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A COMPARATIVE ANALYSIS OF CIVIL LAW SUCCESSION

BY GEORGE A. PELLETIER, JR.† AND
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I.

INTRODUCTION

INITIALLY FAMILY OWNERSHIP preceded individual ownership, obviating any need for a detailed system of succession because the family continued to exist, despite the death of any of its members. Yet, even in the earliest stages there was room for inheritance of status by individuals, thus necessitating some type of extra-familial means of passing rights, privileges and property. To meet just such a need, rules of succession and wills were soon developed.¹

Sir Henry Maine writes that while there are traces of wills in earlier civilizations, the true power of testation was first known to the Romans.² The Romans first sought to regulate the power of testamentary disposition, initially developing elaborate rules for nontestamentary dispositions, all of which were molded into a workable legal institution based on the unifying principle of universal succession.

The Civil Law changed many of the rules and some of the doctrines of the Roman law of succession, imposing many additional restrictions on the freedom of testation. However, it can be said that the modern Civil Law of succession uses Roman law clothing and accessories with notable consistency, so that a French or Italian lawyer can readily understand the details of the German system and vice versa.

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1. See ATKINSON, WILLS 6-7 (2d ed. 1953); HOLMES, THE COMMON LAW 342-44 (1881); MAINE, ANCIENT LAW 194-209 (Pollock ed. 1930). Maine (p. 214) states that the will was not initially intended as a mode for distributing a decedent's goods, but rather as one among several ways of transferring the representation of the household to a new chief.

2. MAINE, *op. cit. supra* note 1, at 195, 214, 216. Professor Lawson has stated that the will is a Roman institution if there ever was one. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 99-100 (1953). ATKINSON, *op. cit. supra* note 1, at 7-8, points out that there are traces of wills in earlier civilizations such as the Egyptians and the ancient Jews, as well as in the Code of Hammurabi.

The underlying concepts of universal succession, forced heirship, the prohibition of the trust concept and representation have, among others, been retained in modern Civil Law practice.³

This paper is a discussion of the general principles that form the basis for Civil Law successions. The topics treated will be universal succession, the devolution of property upon intestacy, wills, to include the principle of the reserve or legitimate portion, and the prohibition against trusts in the Civil Law. Stress will be laid on the Roman law origins of Civil Law successions, especially with respect to the German law which is largely Roman in character.⁴

A brief discussion relating to terminology is inserted here to acquaint the reader with some of the vocabulary used throughout this article. The term "succession" in the Civil Law refers both to the process of the heir succeeding to the inheritance, and to the inheritance or estate itself.⁵ The word "heir" is generally used as descriptive of all persons who share in the estate either by testacy or intestacy. It can, however, under French law, be used to refer only to those who take by intestacy as "universal successors," a term which will be defined below.⁶ In France, all beneficiaries under a will are known technically as legatees (*légataires*).⁷

With this basic terminology in mind, attention is turned to the fundamental concept of the universal successor. Discussion will focus primarily on this term's meaning and evolution under Roman, French, and German law, with comparisons being shown where applicable, between these several systems of law. Other Civil Law systems will be pointed out from time to time when considered of special interest.

II.

THE CONCEPT OF UNIVERSAL SUCCESSION

A. Roman Law

The term "universal succession" is of modern derivation,⁸ and is descriptive of the succession which occurs upon an individual's death under modern Civil Law and its forerunner, Roman law. Universal succession means succession by an individual to the entirety of the

3. For a general review of the Roman law, see BUCKLAND, A TEXT-BOOK OF ROMAN LAW 334-404 (3d ed. 1963); NICHOLAS, AN INTRODUCTION TO ROMAN LAW 234-70 (1962); BUCKLAND & McNAIR, ROMAN LAW AND COMMON LAW 143-92 (2d ed. 1952).

4. I MANUAL OF GERMAN LAW 183 (1950).

5. AMOS & WALTON, INTRODUCTION TO FRENCH LAW 289-90 (2d ed. 1963). Louisiana law is the same. See arts. 871-74, LA. CIV. CODE OF 1870; Oppenheim, *The Fundamentals of Louisiana Succession Law*, 23 TUL. L. REV. 305 (1949).

6. See p. 328 *infra*.

7. AMOS & WALTON, *op. cit. supra* note 5, at 317; see *infra* note 11.

8. NICHOLAS, *op. cit. supra* note 3, at 235.

estate, which includes all the rights and duties of the decedent (*de cuius*), known collectively as the *hereditas* under Roman law.⁹ The succession to the whole of the estate could be by one heir (*heres*) or several (*heredes*), they taking jointly regardless of whether the succession was testate or intestate. The estate (*hereditas*), which passed in Roman succession, was the sum of all the rights and duties of the deceased person (*persona*) except for his political, social and family rights which were not considered inheritable.¹⁰ Transfer of title to the heirs was deemed to occur simultaneously with the individual's death and was a complete transfer of title at that time.

Although the succession of the heir or heirs as universal successors¹¹ was to the whole or an undivided portion of the estate, legacies were permitted to be paid out of the estate, provided there was at least one universal successor.¹² The fact that there was more than one heir did not change the concept of the estate devolving as a whole, for each heir then became entitled to an undivided portion of the whole as a partner with the other heir or heirs. A comparable concept in the common law is the residuary legatee to a will, who receives all that is left after the specific bequests.

The effect of the Roman doctrine was to continue the personalty and patrimony of the dead man in his heir or heirs.¹³ This continuum of rights and privileges was based not so much on economic reasons as on social and religious values of the time. Its purpose was to perpetuate the family and insure that there would be someone on whom the obligation of maintaining the family worship and reverence of ancestors (*sacra*) would devolve.¹⁴

The continuation of the dead man's estate in his heir or heirs is basic to the principle of universal succession. As universal successor

9. See generally *id.* at 235-43; BUCKLAND & McNAIR, *op. cit. supra* note 3, at 143-92; MAINE, *op. cit. supra* note 1, at 200-18. Maine (p. 203) quotes the Roman definition of an inheritance as follows: "*hereditas est successio in universum jus quod defunctus habuit*" (an inheritance is a succession to the entire legal position of a deceased man.)

10. BUCKLAND, *op. cit. supra* note 3, at 308-09. The political, social and family rights were considered to be an integral part of the decedent and they "died" with him. Thus, to take the obvious, a marriage was not inheritable. See NICHOLAS, *op. cit. supra* note 3, at 235.

11. The reader should bear in mind the introductory statement that "heir" or "heirs" refers to both those who take upon testacy or intestacy except for French law. The French make the semantic distinction between heirs, being those who take on intestacy, and universal legatees, being those beneficiaries under a will (with one exception) who take as universal successors. Thus, the term "heirs" as used in the Civil Law, together with the French "universal legatee," is the equivalent of "universal successor." Heir or heirs will be used throughout the remainder of this article as covering all universal successors, both testate and intestate.

12. MAINE, *op. cit. supra* note 1, at 226. At first the legacies were mere directions to the universal successor.

13. II GAIUS, INSTITUTES 229; see MOYLE, IMPERATORIS JUSTINIANI INSTITUTIONES 263 (1949).

14. NICHOLAS, *op. cit. supra* note 3, at 237.

under Roman law, the heir had the right to any undistributed surplus, the decedent not being permitted to die partly testate and partly intestate.¹⁵ As a further concomitant to this principle, if the heir, whether named by will or through intestacy, was also a member of the family (*familia*) and in line for immediate succession, he could not refuse his inheritance even if the liabilities exceeded the assets. There was a form of equitable relief granted by the *Praetors* (the Roman magistrates) to the heirs, but it was not until the time of Justinian that the heirs were finally given the right to conduct an inventory (*beneficium inventarii*) before accepting the estate.¹⁶ Such an inventory allowed the heirs to determine liabilities and enable them to elect whether or not to accept the estate.

B. France

1. General

Universal succession as a legal concept within the Civil Law in France has remained basically the same from Roman times to the present. The estate is considered a single mass (*l'unité du patrimoine*) and vests immediately upon death in the heir or heirs.¹⁷ They are said to have seisin, such seisin being similar in interpretation to that found in the Common Law. The French heir, just as the Roman *heres*, succeeds not only to the estate, as in the Common Law, but also is thought of as continuing the person of the deceased.¹⁸ The heir, once he accepts the estate or his share, becomes liable for the payment of all the debts of the estate even if such debts are in excess of the assets.¹⁹

2. Right of Inventory

A French heir who is a universal successor whether by testacy or intestacy, has the right, as under later Roman Law, to accept or reject the estate, or accept with benefit of inventory.²⁰ If the acceptance is made with benefit of inventory, which grants a delayed right to reject, a declaration to this effect must be made in court,²¹ and the inventory

15. *Id.* at 236.

16. Codex 6, 30, 22; BUCKLAND & McNAIR, *op. cit. supra* note 3, at 149-51.

17. CODE CIVIL art. 718 (Daloz 1965) [hereinafter cited as C.C.]; IV RIPERT & BOULANGER, TRAITÉ DE DROIT CIVIL number 1611 *et seq.* (1959-61).

18. PELLERIN & PELLERIN, THE FRENCH LAW OF WILLS, PROBATE, ADMINISTRATION & DEATH DUTIES 8 (4th ed. 1958).

19. See generally Rheinstein, *European Methods for the Liquidation of the Debts of Deceased Persons*, 20 IOWA L. REV. 431 (1935).

20. C.C. arts. 774, 775. See AMOS & WALTON, *op. cit. supra* note 5, at 305-08. The Louisiana law is similar. See arts. 1013, 1014, 1032, LA. CIV. CODE of 1870; Comment, *Necessity for Administration of a Succession Accepted With Benefit of Inventory*, 26 TUL. L. REV. 238 (1952).

21. C.C. art. 793. The court will be the *Tribunal de Grande Instance* of the district where the decedent was last domiciled.

must be made within three months after decedent's demise.²² Renunciation by an heir must also be made in court,²³ after which a creditor may petition to accept in his place.²⁴ In cases where the heir is incompetent, or where the successor is the state, acceptance can only be made with benefit of inventory.²⁵ However in cases where an heir conceals property belonging to the succession, the court has the right to deny the heir an election and can compel acceptance of the estate.

3. *Partition of the Succession*

That there may be more than one universal successor does not change the concept of the succession devolving as a whole. Each heir becomes possessed of an undivided portion of the whole,²⁶ which makes him a co-owner of the whole estate.²⁷ The Code provides for eventual partition (*partage*) by decreeing a limit of five years on such a state of indivision.²⁸ Partition is relatively simple where the heirs are in agreement and have the necessary capacity, both mental and legal. Even where it is a friendly partition, however, a notarial act will generally be required if immovables are involved.²⁹ If the parties cannot agree to partition, a judicial partition (*partage judiciaire*) is necessary.³⁰ This is done by a notary named by the court and supervised by one of the members of the court.³¹ The Code sets forth rules for the distribution of the succession which the notary must follow.³² These rules require that the partition be of specific assets, a divisible share of the whole, rather than a share of the proceeds of a sale. It has been said that it is the ownership right and not the property that must be divided.³³

Where a spouse survives, the partition is considered two-fold regardless of the type of partition being sought. Since most marriages in France are under a community regime it is first necessary to divide the community and then to partition the succession.³⁴ Although this

22. C.C. art. 794. The heir is given an additional forty days to decide whether he will accept. C.C. art. 795.

23. C.C. art. 784.

24. C.C. art. 788.

25. C.C. arts. 776, 461, 509.

26. It should be noted here that this concept is somewhat akin to the common law concept of a joint tenancy, in the sense that there are the requisite unities of time, title, interest and possession.

27. C.C. art. 724.

28. C.C. art. 815.

29. AMOS & WALTON, *op. cit. supra* note 5, at 313, n.4.

30. C.C. art. 838.

31. See C.C. arts. 815-42 as to partitions and the manner in which they are accomplished.

32. C.C. arts. 815-42. In most Civil Law countries the act of a notary (*notaire*) has far more legal significance than it does in common law countries. The acts of a notary are given legal significance and are often deemed an integral adjunct of the legal system.

33. III PLANIOL, *TREATISE ON THE CIVIL LAW* number 2316 (1959).

34. AMOS & WALTON, *op. cit. supra* note 5, at 313.

situation creates an additional step, it is generally consolidated into a single instrument for the sake of convenience.

4. *The Universal Successor in Intestacy*

French law makes a distinction in intestacy between lawful heirs and irregular successors.³⁵ The former are universal successors and receive possession and title to the estate on the death of the decedent. An irregular successor, while entitled to the estate, has no right of seisin and must receive a court order (*envoi en possession*) before obtaining possession. Under the original text of the Code, the surviving spouse, illegitimate children and the state were all decreed to be irregular successors.³⁶ Now only the state remains in this status.³⁷

5. *The Universal Successor in Testacy*

All beneficiaries under a will who are legatees (*légataires*)³⁸ are not necessarily universal successors.³⁹ When the testator wills his entire estate to one or several legatees, they are considered as universal legatees (*légataires universal*) and assume ownership at the time of the testator's death.⁴⁰ However, the French Code makes a further distinction by classifying some legatees as "legatees by universal title," (*légataires a titre universal*) which basically means a legatee of a designated portion of the estate.⁴¹ A legatee by universal title does not, as does a universal legatee, have the right of succeeding to the whole estate if the other legacies fail, nor does he have seisin or a right to possession on the death of the testator.⁴² A particular legatee (*légataires particulier*) is one given a legacy of a specific bequest and like a legatee by universal title is also not considered a universal successor, receiving possession and ownership of the specified bequest from the universal legatees only upon delivery.

6. *Executors and Administrators*

The immediate possession of the estate in the heirs lessens the need for any executor or administrator. There is no institution corre-

35. C.C. arts. 723, 724, 769, 770.

36. C.C. 723 anc., 756 anc.

37. *Supra* note 35.

38. AMOS & WALTON, *op. cit. supra* note 5, at 317; IV RIPERT & BOULANGER, *op. cit. supra* note 17, at number 1941.

39. But there must be at least one who is. See *supra* note 11 and accompanying text.

40. AMOS & WALTON, *op. cit. supra* note 5, at 324-27. The universal legatee will not gain this ownership at death if the testator neglected to provide for reserved heirs, *i.e.*, those heirs in French law who must receive a fixed share of the estate. On reserved heirs see p. 350 *infra*.

41. C.C. art. 1010.

42. AMOS & WALTON, *op. cit. supra* note 5, at 326-27.

sponding to the Anglo-American probate or grant of administration, the French having no courts designed to deal specifically with inheritance.⁴³ A testator can, at his discretion, appoint one or more testamentary executors (*executeurs testamentaires*), whose duties are to carry out his wishes;⁴⁴ in particular, the due payment of legacies, and the supervisory settlement of the estate.⁴⁵ The French executor is empowered to defend the validity of the will, and also to sell movables to meet legacies where there is a lack of sufficient funds.⁴⁶ Contrary to Anglo-American law he does not receive title to the estate, as this passes immediately to the heirs. Nor is he considered the representative of the estate because of the vesting of immediate possession in the heirs.⁴⁷ Despite this, the testator may confer title on him as to movables but such title may not reside in him for longer than one year.⁴⁸ Also, if the succession is unclaimed any person having an interest, such as a creditor, may move for the appointment of a curator or administrator.⁴⁹

C. Germany

1. General

The principle of universal succession (*Universalsukzession*) is much the same in German law as in Roman and French law. On the death of a person (*Erbfall*) his entire property, whether by testacy or intestacy, passes automatically to the heir or heirs.⁵⁰ There is no distinction made between movable and immovable property, and all property descends both in title and possession to the heirs even though they do not know of the decedent's death or the location of the property.⁵¹ The German Civil Code provides for the issuance of a

43. See PELLERIN & PELLERIN, *op. cit. supra* note 18, at 7; Brown, *Winding up Decedents Estates in French and English Law*, 33 TUL. L. REV. 631 (1959); Brown, *The French Practice of Administration of Estates*, 3 INT'L & COMP. L.Q. 624 (1954). The *Tribunal de Grande Instance* will be the court to handle these matters.

44. C.C. art. 1025; IV RIPERT & BOULANGER, *op. cit. supra* note 17, at number 2172 *passim*.

45. AMOS & WALTON, *op. cit. supra* note 5, at 323-24.

46. *Ibid.* While he is not entitled to any payment for his services, his disbursements come out of the estate. C.C. art. 1034. He is customarily left a legacy for his expected services which he will lose if he refuses to serve. IV RIPERT & BOULANGER, *op. cit. supra* note 17, number 2182.

47. PELLERIN & PELLERIN, *op. cit. supra* note 18, at 8.

48. C.C. art. 1026.

49. C.C. arts. 811, 812. The French law, however, does not have any provision for the appointment of an administrator to supervise an intestate succession which has not been unconditionally accepted by the heirs, *i.e.*, accepted with benefit of inventory. The Louisiana law, although it follows the Code Napoleon, does provide for the appointment of an administrator in such cases. See arts. 1041, 1050, 1051, 1091, LA. CIV. CODE of 1870; Comment, *Penalties for Non-Compliance with Codal Provisions Affecting Administrators*, 23 TUL. L. REV. 384 (1949).

50. BÜRGERLICHES GESETZBUCH art. 857 (hereinafter cited as B.G.B.); I MANUAL OF GERMAN LAW 183 (1950).

51. *Ibid.*

certificate of inheritance (*Erbschein*) by the district court (*Amtsgericht*), which acts as the equivalent of an Anglo-American Probate Court.⁵² This certificate is necessary to effect a formal change in the land registry to reflect the new ownership.⁵³

An heir (*Erbe*), whether by testacy or intestacy, receives ownership of the whole or an undivided portion thereof. A person having only the right to demand from the heir the delivery of specified movables or immovables, or the payment of a sum of money, is a legatee (*Vermächtnisnehmer*). The legatee has only a legal right (*Ansprüche*) to demand his portion of the estate which can be enforced against the heir or heirs.⁵⁴

2. *Acceptance and Disclaimer*

The German law of successions allows for disclaimer of the succession,⁵⁵ just as do all other Civil Law countries. The value of such disclaimer lies where the estate is insolvent, since, under the general principle of universal succession, the heir would otherwise be liable for the debts of the estate even if in excess of the assets. The fact that the succession is considered as having been passed over to the heir in its entirety on the death of the deceased person does not prevent the heir from disclaiming it provided the requisite formalities are followed. Such disclaimer is not valid unless filed in court⁵⁶ not later than six weeks after the heir received notice that the estate had devolved upon him.⁵⁷ During this period an inventory of the estate can be made but German law does not provide for an acceptance with benefit of inventory as does the French law,⁵⁸ and if so limited is ineffective.⁵⁹ This does not mean that the heir cannot conduct an inventory if completed within the six week time period.

3. *Partition*

Where there are several heirs, referred to as a community of heirs (*Erbengemeinschaft*), each takes an undivided interest in the

52. B.G.B. arts. 2353-67. The *Amtsgericht* in its capacity as the court in charge of the estate (*Nachlassgericht*) has numerous functions including issuance of certificates of inheritance, safeguarding an estate where an heir is absent, mediating in the partition, receiving the inventory and so forth. See I MANUAL OF GERMAN LAW 204-07 (1950).

53. I MANUAL OF GERMAN LAW 183 (1950).

54. B.G.B. art. 194; I MANUAL OF GERMAN LAW 39, 184 (1950).

55. B.G.B. art. 1942.

56. B.G.B. arts. 130, 1945.

57. B.G.B. art. 1944. Six months for such disclaimer is permitted if the deceased's domicile was abroad or the heir lives abroad.

58. See *supra* note 20, and accompanying text.

59. B.G.B. art. 150.

whole.⁶⁰ No one heir can act with respect to the property without the concurrence of the others, although he may individually dispose of his undivided share.⁶¹ This co-ownership may not extend beyond thirty years at which time there must be a partition.⁶² If there is an executor, he is charged with making the partition;⁶³ otherwise the heirs must do it themselves or appoint a notary. In cases of dispute, it will be decided by the litigation division of the local courts (*Amtsgericht*).⁶⁴

4. *Executors and Administrators*

A German testator may appoint an executor (*Testamentsvollstrecker*) or he may leave such an appointment to the court.⁶⁵ German law also permits the appointment by the court of an administrator or estate watcher (*Nachlassverwalter*) to protect creditors or an absent heir.⁶⁶ An executor or administrator, depending on his grant of power, can deprive the heir of his possession and right to administer the estate except that title to the property will always remain in the heir.⁶⁷ Lawsuits concerning the estate must be brought by or against the executor or administrator, and an action can be brought by him against the heirs. In the absence of an appointment of an executor or administrator, the heirs in effect combine the rights and powers which Anglo-American law gives to the executor or administrator and the residuary beneficiary;⁶⁸ that is, by reason of their immediate succession to both title and possession they have the right to administer the estate, including the distribution to the legatee of their respective interests. Further, the principle of universal succession decrees that the estate passes as a whole to the heirs, although specific bequests and legacies are permitted, thus entitling them to any unclaimed legacy or undistributed surplus.

D. *Other Modern Civil Law Countries*

The succession laws of all the Civil Law countries embody the basic concept of universal succession; namely, that the decedent's estate passes both in title and possession to the heir or heirs upon the death of the decedent.⁶⁹ Universal succession is also said to form the back-

60. See B.G.B. art. 2032; I MANUAL OF GERMAN LAW 191-93 (1950).

61. B.G.B. arts. 2033, 2034.

62. B.G.B. art. 2044.

63. B.G.B. art. 2204. In making the partition he must follow the rules set forth in B.G.B. arts. 2042-57.

64. B.G.B. art. 2042(5).

65. B.G.B. art. 2197.

66. B.G.B. art. 1975. See generally Wormser & Burchard, *Administration of German Decedents' Estates*, 83 U. PA. L. REV. 37 (1934).

67. B.G.B. arts. 2205, 2206; I MANUAL OF GERMAN LAW 220-21 (1950).

68. BRESLAUER, *PRIVATE INTERNATIONAL LAW OF SUCCESSION* 147 (1937).

69. *E.g.*, NETHERLANDS CIVIL CODE arts. 880, par. 1, 1002; SWISS CIVIL CODE arts. 560, 602, 603; SPANISH CIVIL CODE arts. 657, 661; ITALIAN CIVIL CODE art. 456.

ground for the Soviet law of inheritance.⁷⁰ Under Soviet law the heirs have the usual Civil Law rights of acceptance or rejection of the succession,⁷¹ but upon acceptance are only liable for the debts of the estate to the extent of its assets, contrary to the Civil Law rule of unlimited liability.⁷²

As a general rule in the Civil Law countries where there is no appointment of a testamentary executor, the processes of administration, liquidation, and partition of an estate are generally left to the heirs. Something akin to the Anglo-American administrator may be instituted in special cases, such as where creditors request protection. Creditors receive payment from the heirs but in certain cases where there is good cause to believe that the assets of the estate may be dissipated or removed by the heirs, the court may supervise this payment. In Switzerland, for example, this is done by an institution called the "official liquidation," which is a proceeding conducted by a liquidator appointed and supervised by the cantonal authorities.⁷³ This is a close parallel to the German estate watcher (*Nachlassverwalter*) discussed earlier,⁷⁴ and both bear resemblance to the Anglo-American administrator as they are appointed by the court for the preservation of the assets of the estate. An important difference is that the Swiss official liquidator and the German estate watcher do not take title to the property as does the Anglo-American administrator or executor (at least as to personalty), they only take possession.

III.

DEVOLUTION OF THE SUCCESSION ON INTESTACY

A. Roman Law

The first order for intestate succession as found in Justinian's Novels was that of the deceased's descendants,⁷⁵ the distribution being *per stirpes*, or by representation.⁷⁶ Thus, for example, where a de-

American courts in conflict cases have recognized the Civil Law concept of universal succession. *Anglo-California Nat'l Bank v. Layard*, 106 F.2d 693, 698 (9th Cir. 1939); *Rogues v. Grossjean*, 66 N.Y.S.2d 348 (Sup. Ct. 1946).

70. I GSOVSKI, *SOVIET CIVIL LAW* 638 (1948).

71. *Id.* at 640-44. See HAZARD & SHAPIRO, *THE SOVIET LEGAL SYSTEM* part III, 68-69 (1962).

72. *FUNDAMENTAL PRINCIPLES OF CIVIL LEGISLATION OF THE U.S.S.R. AND OF THE UNION REPUBLICS*, December 8, 1961, effective May 1, 1962, art. 120. See HAZARD & SHAPIRO, *op. cit. supra* note 71, at 71, for a translation of this article. The distinction is slight, however, as most other Civil Law countries grant the right of inventory prior to acceptance, making it unlikely that a debt ridden estate would ever be accepted. *E.g.*, *SWISS CIVIL CODE* arts. 774, 775; *supra* note 20.

73. *SWISS CIVIL CODE* art. 594.

74. See *supra* note 66 and accompanying text.

75. On the Justinian law of intestate succession see generally, NICHOLAS, *op. cit. supra* note 3, at 250-51; BUCKLAND, *op. cit. supra* note 3, at 374-75.

76. On the distinction between *per stirpes*, the taking by representation, and *per capita*, the taking in equal parts, see V THOMPSON, *REAL PROPERTY* §§ 2421, 2422 (1957 ed.).

cedent had as his only heirs two children, one of whom predeceased his father leaving children of his own, these children would take the share of their grandfather's estate that their father would have received had he survived. No distinction was made as to sex. The second order was composed of the ascendants of the deceased, the nearer excluding the more remote. Also included in this order were the brothers and sisters of the deceased. While each member of this class took *per capita*, that is, by equal share,⁷⁷ children of deceased brothers and sisters were nevertheless allowed to represent their parents if any other brother or sister was still living, thereby making this division *per stirpes*. On default of members in any of the above classes the nearest collaterals took *per stirpes*. At this time there was no necessary restriction on the nearness of the blood relationship, called consanguinity. Upon default of this class the surviving spouse had the right to inherit the estate, followed by the state.

The Roman method of determining consanguinity was to count the number of generations up to the common ancestor and then down to the prospective heir.⁷⁸ Thus, a nephew would have only three intervening generations and would take in preference to a first cousin who would be four generations removed. This method of determining nearness of relationship is today known as the Civil Law method and is in use in these countries⁷⁹ and in most states in the United States.⁸⁰ It is to be distinguished from the common or canon law method which entails counting the generations from the common ancestor down to the decedent, figuring one degree for each generation, and then counting the generations from the common ancestor down to the claimant; the longest line governing the degree of relationship.⁸¹

The Roman law of intestate succession, as formulated by Justinian in the Novels and as set out above, represented a significant improvement over the old Roman law which had been based on a strong agnatic concept, which determined descent from the father (*paterfamilias*), and which resulted in numerous inconsistencies and defects.⁸² The Justinian system is remarkably modern in comparison with present systems, and indeed was the original model for them.⁸³ Significantly, the principles of representation and the Civil Law method of determining consanguinity are of Roman origin.

77. *Ibid.*

78. NICHOLAS, *op. cit. supra* note 3, at 247.

79. On the French law see AMOS & WALTON, *op. cit. supra* note 5, at 291.

80. See I ROLLISON, *CASES AND MATERIALS ON ESTATE PLANNING* 8 (1959).

81. *Id.* at 6; V THOMPSON, *op. cit. supra* note 76, at § 2424.

82. See generally NICHOLAS, *op. cit. supra* note 3, at 246-50.

83. See BUCKLAND, *op. cit. supra* note 3, at 375.

B. *French Law*1. *Qualifications of the Heir*

An heir, to succeed, must be in existence when the intestate dies.⁸⁴ A child conceived but not born will succeed provided he is born alive and capable of living.⁸⁵ In cases of common disaster there are elaborate rules and presumptions based on the respective sexes and ages of the victims, an example being that if those who die together are all under fifteen years of age the eldest will be presumed to have survived.⁸⁶

The heir must in addition be considered worthy of taking. There are three causes for unworthiness: (1) having been condemned for killing or attempting to kill the deceased, (2) bringing a complaint of a capital offense against the deceased, and (3) failure to inform the authorities of the murder of the deceased if he knows such to be the case.⁸⁷ This concept relating to worthiness is akin to a somewhat similar doctrine under common law. The prevailing view in both legal systems is to treat this as occurring by operation of law and not by judicial decree.

2. *Order of Succession*

The French continued the Roman law concept of representation whereby an heir steps into the shoes of another ancestor and is entitled to inherit from the deceased the same as would that ancestor.⁸⁸ Representation is allowed with respect to descendants regardless of how far removed,⁸⁹ while with the collateral line, representation is only permitted with children of deceased brothers and sisters,⁹⁰ or in testamentary successions.⁹¹

The order for intestate succession, subject to the rights of a surviving spouse, is as follows:⁹²

- a. Children of the deceased will take the estate *per capita* and their descendants *per stirpes* by representation.⁹³ Adopted or legitimate children receive the same,⁹⁴ while illegitimate children receive only half the share they would have received if legitimate.⁹⁵

84. C.C. art. 725.

85. AMOS & WALTON, *op. cit. supra* note 5, at 292-94.

86. C.C. arts. 720-22.

87. C.C. art. 727; AMOS & WALTON, *op. cit. supra* note 5, at 294.

88. C.C. art. 739; IV RIPERT & BOULANGER, *op. cit. supra* note 17, at number 1594.

89. C.C. art. 740.

90. C.C. art. 742.

91. C.C. art. 741.

92. See generally AMOS & WALTON, *op. cit. supra* note 5, at 290-304; Bell-MacDonald, *French Law of Succession*, 2 INT'L & COMP. L.Q. 415, 417-20 (1953).

93. C.C. arts. 731-67.

94. C.C. art. 364 nouv. (as amended by 0.23.12.1958).

95. C.C. art. 758; see AMOS & WALTON, *op. cit. supra* note 5, at 298.

b. If there are no descendants, the parents of the deceased, if they survive, will receive one-half the estate and the deceased's brothers and sisters as a group will receive one-half.⁹⁶ If only one parent survives three-fourths is divided among the brothers and sisters,⁹⁷ and if no parent survives, they take the entire estate.⁹⁸

c. Where the deceased does not leave descendants or brothers and sisters his estate will go to his ascendants,⁹⁹ the estate being divided in half (*fente*) for the maternal and paternal lines.¹⁰⁰

d. In default of any survivors in the above orders the estate devolves on the spouse.¹⁰¹

e. If there is no surviving spouse the estate is divided in half (*fente*) and distributed among the collaterals of each line up to the sixth degree of consanguinity. Collaterals up to the twelfth degree take if the decedent was incapable of making a will but had not been declared insane.¹⁰² Relationship is determined by using the Roman system of degrees which counts from the prospective heir to the common ancestor and then down to the deceased.¹⁰³

f. On failure of all other orders the estate escheats to the state which takes as an irregular successor.¹⁰⁴ An irregular successor, as has been discussed, is one who lacks the status of an heir and must prove his right to the succession by securing an entry into possession.¹⁰⁵ As mentioned earlier, the State today is the only remaining irregular successor.¹⁰⁶

3. *Rights of a Surviving Spouse*

The surviving spouse in France has various rights in the decedent's estate such as community property rights,¹⁰⁷ the absolute right to succeed in certain limited cases and the right of usufruct, which the Civil Code defines as "the right to enjoy things of which another is owner, but [which is] subject to the obligation to conserve the substance."¹⁰⁸ This right of usufruct is in substance that of the Anglo-American life tenant except for its inalienability.¹⁰⁹

96. C.C. art. 748.

97. C.C. art. 751.

98. C.C. art. 750.

99. C.C. art. 746.

100. C.C. art. 733.

101. C.C. art. 767.

102. C.C. art. 755.

103. C.C. arts. 735-38.

104. C.C. arts. 723, 768.

105. *Supra* notes 35, 36, and accompanying text.

106. *Ibid.*

107. Not all marriages in France are based on a community property regime, as spouses prior to marriages are free, within certain restrictions, to decide by contract how they wish to arrange their property rights during the marriage. See generally AMOS & WALTON, *op. cit. supra* note 5, 253-87, especially 266; IV RIPERT & BOULANGER, *op. cit. supra* note 17, at number 62 *passim*; Bell-MacDonald, *supra* note 92, at 419-20.

108. C.C. art. 578. See also C.C. arts. 572-636; AMOS & WALTON, *op. cit. supra* note 5, at 118-19, 300-01.

109. See McClean, *The Common Law Life Estate & the Civil Law Usufruct: A Comparative Study*, 12 INT'L & COMP. L.Q. 648 (1963).

Where the decedent leaves children or their descendants, the surviving spouse is granted a usufruct over one-fourth of the estate.¹¹⁰ Where the children are of a previous marriage, the usufruct is a fraction equal to a child's share in the succession, but with a maximum of one-fourth.¹¹¹ The surviving spouse will receive one-half where the deceased leaves illegitimate children, brothers or sisters, or ascendants.¹¹² Such spouse will only be entitled to the usufruct if he or she is not divorced from the deceased or, in the case of judicial separation, if the surviving spouse was not adjudged the guilty party.¹¹³

The heirs, on giving security, can compel a surviving spouse to accept an annuity of an amount equivalent to the usufruct. Such an arrangement is not uncommon where the usufruct involves a business or property necessary for a business. By granting such an annuity, the spouse is provided for, and the heirs can then utilize the usufruct as they see fit, without the necessity of consulting with the spouse.¹¹⁴

C. Germany

1. Order of Succession

The German Code utilizes the system of the Austrian Civil Code¹¹⁵ called *Parentelen* (statutory heirs) under which blood relatives are grouped into classes corresponding to their relationship to common ancestors.¹¹⁶ The first *Parentelen* consists of the descendants of the deceased, the second the parents of the deceased and their descendants, the third the grandparents of the deceased and their descendants and so forth. Theoretically, there is no limit to this expansion of possible relatives.

The nearest living relative will exclude all other relatives in more distant *Parentelen*.¹¹⁷ Similarly, in each *Parentel* those nearest in degree take priority over those further removed. Representation *per stirpes* is permitted in the first three *Parentelen*, with *per capita* distribution in the fourth and more remote groupings due to the greater

110. C.C. art. 767.

111. *Ibid.* The result is that the surviving spouse is treated as one of the children and the estate is then divided subject to the one-fourth limitation.

112. C.C. art. 767.

113. *Ibid.*

114. *Ibid.*

115. II ARMINJON, NOLDE & WOLFF, TRAITÉ DE DROIT COMPARE 373, n.3 (1950).

116. B.G.B. arts. 1924-30. The German Code refers to the *Parentelen* as *Ordnungen*. See generally I MANUAL OF GERMAN LAW 185-87 (1950). For development of the *Parentelen* system see HUEBNER, HISTORY OF GERMANIC PRIVATE LAW 712-39 (1918).

117. B.G.B. art. 1929.

possibilities of splitting the estate into many small portions. Thus, for example, in the first *Parentelen* the children of the deceased would take equal shares and, if one child was deceased, his descendants would take his share by representation. If there are no children or descendants of the deceased the estate goes equally to the parents in the second *Parentel*, and if one of them is deceased, his or her heirs receive that parent's share.¹¹⁸

DIAGRAM OF GERMAN PARENTELEN SYSTEM¹¹⁹

Diagram I

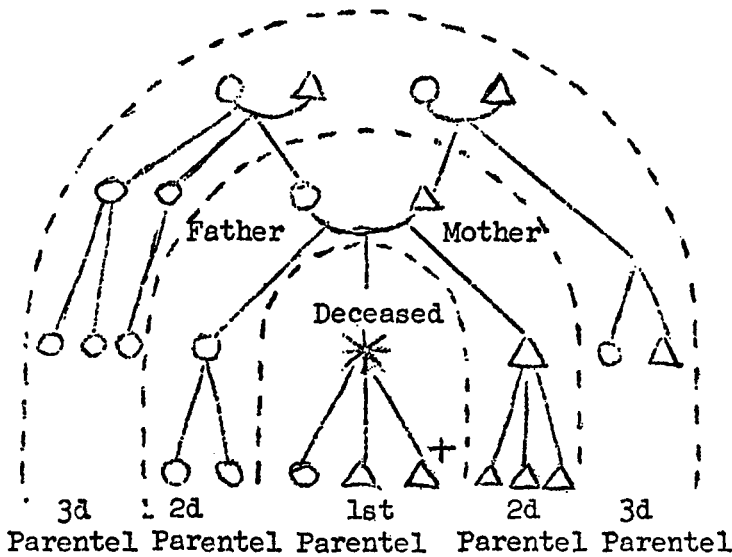
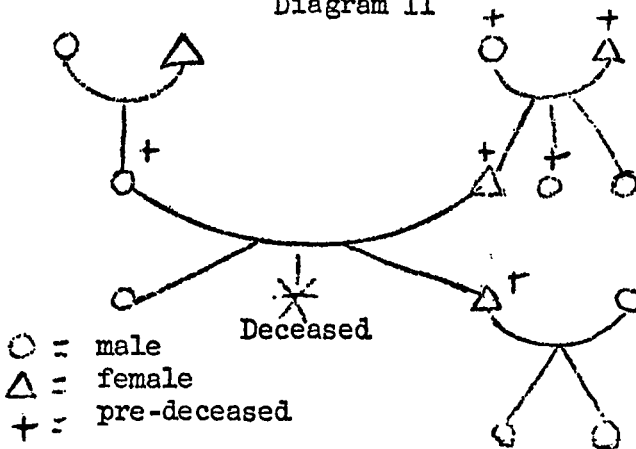


Diagram II



118. See B.G.B. arts. 1924-30.

119. Taken from I MANUAL OF GERMAN LAW 187 (1950).

In the case illustrated by Diagram II the deceased is survived by his brother, his brother-in-law, his grandparents on the father's side and an uncle on the mother's side. Under German law the brother takes one-half and each of the nephews one-quarter of the estate.

2. *Rights of the Surviving Spouse*

The German law has not adopted the usufruct concept, but instead grants the surviving spouse an absolute right to share in the testate succession.¹²⁰ If he or she is in competition with descendants (the first *Parentel*), the spouse receives an outright grant of one-fourth the estate and the descendants' interests are reduced accordingly. If the spouse is in competition with relatives of the second *Parentel* or lower, there is an additional right to all the household effects and wedding gifts.¹²¹ Divorce based on the fault of the surviving spouse will preclude his or her rights in the estate.¹²²

D. *Soviet Russia*

During the twentieth century contemporary Soviet Russian succession came under political attack, and, consequently, the Russian system and its historical basis deserves special mention. Further, it was in Soviet Russia at this time that the fundamental concept and rationale for succession itself came into question. The Soviets, soon after assuming power in 1918, promulgated a decree abolishing all inheritance except estates under 10,000 rubles which were permitted to pass to the close relatives of the decedents living with him.¹²³ However, the decree stated that until provisions were made for universal social insurance, the close relatives of decedents leaving estates in excess of 10,000 rubles could receive a minimal sum from the estate necessary for self-support. The general right of inheritance returned to the law in 1922, although subject to various restrictions.¹²⁴ Then in 1943 the inheritance tax was abolished and in 1945 the law was further relaxed, particularly with respect to those capable of inheriting.¹²⁵

The main thrust of the Soviet law of descent and distribution is directed towards protecting the family and those persons dependent

120. B.G.B. arts. 1933, 1934.

121. *Ibid.*

122. *Ibid.*

123. R.S.F.S.R. Laws 1917-18, text 456.

124. See 1922 CIVIL CODE OF THE R.S.F.S.R. art. 416.

125. On the general history and the about turn in the Soviet law of inheritance see II GSOVSKI & GRZYBOWSKI, GOVERNMENT LAW & COURTS IN THE SOVIET UNION & EASTERN EUROPE 1163-74 (1959); I GSOVSKI, *op. cit. supra* note 70, at 618-58 (1948); Griffin, *The About Turn: Soviet Law of Inheritance*, 10 AM. J. COMP. L. 431 (1961). GSOVSKI, *id.* at 634, says that the 1945 edict introduced a system of inheritance somewhat similar to that of the other European codes.

on the deceased. There are three classes of heirs, the first of which includes the surviving spouse, children (including adopted children), parents and other persons regardless of relation to the deceased who have been dependent on the deceased for at least one year prior to his death.¹²⁶ Each person in this class takes an equal share and, if a child dies at any time prior to the opening of the estate, his children or grandchildren are entitled to his share *per stirpes*. Surviving spouses are entitled to one-half the community property acquired during the marriage.¹²⁷ In the absence of any of the above heirs, or if all refuse to accept the inheritance, the succession goes to the able-bodied parents, the second class, and then to the third class of heirs, the brothers and sisters.¹²⁸ If none of these heirs appear the property will escheat to the state.

E. Other Modern Civil Law Countries

1. General

The Civil Law countries do not distinguish between movable or immovable property (real and personal property) in their laws of intestate succession, nor do they distinguish between the title or rights acquired by a legal heir or an appointed heir. No distinction is made between the sexes with regard to inheritance rights, and the Civil Law has never recognized primogeniture.

Special laws exist in several Civil Law countries designed to keep farm lands intact and prevent their division into small plots through inheritance.¹²⁹ The new German law, for example, while it imposes no restriction on the freedom of testation, does provide for a privileged succession.¹³⁰ The French in their desire to avoid such fragmentation of property have adopted a policy in their partition proceedings of permitting unequal shares so that property can pass intact.¹³¹ It is permissible to include a balancing charge (*soultes*) as part of a share. The proper recipient of each share is then determined by lot.¹³²

126. FUNDAMENTAL PRINCIPLES OF CIVIL LEGISLATION OF THE U.S.S.R. AND OF THE UNION REPUBLICS, December 8, 1961, effective May 1, 1962, art. 118. See HAZARD & SHAPIRO, *op. cit. supra* note 71, at 70-71, for a translation of this article.

127. See R.S.F.S.R. CODE OF LAWS ON MARRIAGE, DIVORCE & GUARDIANSHIP OF 1926, art. 10; II GSOVSKI & GRZYBOWSKI, *op. cit. supra* note 125, at 1171.

128. *Ibid.*

129. III PLANIOL, *op. cit. supra* note 33, at numbers 2319-21C; I MANUAL OF GERMAN LAW 207-09 (1950).

130. I MANUAL OF GERMAN LAW 207-09 (1950).

131. C.C. art. 832. See AMOS & WALTON, *op. cit. supra* note 5, at 314; IV RIPERT & BOULANGER, *op. cit. supra* note 17, at number 3073.

132. *Ibid.*

2. Order of Succession

France and Germany are representatives of the two basic types of succession in the Civil Law countries. Although the rules may differ, other countries follow either one or the other system.¹³³ Denmark, for example, follows the German system, but has only three *Parentelen*: (1) children and descendents of deceased children, (2) parents and descendents of deceased parents, and (3) grandparents and their children, but not their grandchildren.¹³⁴ Upon failure of such relatives or a surviving spouse, the estate escheats to the State. A surviving spouse has substantial rights under this system. If there are other descendents, the spouse is entitled to one-third of the estate. In the absence of any descendents, he or she receives the entire estate.¹³⁵

Most Civil Law countries which follow the *Parentelen* system are in accord with Denmark in permitting intestate inheritance only as far as the *Parentel* of the grandfather. However, under the German law the *Parentelen* scale does not end with the grandparents, and as mentioned previously there is no theoretical limit to the expansion of relatives by *Parentelen*.¹³⁶

The Italian plan for intestate succession closely resembles the French. In brief, property devolves in the following manner: (1) lawful descendents, (2) lawful ascendants, (3) collaterals, (4) natural relatives, (5) surviving spouse, (6) the State.¹³⁷ The surviving spouse receives a usufruct of the income from half the estate if there is only one child, and from one-third if there are two or more children.¹³⁸

One of the primary differences between the two basic Civil Law systems (the mixed French orders as compared with the German *Parentelen* scheme) are the rights of the surviving spouse. The French system leaves the surviving spouse with a usufruct and the right to inherit as an heir but only upon the failure of almost all designated classes of relatives. The German system gives no usufruct but instead grants the surviving spouse an absolute right to inherit.

Some countries combine these two rights. Switzerland does this by granting the surviving spouse a choice between a usufruct for life

133. Those Civil Law countries following the *Parentelen* scheme are: Austria, Denmark, Germany, Finland, Liechtenstein, Netherlands, Norway, Sweden, and Switzerland. The French system of mixed classes is followed by Belgium, Italy, Portugal, and Spain. The Russian system with its emphasis on providing for the family and dependents unable to care for themselves is quite different from either of the above systems and was discussed *supra*.

134. See DANISH COMMITTEE ON COMPARATIVE LAW, DANISH AND NORWEGIAN LAW 59-61 (1963).

135. *Ibid.* This system mechanically tends to resemble systems found in many states in this country. See ATKINSON, WILLS 61-64 (1953).

136. See *supra* pp. 336-37.

137. ITALIAN CIVIL CODE art. 565.

138. ITALIAN CIVIL CODE art. 581. See also articles 582, 583, 585.

in one-half of the decedent's property, or complete ownership of one-quarter if decedent has left children.¹³⁹ The Turkish law is the same.¹⁴⁰

III.

TESTAMENTARY SUCCESSION

A. *Wills*

1. *Roman Law*

The Roman jurist, Gaius, tells of three early forms of Roman wills.¹⁴¹ The first was the emergency or soldiers' will which was made orally before going into battle. The second was a form of public declaration before the *comitia curiata*, or peoples' assembly, which met twice a year for such purposes. Initially the consent of this body was probably necessary for the validity of the arrangement, but by the time of the Twelve Tables (around 450 B.C.) an appearance before this body was only for reasons of publicity. While this will was revocable, it was not secret and probably not available to the plebian masses.¹⁴² Therefore, a third manner of testamentary disposition was devised, based on the Roman concept of *mancipatio*, or sale.

The *mancipatory* will began as an actual sale by the dying testator to his intended heir.¹⁴³ The testator, in the manner of an ordinary sale under the Roman law, made a publication (*nuncupatio*) of his intention to sell to the heir in the presence of five witnesses and a balance holder.¹⁴⁴ It was from this publication of intention that the modern will developed. The declaration was eventually put into writing and its effect suspended until death. Further, the heir was replaced in the sale transaction by a straw man who agreed to take the property subject to the testator's wishes. By the time of Gaius (around 160 A.D.) the sale had already become a mere formality, merely giving validity to the written declaration which was revocable until death.

2. *France*

a. *Formalities*

The French will is characterized as a solemn act (*acte solennel*) and follows the forms prescribed by law, all of which require a

139. SWISS CIVIL CODE art. 462. Where the decedent leaves only survivors in the parents (*Parentel*) the surviving spouse receives a usufruct of three-quarters and ownership of one-quarter. If the only survivors are in the grandparents (*Parentel*) the surviving spouse receives half the estate outright and the other half as a usufruct; if there are no survivors among the *Parentelen* of the descendants, parents or survivors among the *Parentelen* of the descendants, parents or grandparents, the surviving spouse receives the entire estate outright.

140. TURKISH CIVIL CODE art. 444.

141. BUCKLAND, *op. cit. supra* note 3, at 283-86; NICHOLAS, *op. cit. supra* note 3, at 253-54.

142. See generally Buckland, *The Comitial Will*, 32 LAW Q. REV. 97 (1916).

143. *Ibid.* MAINE, *op. cit. supra* note 1, at 220-32.

144. This is similar to the present day use of an escrow agreement.

writing.¹⁴⁵ However, where a will has been accidentally destroyed its contents may be proved by witnesses.¹⁴⁶ The requisites necessary for such proof are similar to those required in common law courts, including, among other things, method of destruction, reason for such destruction, intent and testimony as to the will's provisions by disinterested parties.

Joint or mutual wills are not permitted because they are thought to interfere with the revocability of the will.¹⁴⁷ A married woman does not need the authority of her husband to execute a will as she is deemed fully competent to perform such an act.¹⁴⁸ A minor between sixteen and twenty-one years of age can validly execute a will, although he can only dispose of one-half the property otherwise controllable upon his majority.¹⁴⁹ The testator must, in addition, satisfy the requirement of competency¹⁵⁰ and there must be no fraud or undue influence.¹⁵¹

b. *Types of Wills*

There are three major types of wills: holographic, notarial and mystic. The holographic will is the simplest because it is written entirely in the hand of the testator. Witnesses are not necessary,¹⁵² but the testator must include the date and his signature.¹⁵³ It is customary to execute such a will in duplicate and deposit one copy with a notary or lawyer.¹⁵⁴ Upon death, a copy is presented to the President of the *Tribunal de Grande Instance* who makes *proces-verbal* (a collection of relevant documents) on it and orders its deposit with a designated notary.¹⁵⁵ Once the will has been duly presented it is then subject to execution and the estate formally passes to the heirs.

The notarial will is executed in the presence of a notary and two witnesses, or two notaries.¹⁵⁶ The testator dictates his will to a notary who may assist the testator with respect to legal terms and language but the final product must be the testator's and reflect his intentions.

145. AMOS & WALTON, *op. cit. supra* note 5, at 317; III PLANIOL, *op. cit. supra* note 33, at numbers 2515, 2679-81.

146. AMOS & WALTON, *op. cit. supra* note 5, at 317-18; IV RIPERT & BOULANGER, *op. cit. supra* note 17, at number 1976.

147. C.C. art. 968. It should be noted that a similar view is widely held in Anglo-American countries as well.

148. C.C. art. 216. On the rights of married women see AMOS & WALTON, *op. cit. supra* note 5, at 43-46.

149. C.C. arts. 903, 904.

150. C.C. art. 901.

151. IV RIPERT & BOULANGER, *op. cit. supra* note 17, at numbers 2025, 3375-84.

152. C.C. art. 969.

153. C.C. art. 970. See generally III PLANIOL, *op. cit. supra* note 33, at numbers 2686-97.

154. PELLERIN & PELLERIN, *op. cit. supra* note 18, at 23.

155. C.C. art. 1007; AMOS & WALTON, *op. cit. supra* note 18, at 23.

156. C.C. arts. 971-75; AMOS & WALTON, *op. cit. supra* note 5, at 318-19.

The will is then kept by the notary. The advantages to this will are that it has the probative force of a notarial act and it can be made by a person unable to write.¹⁵⁷

It is important to remember that the *notaire*, or notary, has no opposite under the common law. In Civil Law countries and particularly in France, the *notaire* has almost virtual control over conveying, marriages and succession. Although a notarial will is drawn at the request of an individual, once drawn it has the force of law and requires assent and compliance. The notary was originally considered an officer of the court and his notarial acts are binding on individuals concerned.¹⁵⁸

The third major type of will commonly in use is the mystic or secret will. This type of will is one drawn up either by the testator or a third person, signed by the testator, placed in an envelope and sealed.¹⁵⁹ The testator delivers the envelope to a notary in the presence of at least two witnesses, declaring at such time that this is his last will and testament. The notary prepares a declaration to this effect which is written on the envelope and signed by the testator, the notary and the two witnesses.¹⁶⁰ Upon the completion of these formalities the will becomes binding and has the force of law.

The Civil Code contains special rules for the wills of servicemen while on active duty,¹⁶¹ those made on a sea voyage¹⁶² and for wills made during an epidemic.¹⁶³ Such wills remain valid for only six months after the special circumstances have ceased.¹⁶⁴ These provisions represent a substantial expansion of the Roman emergency will permitted soldiers before they entered battle.¹⁶⁵ The present Civil Law concept of privileged wills is similar to the Anglo-American provisions for nuncupative (oral) wills made by the testator during his last illness.¹⁶⁶ This will's effect is generally limited to personalty, and the declaration must be made at the testator's home during his last illness and reduced to writing within a required period.¹⁶⁷ In addition, the

157. *Ibid.*

158. AMOS & WALTON, *op. cit. supra* note 5, at 24.

159. C.C. art. 976; See generally Brown, *The Office of the Notary in France*, 2 INT'L & COMP. L.Q. 60 (1953).

160. *Ibid.*

161. C.C. arts. 981-84.

162. C.C. arts. 988-96.

163. C.C. art. 985.

164. AMOS & WALTON, *op. cit. supra* note 5, at 319.

165. See *Drummond v. Parish*, 163 Eng. Rep. 812 (1843).

166. An example of such a will is found in the District of Columbia. D.C. CODE ANN. § 102 (1951).

167. ATKINSON, WILLS 363-68 (2d ed. 1953).

Anglo-American jurisdictions permit verbal and unattested wills by soldiers and sailors.¹⁶⁸

c. *Foreign Wills*

A Frenchman when abroad may make a holographic will or a notarial will, which will be given full effect in France.¹⁶⁹ The notarial will may follow either the French form or be in accordance with the laws of the country where the Frenchman is executing the will.¹⁷⁰ An oral testament will also suffice if it is considered a permissible form of testament in the foreign country.¹⁷¹

The enforcement of a will made in a foreign country requires a recording at the clerk's office (*greffe*) of the *Tribunal de Grande Instance* of the district where the testator had his domicile or his last known domicile.¹⁷² If the will contains dispositions of immovables it must also be recorded at the situs of these immovables.¹⁷³

A foreigner who is a resident in France and is desirous of making a will may either follow one of the French forms, or one utilized in his country.¹⁷⁴ Such testamentary dispositions will be valid to pass property in France.¹⁷⁵

d. *Revocation of Wills*

A will is revocable during the lifetime of a testator.¹⁷⁶ This concept of revocation rests on the Roman belief in the will's ambulatory nature, thereby allowing for a change of heart by the testator. Revocation is accomplished either by an express act, such as execution of a new will or a notarial declaration of revocation¹⁷⁷ or an implied one, such as a voluntary destruction of an existing will.¹⁷⁸

Revocation under the French Civil Law system is quite similar to the Anglo-American concept of revocability. In both systems, there are requirements that there be both an act of revocation and a revocatory intent. Without both prerequisites, destruction of a document alone will not be considered as a revocation.

168. *Id.* at 368-74.

169. C.C. art. 999.

170. *Ibid.* Needless to say, notarial wills cannot be made in Anglo-American countries as they are not given legal recognition. Therefore, it is felt that this extra-territorial right given under the French Code is really limited to other Civil Law countries which give the same or similar importance to the notarial act.

171. AMOS & WALTON, *op. cit. supra* note 5, at 319-20 n.11.

172. C.C. art. 1000.

173. *Ibid.*

174. *Sourdis v. Morlet*, Civ. Court of Seine, February 23, 1921, [1923] Clumet 946; see also Court of Cassation, (Ch. civ.), April 17, 1953, [1953] J.D.I. 894; PELLERIN & PELLERIN, *op. cit. supra* note 18, at 21-22.

175. *Ibid.*

176. C.C. art. 895; IV RIPERT & BOULANGER, *op. cit. supra* note 17, at number 2068.

177. C.C. art. 1035.

178. AMOS & WALTON, *op. cit. supra* note 5, at 320-21.

3. *Germany*

a. *Formalities*

The German law relating to the execution and revocation of wills is governed by an Act of July 31, 1938, which in 1953 was finally incorporated into the Civil Code.¹⁷⁹ All documents containing unilateral dispositions *causa mortis* are referred to as wills.¹⁸⁰ German law further permits the execution of contracts of inheritance before a judge or notary.¹⁸¹ Whether a testament contains the appointment of an heir is irrelevant under the law, and there is no longer any distinction between wills and codicils.¹⁸²

A minor sixteen years or over is competent to execute a will, but it may not be a holographic will.¹⁸³ Mental incompetents, even under guardianship, are not capable of executing a valid will.¹⁸⁴ Spouses are permitted to execute joint wills,¹⁸⁵ and frequently do so.¹⁸⁶ Any revocation during the lifetime of both spouses requires a publicly certified declaration addressed to the other spouse. After the death of one spouse the surviving spouse can only effect a revocation by first renouncing all rights under the will of the deceased spouse.¹⁸⁷

b. *Types of Wills*

There are only two types of ordinary wills, the holographic and the notarial or judicial will.¹⁸⁸ The holographic or private will is written by the testator in longhand and signed by him. Contrary to the French law, the holographic will is valid even if the date is not in the testator's own hand, although the law does advise such inclusion along with the place of execution.¹⁸⁹ The German law is also more lax on the signature; all that is required is that the person of the testator be readily identifiable. Signatures such as "Your Charles" or "Grandfather" are permissible. Also, the courts have not strictly followed the rule that the signature must be at the exact bottom of the document.¹⁹⁰

179. B.G.B. arts. 2229-64.

180. See I MANUAL OF GERMAN LAW 195 (1950); SCHUSTER, PRINCIPLES OF GERMAN CIVIL LAW 593 (1907).

181. See B.G.B. arts. 2274-2302. Mutual consent is then required for any revocation or modification.

182. *Supra* note 179.

183. B.G.B. art. 2247.

184. B.G.B. art. 2229.

185. B.G.B. arts. 2265-73.

186. I MANUAL OF GERMAN LAW 197 (1950).

187. B.G.B. arts. 2271, 2296.

188. B.G.B. arts. 2231, 2247.

189. B.G.B. art. 2247.

190. See generally I MANUAL OF GERMAN LAW 195-96 (1950).

The notarial or judicial will is the public type of will which is drawn by a judge or notary pursuant to the testator's wishes, or it may be a will, drafted by a third person, which the testator presents to a notary or judge.¹⁹¹ If the testator is not a minor he may submit the latter type of will in a sealed envelope; otherwise, it is the duty of the judge or notary to read the will and verify its legality. This proceeding is recorded in minutes which are signed by the testator and the judge or notary. The papers are then sealed and filed with the *Amtsgericht* and the testator receives a receipt. Where the will is submitted in a sealed envelope (the equivalent of the French mystic will) the minutes are dispensed with because there is no reading.

During times of war, or while on the high seas, a will may be declared orally before three witnesses.¹⁹² Also, where death is near, a person may execute a will before a mayor if it is feared that a notary or judge cannot be called before the person dies.¹⁹³ These wills lose their validity if the person is still living three months from the date of execution of the will. Such testaments are substantially equivalent to the Anglo-American nuncupative wills with their special provisions for soldiers and sailors in time of war. The primary requirement under both German and Anglo-American law is that death be imminent and that there be a reasonable belief by the individual of impending death.¹⁹⁴

German law is quite liberal in recognizing foreign wills. A will of a foreign national or of a German executed in a foreign country will be recognized if executed in accordance with the laws of the other country and if in any living language.¹⁹⁵

c. *Revocation of Wills*

There are numerous ways by which a German testator may revoke his will.¹⁹⁶ Destruction revokes a will, as does an erasure as to the part erased. The execution of a new will revokes those parts of an earlier will that are inconsistent if the new will does not expressly revoke the former in its entirety. Where a will has been deposited with the *Amtsgericht*, the removal of the will is a complete revocation unless it is a holographic will, the only type of nonregistered will permitted under German law.

191. B.G.B. art. 2238.

192. B.G.B. arts. 2250, 2251.

193. B.G.B. art. 2249.

194. See *supra* notes 165-67, and accompanying text.

195. B.G.B. introduction.

196. B.G.B. arts. 2253-58; see I MANUAL OF GERMAN LAW 197 (1950).

4. *Soviet Russia*

Soviet law only recognizes those wills which are signed by the testator, presented by him in person to the notarial office and there certified and recorded.¹⁹⁷ At the time of certification the notary makes a determination of the will's legal sufficiency. Where the testator is illiterate a "writing witness" may sign for him provided no property is bequeathed to him.¹⁹⁸ Various officials, such as consuls, ship captains and military unit commanders have the power to certify wills.¹⁹⁹ Revocation is effected by certification of a new will or the filing of a declaration of revocation.²⁰⁰

5. *Other Civil Law Countries*

a. *Types of Wills*

The holographic, notarial, and mystic wills, in addition to the usual emergency nuncupative wills, are common to most Civil Law countries.²⁰¹ Several countries do not have provisions for mystic wills, presumably because a holographic will can serve the same purpose of secrecy except for those unable to write.²⁰² Traditionally many testators in the Civil Law countries deposit their wills with a notary for safekeeping.²⁰³ This filing does not give the instrument the probative force of a notarial act which is inherent in a notarial will. However, such an arrangement is widely followed as it guarantees proper custody and avoids the formalities required of a notarial will. Most Civil Law countries, upon the death of the testator, require that holographic or mystic wills be presented to the appropriate court for recording (a form of authentication) after which the court will order the will to be deposited with a notary.²⁰⁴ This is a mere formality and does not

197. R.S.F.S.R. art. 425. See generally I GSOVSKI, *op. cit. supra* note 70, at 644-47; Griffin, *The About Turn: Soviet Law of Inheritance*, 10 AM. J. COMP. L. 431, 437-39 (1961).

198. See GSOVSKI, *op. cit. supra* note 70, at 645.

199. *Ibid.*

200. R.S.F.S.R. art. 426.

201. *E.g.*, ITALIAN CIVIL CODE arts. 602-05, 609, 611-16; SWISS CIVIL CODE arts. 499-508.

202. *E.g.*, Switzerland, Yugoslavia, Soviet Russia.

203. III PLANIOL, *op. cit. supra* note 33, at number 2694A.

204. *E.g.*, BELGIAN CIVIL CODE art. 1007; SPANISH CIVIL CODE art. 689, 712 (person holding such will given ten days from the date of death to present it); FRENCH CIVIL CODE art. 1007; *cf.* SWISS CIVIL CODE arts. 556-58 (all forms of wills must be delivered to the proper authority). The Italian law differs in that it provides for the opening of the will and its publication by a notary. ITALIAN CIVIL CODE arts. 620, 621.

These courts generally do not issue any certificate of inheritance (*contra*, SWISS CIVIL CODE art. 559) unless there is a reason, such as assets in a foreign country. See French Fiscal Law of July 13, 1925, art. 52. Also, irregular successors are required to secure an order for entry into possession. See, *e.g.*, *supra* notes 35-37, and accompanying text on the French law of irregular successors.

prevent the property from passing to the heirs as of the date of death. The recording is not necessary for notarial wills because they are prepared by a notary in his official capacity, thereby obviating such an act. However, the will still must be presented to the court, even though notarial.

The will itself does not seem as important in the Civil Law countries as it is in the Anglo-American law.²⁰⁵ In France, for example, only a small proportion of Frenchmen bother to make a will, evidently because the rules of intestate succession, combined with the various forms of matrimonial regimes, are satisfactory.²⁰⁶

All Civil Law countries except the Netherlands are in agreement with French and German law in recognizing as valid any disposition of property by will if such was executed in accordance with the laws of the country where it was drawn (*locus regit actum*).²⁰⁷ Anglo-American law differs, making a distinction between movable and immovable property. The law of the domicile of the deceased at his death is applied to movables in determining the validity of the will, while the law of the place where the property is located is the test for immovables.²⁰⁸

Joint and mutual wills are not permitted in most of the Civil Law nations, due to the belief that there is difficulty in revoking such wills.²⁰⁹ However, there is some tendency to follow the German initiative which does allow spouses to make mutual wills.²¹⁰ Inheritance contracts or pacts, which serve much the same purpose, are permitted in some Civil Law countries. The Swiss law, for example, permits a person to contract to leave his estate or a fraction of it to another, regardless of whether any compensation is received in return.²¹¹ A person may also renounce his heirship under a Swiss inheritance pact.²¹²

205. CHIATI, FORM AND LEGAL EFFECT OF WILLS MADE BY THE SAME PERSON IN DIFFERENT COUNTRIES, in REPORT OF INTERNATIONAL BAR ASS'N EDINBURGH CONFERENCE 2 (1962); AMOS & WALTON, *op. cit. supra* note 5, at 289; Leyser, "Equality of the Spouses" Under the New German Law, 7 AM. J. COMP. L. 276, 284 (1958).

206. AMOS & WALTON, *op. cit. supra* note 5, at 289.

207. See, e.g., Swiss Fed. Law of 1891, art. 24; Farran, *The Devolution of Property on Death in Spanish and English Law*, 32 TUL. L. REV. 387, 401-02 (1958). See CHIATI, *op. cit. supra* note 204, at 3. Netherlands law, on the other hand, requires that the will be drawn by a person of the status of a Dutch notary or by a Netherlands counsel. An American notary would not suffice; a lawyer would be needed. See NETHERLANDS CIVIL CODE art. 992; KILLEWIJN, AMERICAN-DUTCH PRIVATE INTERNATIONAL LAW (1955).

208. CHESHIRE, PRIVATE INTERNATIONAL LAW 559-71, 603-14 (6th ed. 1961); ATKINSON, WILLS 487-89 (2d ed. 1953).

209. ITALIAN CIVIL CODE art. 589; SPANISH CIVIL CODE art. 669; HUNGARIAN CIVIL CODE art. 644. See also *supra* note 147 and accompanying text. See III PLANIOL, TREATISE ON THE CIVIL LAW, No. 2316 (1959).

210. See, e.g., Norwegian Statute on Inheritance, July 31, 1854. On German law see *supra* note 185, and accompanying text.

211. SWISS CIVIL CODE art. 494. It is a prerequisite that the person so contracting must have full legal capacity. SWISS CIVIL CODE art. 468.

212. SWISS CIVIL CODE arts. 495-97.

b. *Formal Requirements*

Testamentary capacity in Civil Law parlance means much the same as testamentary capacity in the Anglo-American systems.²¹³ The testator must fulfill the usual rules of being of sound mind and requisite age. Most states in the United States set the age limit at twenty-one and a few at eighteen.²¹⁴ In Civil Law countries the age limit is generally lower. Several countries in addition to France and Germany provide limited rights of testation for minors,²¹⁵ and many Civil Law countries provide full rights of testation at eighteen.²¹⁶ The Civil Law provisions on undue influence, fraud and mistake are also similar to the Anglo-American system.²¹⁷

B. *Restrictions on Testation: Forced Heirs*

1. *Roman Law*

Roman law under the Twelve Tables (*circa* 450–451 B.C.) granted the father, as head of the household, the absolute right to dispose of his property by testament as he saw fit, and such bestowal had the force and effect of law.²¹⁸ However, the Romans observed that a father's dispositions did not always correspond to his duties as a father and thus various restrictions were placed on his freedom of testation to insure that certain favored survivors were not disinherited. Descendants, ascendants, brothers and sisters of the deceased who would have been entitled to share in the estate on intestacy but were excluded from taking by the will were permitted to bring a "complaint of an unduteous will" (*querla inofficiosi testamenti*).²¹⁹ The *Lex Falcidia* (40 B.C.) decreed that these favored survivors were entitled to at least one-fourth of what they would have received on intestacy, which meant that the testator could only freely dispose of three-fourths of his estate. If

213. See generally Farran, *The Devolution of Property on Death in Spanish and English Law*, 32 TUL. L. REV. 387, 391–402 (1958). For a discussion of the American law see ATKINSON, WILLS 228–52 (2d ed. 1953).

214. ATKINSON, WILLS 230 (2d ed. 1953).

215. Norway, for example, provides that a minor under 18 is competent to execute a valid will provided it is confirmed by the King. See DANISH COMMITTEE ON COMPARATIVE LAW, DANISH AND NORWEGIAN LAW 63 (1963). Finland provides that a minor of fifteen may dispose of any property accumulated through his own earnings. See Law of Finland, December 31, 1953. On the French and German law see *supra* notes 148 and 182, and accompanying text.

216. *E.g.*, SWISS CIVIL CODE art. 47; ITALIAN CIVIL CODE art. 591.

217. For the American law see ATKINSON, WILLS 253–90 (2d ed. 1953). See also Cahan, *Undue Influence and Captation — A Comparative Study*, 8 TUL. L. REV. 507 (1934).

218. TWELVE TABLES 5.1, I SCOTT, THE CIVIL LAW 66 (1932); BUCKLAND & McNAIR, *op. cit. supra* note 3, at 167; NICHOLAS, *op. cit. supra* note 3, at 260.

219. NICHOLAS, *op. cit. supra* note 3, at 261–64; BUCKLAND, *op. cit. supra* note 3, at 167–68; Comment, *Forced Heirs, The Legitimate and Loss of the Legitimate in Louisiana*, 37 TUL. L. REV. 710, 710–13 (1963).

a father had two children, each would receive one-half of the estate in intestacy and under the *Lex Falcidia* they would have an enforceable right to one-fourth of this on testacy, to wit, one-eighth. The justification for this rule was based on the belief that the testator must have been insane to have so ignored the moral duty he owed to his family to provide for them.²²⁰ At first the entire will was voided when the testator failed to so provide, and the estate passed by intestacy. Eventually, this approach was tempered by allowing the excluded heirs to receive one-fourth of their intestate share.

Justinian in his revision of Roman law granted children a greater right to the share of their father's testate succession: one-third of the estate if four or less children, and one-half if more.²²¹ He also decreed the first complete list of legal causes for disinheritance.²²² While disinheritance had been permitted under the old law there had been no absolute rules to guide the courts, and disinheritance decrees were often based on inconsistent or unequal determinations. With Justinian's revisions, the standards applying to disinheritance became fixed and readily ascertainable.

2. French Law

The French law is quite similar to the Roman law because the amount of the estate which a French testator can freely dispose of (*le disponible*) varies with the number of heirs. But not all heirs are entitled to a reserved portion (*la reserve*) of the estate. The reserve share to which these privileged heirs are entitled should not be confused with their intestate share, as the reserve is generally less than such an intestate share.²²³

The French Civil Code grants reserved rights only to descendants and ascendants of the deceased,²²⁴ thereby denying the surviving spouse and any collaterals a right to any reserve. However, the lineal relatives who have this reserved right must be entitled to succeed on intestacy by reason of their place in the line of succession before they will be entitled to exercise their right of reserve. Exercise of this right will reduce all other testamentary dispositions by a proportionate amount.²²⁵

220. BUCKLAND, *op. cit. supra* note 3, at 327. The insanity was not thought to be actual, but rather originally was the only available method by which the Roman courts could strike down such wills.

221. Novels 18.1, 16 SCOTT, *THE CIVIL LAW* 96 (1932).

222. Novels 115.3, 17 SCOTT, *THE CIVIL LAW* 41 (1932).

223. See generally PLANIOL, *op. cit. supra* note 33, at numbers 3047-3140; Dainow, *Forced Heirship in French Law*, 2 *LA. L. REV.* 669 (1940).

224. IV RIPERT & BOULANGER, *op. cit. supra* note 17, at number 1833.

225. See AMOS & WALTON, *op. cit. supra* note 5, at 336-38, on the reduction of gifts and legacies to meet a reserved share.

Under the present law the testator can only dispose of half his estate if he leaves one legitimate child at his decease, one-third if he leaves two, and only one-fourth should he leave three or more.²²⁶ These children are entitled to this reserved share of the estate and may claim such if the testator bequeaths them a lesser amount in his will. Where a child predeceases the testator, representation *per stirpes* is permitted. However, illegitimate children in such a case merely receive a fraction of what they would have taken had they been legitimate issue.²²⁷ Should there be no descendants, the reserve shares go to the ascendants, they being entitled to one-quarter of the estate as their reserve.²²⁸ In the absence of ascendants and descendants the testator can freely dispose of his entire estate.²²⁹

When discussing the reserve, a comparison can be drawn to the Anglo-American concept of statutory shares, which operate in a similar manner. Although the percentages that the children receive vary among the different states, the basic principle of setting aside a designated portion of the estate is in force, although it operates in cases of intestacy only, the Anglo-American testator having the right to disinherit his children in testacy. However, a reserved right is granted to a surviving spouse regardless of whether the decedent dies testate or intestate, as most states provide a given percentage for the wife in cases of intestacy and a right to a statutory share or election should the decedent attempt to deny the spouse a given portion of his estate.²³⁰

3. *Germany*

Under German law the decedent's surviving spouse and descendants have a statutory claim in the estate, called a compulsory share (*Pflichtteil*), equal to one-half their intestate share.²³¹ This granting of a fixed percentage of the intestate share as a compulsory share contrasts with the French system and most other Civil Law countries which grant a right to a portion or share of the estate, called the reserve. The German law further differs from the French law as the spouse has been accorded a right of forced heirship by the compulsory share which even cuts off the compulsory shares of ascendants' parents.

If the German heir is not accorded his compulsory share in the will, he has a right of action against the testamentary heirs for a pay-

226. C.C. art. 913.

227. C.C. art. 913, par. 2; IV RIPERT & BOULANGER, *op. cit. supra* note 17, at numbers 3070-74.

228. C.C. art. 914.

229. C.C. art. 916.

230. See ATKINSON, WILLS 118-26 (2d ed. 1953); V THOMPSON, REAL PROPERTY § 2429 (1957).

231. B.G.B. art. 2303; see I MANUAL OF GERMAN LAW 202-03 (1950). If there is no surviving spouse or living descendants, then the parents of the deceased have a right to this compulsory share.

ment in cash of his entitlement,²³² the value of the estate being determined at the death of the testator.²³³ Any advance distribution of the testator's estate made during his lifetime is deducted from the compulsory share.²³⁴ This is similar to the common law treatment of advancements in some jurisdictions.

In exceptional cases a testator may deprive a compulsory heir of his share.²³⁵ An example would be where the heir has attempted to kill the testator, or a spouse who is guilty of any matrimonial offense which would have entitled the testator to claim a divorce.²³⁶

4. *Other Modern Civil Law Countries*

Forced heirship is peculiar to the Civil Law, although there are some parallels in Anglo-American law. The English Inheritance (Family Provision) Act of 1938²³⁷ permits the court to make adequate provision for dependent members of the testator's family if he failed to do so. In the United States there are the pretermitted heir statutes, limitations on charitable devises, forced shares for surviving spouses, homestead rights, family allowances, and dower and courtesy.²³⁸ Also Louisiana, whose laws are based on the Code Napoleon, has the equivalent of the French forced heirship provisions.²³⁹ The Civil Law also has other restrictions on the freedom of testation, such as homestead rights and community property.²⁴⁰

Swiss law grants rights of forced heirship to descendants, parents, brothers, sisters and the surviving spouse.²⁴¹ The portion they must receive is a set percentage of their intestate share, which varies between seventy-five percent for descendants to twenty-five percent for brothers and sisters.²⁴² The cantons may abolish the forced heirship rights of brothers and sisters or extend same to their descendants.²⁴³ A testator

232. B.G.B. art. 2305.

233. B.G.B. art. 2311.

234. B.G.B. art. 2316. This arrangement is quite similar to the common law concept of advancement, and to a lesser extent, hotchpot. Under both common law concepts, inter vivos distributions are taken into any final accounting made by the decedent for the benefit of the inter vivos recipient.

235. B.G.B. art. 2333.

236. I MANUAL OF GERMAN LAW 202-03 (1951).

237. 1 & 2 GEO. VI, c. 45; see Dainow, *Limitations on Testamentary Freedom in England*, 25 CORNELL L.Q. 337 (1940).

238. See generally ATKINSON, WILLS 104-46 (2d ed. 1953). It should be noted that dower and courtesy are not universally accepted in the United States. See also Cahn, *Restraints on Disinheritance*, 85 U. PA. L. REV. 139 (1936); Sayre, *Husband & Wife as Statutory Heirs*, 42 HARV. L. REV. 330 (1929).

239. LA. CIV. CODE arts. 1493-1501, 1617-24 (1870). For a thorough analysis of forced heirship and the Louisiana provisions see comment, *Forced Heirs, The Legitimate and Loss of the Legitimate in Louisiana*, 37 TUL. L. REV. 710 (1963).

240. See the German Law of May 10, 1920, relating to homesteads; AMOS & WALTON, *op. cit. supra* note 5, at 94-95 (homestead rights), 254-68 (community property).

241. SWISS CIVIL CODE arts. 470-71.

242. *Ibid.*

243. SWISS CIVIL CODE art. 472.

may totally or partially disinherit a compulsory heir under certain circumstances, such as grave wrong against the testator or the insolvency of the heir.²⁴⁴

Prior to 1961, testator's dispositions in Soviet Russia were limited to members of the various classes of intestate heirs.²⁴⁵ The new Fundamental Principles of Civil Law enacted December 8, 1961, changed this by granting the testator complete freedom of testation among potential devisees.²⁴⁶ However, the law did retain the forced heirship provision denying testator the right to deprive his children under eighteen, or those heirs unable to work, of an amount equal to two-thirds of their intestate shares.²⁴⁷

V.

TRUSTS

The Anglo-American concept of the trust with a trustee holding title and possession and the beneficiary holding the equitable rights to use and enjoyment of the trust *res* is not present in the Civil Law, although there are other institutions which tend to effect the same result.²⁴⁸ The Civil Law has no distinct system of equity jurisprudence and so the aims of the trust²⁴⁹ must be met through other legal institutions, namely, executors, family foundations, charges and substitutions. Thus, although the principle of division between ownership and enjoyment cannot be theoretically justified under Civil Law, the advantages to such a concept are so manifest that these other institutions were formulated to gain the advantages of the trust.²⁵⁰

As stated, the principal objection to the trust concept lies in the Civil Law's rejection of a division of title.²⁵¹ Indivisible ownership, and its related doctrine of apparent ownership, are inherited from Roman law principles, where ownership was considered as complete, and possession created irrefutable rights.²⁵² Continuation of this doc-

244. SWISS CIVIL CODE arts. 477-80.

245. I GSOVSKI, *op. cit. supra* note 69, at 634-35, discusses the old law.

246. Art. 119 of the Fundamental Principles.

247. R.S.F.S.R. art. 422.

248. Daggett, *General Principles of Succession on Death in Civil Law*, 11 TUL. L. REV. 399 (1937), states that the three fundamental principles of Civil Law successions are forced heirship, community property, and prohibition of substitution and *fidei commissa* (trusts). See generally WEISER, TRUSTS ON THE CONTINENT OF EUROPE (1936); Newman, *Trusts, Civil Law Concepts and Legal Realism*, 3 INTER-AM. L. REV. 379 (1961); Ryan, *The Reception of the Trust*, 10 INT'L & COMP. L.Q. 265 (1961); Bolgár, *Why No Trusts in the Civil Law?*, 2 AM. J. COMP. L. 204 (1953).

249. In brief these aims are; provident administration, preservation of the corpus for the remainderman and protection of the beneficiary against his own indiscretions.

250. A trust is of particular value when widows and children require protection or when devisees are made to charitable organizations and some degree of control over the bequests' implementation is desired.

251. C.C. art. 544; B.G.B. art. 137; SWISS CIVIL CODE art. 641.

252. See Bolgár, *The Concept of Public Welfare*, 8 AM. J. COMP. L. 48 (1959).

trine of apparent ownership is reflected in such provisions as article 930 of the French Civil Code which states that possession of movable property is equivalent to actual title. Further, there is a requirement of public registration of all *in rem* property interests, which is implemented in both the French and German Codes by provisions permitting recordation of only certain interests.²⁵³ Under these statutes a beneficiary's interest is not recordable.²⁵⁴

These doctrines conflict with the trust conception requiring successive ownership at one and the same time, there being both a legal right in the trustee to the property and the equitable right of the beneficiary to the property. The trustee, while the possessor and apparent owner, is subject to the rights of the beneficiary. It is this future interest of the beneficiary that the Civil Law does not wish to accept.²⁵⁵

The Civil Law's fidelity to these doctrines has in reality never been complete.²⁵⁶ Forced heirship which limits freely disposable portions of the estate effectively splits ownership into present and future estates. The surviving spouse's right of usufruct does the same as it grants a beneficial interest in the estate which ripens on death.

The French law does in fact specifically recognize certain future interests or substitutions. Article 1048 provides that a mother or a father can dispose of their estate to one or several of their children with the condition that they shall transfer same to their children including those subsequently born. Article 1049 provides that any person leaving no issue can bequeath his estate to his brothers and sisters with the condition that they transfer the same to their children including those subsequently born.²⁵⁷ The French Civil Code in article 1073 further permits the appointment of a guardian with administrative powers of care, investment and sale of property, even though the beneficiary is of full age.²⁵⁸

253. Newman, *supra* note 248, at 387-89.

254. It should be noted that, in the United States, there are doctrines like that of apparent ownership, although they work within the framework of trust concepts and are usually used to negate rather than enforce such ownership. These doctrines are called constructive or equitable trusts, the main purpose being to prevent fraud or mismanagement of trust property. In equitable trusts, the main purpose is to rebut the inference of apparent ownership held by an individual, converting his position to that of trustee for the benefit of the person who was intended to have the enjoyment of the property. See generally IV SCOTT, TRUSTS § 462-462.6 (2d ed. 1956).

255. This refusal to accept the divisibility is not unlike the reasoning that led to the Statute of Uses under common law.

256. See generally Newman, *op. cit. supra* note 248.

257. Other than these two exceptions substitutions are expressly prohibited under the FRENCH CIVIL CODE by art. 896. This article states: "Any provision pursuant to which a donee or heir or the legatee is charged to retain assets and to hand the same to a third party is null and void." See AMOS & WALTON, *op. cit. supra* note 5, at 132-34, 328-29.

258. Newman, *supra* note 248, at 385, states the combined effect of arts. 1048, 1049 and 1073, is not essentially different from the Anglo-American trust. See also C.C. arts. 918, 951 and 1082.

There are other trust analogies, such as the family foundation for the support and education of members of the family²⁵⁹ and trusts for Masses.²⁶⁰

Under German law a testator may name one or more heirs to succeed the first heir upon the latter's death or after a specified event or stated number of years.²⁶¹ The first heir is considered the lawful owner until the happening of the event, although the interest of the reversionary heir must be registered in the land registry if any real property is involved. Unless the will provides otherwise, the first heir may not destroy or diminish the capital of this estate.

In viewing the methods employed under the Civil Law, it becomes evident that the theoretical limitations against the use of trusts are not as forceful in practice as assumed on first glance. Family foundations, public charitable devises and the use of future interests undermine the theoretical prohibitions that justify the denial of trusts. It is felt that with these arguments failing to maintain their strength, there will arise a gradual implementation of trust principles in the Civil Law countries of Europe. Roman law utilized the trust concept,²⁶² and it is in use in Latin America today.²⁶³ The trust has proven itself a useful tool in planning the succession of an individual's estate and will see more use in future years.

VI.

CONCLUSION

The purpose of this article was to focus attention on four major areas of Civil Law successions which differ radically from Anglo-American or common law practices and procedures. The inquiry was not directed toward a demonstration of the practical aspects of succession law so much as it was toward a comparative indication of the underlying similarity and reasoning behind the two major Civil Law systems. It was to form a better understanding and a sounder foundation that Roman law was introduced. Further the brief discussions relating to the other Civil Law countries were presented so that the reader would have a broader awareness of the universality of the French and German systems among the other Civil Law nations.

259. SWISS CIVIL CODE art. 631(2).

260. SPANISH CIVIL CODE art. 35; B.G.B. art. 80 (permission of the government is required.)

261. See B.G.B. arts. 2100-39; I MANUAL OF GERMAN LAW 193-95 (1950). See also, SWISS CIVIL CODE art. 488. This is quite similar to the common law concepts of contingent remainders and the fee subject to divestment.

262. See Newman, *op. cit. supra* note 248, at 382; Goldschmidt, *The Trust in the Countries of Latin America*, 3 INTER-AM. L. REV. 29, 33-35 (1961).

263. See Goldschmidt, *op. cit. supra* note 262.

Both authors felt that to approach this subject solely from a comparison between Civil and common law systems would have obscured and muddled this highly delineated and complex area. To obtain valid value judgments between these two legal systems the reader could only judge his own system more accurately if the differences within the foreign system were highlighted.

Once the common law lawyer looks beyond the different terminology, practice and procedure, the common roots between Civil law and common law become apparent and more identifiable. Universal succession, which at first appears alien to the common law, is really akin to it. Common law is derived in large part from Roman Law in this area and the concept of *seisin* is well known to the common law lawyer. So is the residuary legatee which is a more narrow type of universal successor. It is only the more sweeping embrace of universal succession that tends to separate the systems rather than the concept of being "alien" to common law.

The concepts of equal shares (*per capita*) or representation (*per stirpes*) are as well known to the common law lawyer as they are to the Civil Law lawyer. That the rules of intestate succession between France and Germany differ as to themselves should cause the common law lawyer no discomfort, especially in the United States which has different orders of succession for almost every state. It is not strange that parts of the French and German systems have been assimilated into the jurisprudence of the common law countries, all having derived a common heritage from Roman law.

Also, in the area of testate succession, dealing principally with wills, one finds a greater proximity of form and substance between Civil and common law. It is in this area that Roman law has been most closely followed by both legal systems. Further, differences have tended to be minimized between the legal systems regarding restrictions on testation as was pointed out in the discussion of forced heirs and the common law concept of statutory shares.

In the discussion on trusts, the common law lawyer should feel no strangeness at all. It is in this area that the Civil Law system is reaching out to bring within its framework the trust device found so useful and necessary in this present day. The rock-bound principles against such a succession of property are being flexed and expanded to embrace this legal concept, albeit under different terminology or different form.

It is felt that by illuminating differences within the Civil Law system a better understanding by a person used to common law structure can be achieved, allowing for a broader analysis of similarities between the Civil Law and common law systems.