parties to the prior suit. All plaintiffs in *Lewis* had been parties to the earlier suit ordering the sale. In rebutting their contention, the Court of Appeal, Third Circuit, said:

“[O]ur law does not require that all co-owners be joined in order to make the partition by licitation binding on those

16. *Id.* 13:4986. To insure constitutionality, co-owners are given a period of six months from the effective date of the act to set aside a previous partition where all co-owners were not parties thereto.

17. *Id.* 13:4988: “The provisions of R.S. 13:4985 through 13:4990 shall be effective as to all parties including absentees, minors, and interdicts.” The legislature was evidently trying to stabilize land titles when it passed this act. The title of the Act states that it is: “An Act to provide that where real property is partitioned the validity of the partition shall not be affected by the fact that one or more co-owners were not parties thereto”

18. 135 So.2d 643 (La. App. 1st Cir. 1961).

19. See cases cited at note 12 *supra*.

20. Therefore the partition in *Lang* should have been upheld unless it was subject to attack on the grounds for rescission of any contract, *e.g.*, error, mistake, or fraud. Prior to R.S. 13:4985 the court said that there was no question of rescission involved since there had been no partition. See note 12 *supra*. It would seem that since the act makes these partitions valid (at least among the parties) they would be subject to the actions for rescission. For example, in *Lang* the partition was made in the form of reciprocal acts of sale. In the sale from defendants to plaintiffs' mother, it was agreed that the minors would, upon reaching their majority, transfer their interest in the property transferred to plaintiffs' mother to her. The opinion of the court does not show whether this was ever done. If it were not, there might be grounds for rescission on the basis of failure of cause.

21. 137 So.2d 706 (La. App. 3d Cir. 1962).

co-owners who are parties to the suit. . . . To hold that where co-owners are not joined the judgement is subject to attack under Code of Practice Article 607 because it is unconscionable and inequitable, would be holding that R.S. 13:4985 does not have any effect."²²

Therefore, the statute has at least changed the rights of co-owners who were parties to the partition; they can no longer attack its validity. The courts, however, have not interpreted the statute with respect to the rights of a co-owner not a party to the partition. The proviso "the interests of such co-owner . . . shall remain the same as if the property had not been partitioned"²³ is subject to at least two interpretations. It could mean that the rights of the non-party co-owner remain the same as they were under the jurisprudence prior to the statute. Thus he could still have the partition declared null. However, such interpretation would not stabilize land titles. The statute would only limit the persons who could attack the partition.

It would seem more logical and desirable to interpret the statute as upholding the validity of the partition even from attack by a co-owner who was not a party thereto. The proviso then protects the non-party co-owner by preserving his interest in the whole property despite the partition. Under this interpretation any division or sale of the property under or subsequent to the partition would be valid except to the extent of the non-party co-owner's interest.²⁴

It is submitted that the court should adopt the latter interpretation because of the desired stabilization of land titles. In any event the partition is obviously no longer to be considered absolutely null; only the unrepresented co-owner can attack it. The validity of the partition is unimpeachable by those who participate in it.²⁵

Richard B. Sadler III

22. *Id.* at 708.

23. LA. R.S. 13:4985 (1950).

24. Thus he would hold his proportionate interest in indivision with the holder of each separate piece of the partitioned property. For example, if one of ten co-owners was unrepresented, and the property was divided into nine equal lots, he would then own a 1/10 interest in each of the lots. Under this interpretation a third party purchasing from one of the parties to the partition would be protected as he would have valid title to 9/10 of the property he purchased, whereas prior to the statute he would have had nothing except his warranty action.

25. Another problem posed by the statute is that of prescription. Under the jurisprudence in cases in which there was an unrepresented co-owner, the courts have held that a partition deed is merely declaratory and not translatif of title