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Le Mort Salsit Le Vif: True or False After Succession of Stouaflet?

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NOTES

Le Mort Saisit Le Vif: True or False After *Succession of Stoufflet*?[1]

I. INTRODUCTION

Oswald Stoufflet died in 1985. His wife died in 1987, leaving behind four children, including Paul and Oswald, Jr. In February 1993, Oswald, Jr. filed a petition to open his parents' succession. He was appointed succession representative. The sworn descriptive list of the succession listed one asset: the Stoufflet family home valued at $40,000. The succession had no other assets, but there were various outstanding debts owed by the estate.

Houma Mortgage & Loan Inc. filed a petition of intervention in the succession proceeding as a judgment creditor of Paul Stoufflet, seeking to enforce a June 25, 1991 judgment against Paul. Houma Mortgage wished to review the sworn descriptive list. Oswald, Jr. filed a petition of no right of action, claiming that his brother, Paul, had sold his interest in his parents' succession prior to the date on which Houma Mortgage recorded its judicial mortgage. In support of the exception, Oswald, Jr. introduced an act of sale dated September 1, 1988, by which Paul sold his undivided interest in the family home to Oswald, Jr. for $10,000. Also introduced was a November 25, 1991 act of sale by which Paul and Oswald, Jr. acknowledged that the September 1988 sale was intended to transfer all of Paul's rights, title, and interest in and to the estate of his deceased parents to Oswald, Jr., not just his undivided interest in the immovable property of the estate. The trial court overruled the exception of no right of action. Oswald, Jr. filed a writ application requesting a review of the correctness of the district court ruling. *Held:* The sale of an heir's undivided interest in a specific piece of property belonging to a succession is an absolute nullity.[2]

The facts and holding of *Sucession of Stoufflet* represent an issue that has been debated for many years in Louisiana courts: if it is clear that ownership is transmitted to the heirs by operation of law at the moment of death, why is it that the heir cannot sell his interest in a specific piece of property he has inherited? Ordinarily, an owner of property has the right to do with the property as he sees fit. Article 477 of the Civil Code provides that "[o]wnership is the right that confers on a person direct, immediate, and exclusive authority over a

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1. 665 So. 2d 98 (La. App. 1st Cir. 1995), *writ denied*, 667 So. 2d 1052 (1996). Literally translated, "le mort saisit le vif" means the death invests the seizin in the living. *See* Ferdinand Michel Lob, *Seisen in the Civil Law and Louisiana*, 15 Tul. L. Rev. 576 (1941).

2. *Stoufflet*, 665 So. 2d at 100.

thing."[3] Moreover, "[t]he owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law."[4]

When ownership of property transfers through a succession, however, the new owner cannot "use or dispose" as he desires.[5] If he does so, any transfer of an interest in a specific piece of property is considered an absolute nullity.[6] To complete a valid transfer of an interest, the heir must sell his entire interest in the succession, subject to the charges with which his interest is burdened.[7]

This article will focus on this anomaly in Louisiana's law. Part I traces the Civil Code articles involved in this area of the law. Part II points out the irregularities in Louisiana court decisions regarding this particular issue, with an emphasis on the emergence of two schools of thought or "theories" on the subject: the "entity theory" and the "transfer theory."[8] Part III focuses on *Succession of Stoufflet*, the last case to visit this issue, and the court's failure to apply the maxim "le mort saisit le vif." Part IV offers possible explanations for this confusion in the courts and possible solutions to the problem currently facing Louisiana courts.

II. STATUTORY HISTORY

The Louisiana Civil Code of 1808 considered the succession as an entity that consisted of the property of the deceased until it was accepted or renounced by the heirs.[9] Thus, following the death of the owner of the estate and after any charges on the estate were paid, the succession property stood in limbo until the heirs decided whether to accept or not. In this respect, early Louisiana law conformed to the principles of Spanish[10] and Roman law.[11] However, in 1825, the redactors of the Louisiana Civil Code decided to depart from this approach, instead choosing to follow the maxim "*le mort saisit le vif.*"[12] This new article, Article 934,[13] introduced the concept of seizin[14] into Louisiana law, which

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3. La. Civ. Code art. 477.

4. *Id.*

5. *Stoufflet*, 655 So. 2d at 98.

6. Houma Mortgage & Loan, Inc. v. Stoufflet, 602 So. 2d 1147 (La. App. 1st Cir. 1992). *See also* Succession of Griffen v. Davidson, 125 So. 2d 30 (La. App. 2d Cir. 1960).

7. *Griffin*, 125 So. 2d at 30.

8. These are the author's terms and are used throughout this article.

9. La. Civ. Code art. 74 (1808): "Until the acceptance or renunciation, the inheritance is considered as a ficticious being, representing in every respect, the deceased who was the owner of the estate."

10. Las Sietas Partidas 6.14.1 (Moreau Lislet & H. Carleton trans. 1820).

11. Max Radin, Handbook of Roman Law 398, § 146 (1927).

12. *Le mort saisit le vif* translated means "the death gives the seizin to the living."

13. Article 934 of the Code of 1825 is the same as Article 940 of the 1870 Code which is still in effect today. *See also* Lob, *supra* note 1, at 580.

14. "The doctrine of seisen [sic] which was adopted in the Civil Code of 1825 is of the utmost importance and affects the entire theory of Louisiana succession law." 1 Leonard Oppenheim, *Successions and Donations*, § 2, at 6, *in* 10 Louisiana Civil Law Treatise (1973).

provides that the succession descends to the heirs from the moment of death.[15] The comments preceeding this article explained that the codifiers believed it was best to adopt a rule which vested the rights of the heir from the moment of death of the deceased, which was in accordance with the other dispositions of the Civil Code. In addition, the codifiers made it clear that this new article represented a change in the law.[16] Thus, the succession was no longer an entity that had to be accepted or rejected before the assets in the succession became the property of the heirs.

The operation of the doctrine of seizin has two important effects. First, it transmits the succession to the heirs of the deceased even though they may be ignorant of the fact that the succession had been opened in their favor.[17] Second, it authorizes the heirs of the deceased to bring all actions, including possessory actions, which the deceased had a right to institute and the continuance of actions already commenced by the deceased.[18]

As will be pointed out later in this article in the discussion of *Baten v. Taylor*,[19] understanding the difference between seizin and ownership is crucial to grasping the confusion in this area of the law. Ownership gives the owner of property the right to do with it as he wishes within the confines of the law.[20] However, seizin is different in that it has only two effects: transferring the succession to the heirs even if they were ignorant of the fact that it was opened, and giving them the right to bring all actions the deceased could have brought. This difference cannot be overemphasized, for it is possibly the confusion of the two concepts which has caused the two aforementioned theories to evolve in Louisiana courts.

When the Code was revised in 1870, the redactors maintained the doctrine of seizin and changed only the number of former Article 934 to Article 940.[21] This article, still in effect today, provides:

> A succession is acquired by the legal heir, who is called by law to the inheritance, immediately after the death of the deceased person to whom he succeeds. This rule applies also to testamentary heirs, to instituted heirs and univeral legatees, but not to particular legatees.[22]

The articles following 940 all indicate an intention to impose the doctrine of seizin upon the successions framework. Article 941 states: "The right mentioned in the preceeding article is acquired by the heir by the operation of the law alone, before he has taken any step to put himself in possession, or has

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15. *Id.*
16. Projet of the Louisiana Civil Code of 1825, 1 Louisiana Archives (1937).
17. La. Civ. Code art. 944.
18. Oppenheim, *supra* note 14, at 127.
19. 386 So. 2d 333 (1979).
20. *See supra* text accompanying notes 2 and 3.
21. La. Civ. Code art. 940 (1870).
22. *Id.*

expressed any will to accept it."[23] Article 942 provides in pertinent part: "the right of possession . . . continues in the . . . heir as if there had been no interruption . . . ."[24] Article 944 gives the heirs of the person who has inherited the succession the rights of inheritance as well.[25] Thus, even an heir who does not know of the succession in his favor gives his heirs the right to inherit should he die.[26]

While all of the above articles form parts of a cohesive framework, Article 946 throws a bit of confusion into an otherwise harmonious mix. Article 946 states:

> Though the succession be acquired by the heir from the moment of death of the deceased, his right is in suspense, until he decide whether to accept or reject it. If the heir accepts, he is considered as having succeeded to the deceased from the moment of death; if he rejects it, he is considered as never having received it.

A literal reading of this article seems to contradict the maxim of *le mort saisit le vif* and the other articles meant to implement this principle.

Article 946 has been the source of varying analyses in light of the maxim of *le mort saisit le vif* and the idea that the heir takes the succession immediately upon the death of the deceased. One commentator tendered the idea that Article 946 refers to the "right" to accept or renounce the succession.[27] This interpretation, however, is untenable. If the article is referring to the "right" to accept or renounce, then inserting the words "to accept or renounce" into the article would read "his right to accept or renounce is in suspense, until he decide whether he accepts or rejects it." An heir could not accept or renounce until he had accepted or renounced, in which case he could never accept or renounce.[28] This would of course create an impossible situation in which an heir could not act at all, rendering the article completely useless. Another problematic approach was offered by the supreme court in *Davis's Heirs v. Elkins*.[29] In an attempt to reconcile the two opposing codal provisions, the court held that Article 940 of the 1825 Code (946 of the code of 1870 and current Civil Code) annulled or rendered inoperative Article 934 of the 1825 Code (currently 940), and thus effectively avoided the question.[30]

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23. La. Civ. Code art. 941.
24. La. Civ. Code art. 942.
25. La. Civ. Code art. 944.
26. *Id.*
27. *See* Lob, *supra* note 1, at 585.
28. *See* Madeleine Fischer, *Seisen: Rights and Obligations of the Heir Before Acceptance or Renunciation*, 49 Tul. L. Rev. 1110 (1975).
29. 9 La. 135 (1836).
30. *See* Fischer, *supra* note 28, at 1113, where the author points out that were the court truly unable to reconcile the two codal provisions, "what principles of civilian interpretation authorize the court to totally annul several articles and the entire scheme which they support in order to give full effect to one half of another article."

Since 1870 when the Code was revised, the Code has stood as it does now, with two seemingly irreconcilable schools of thought residing within a few articles of each other. This framework left the interpretation of the successions articles to the courts with little guidance. Although the intent in revising the code in 1825 was to change the law and adopt *le mort saisit le vif*, Article 946 certainly seems to disallow that attempt.

Further adding to the confusion are several articles in the Code of Civil Procedure. Article 3211 states: "A succession representative shall be deemed to have possession of all property of the succession and shall enforce all obligations in its favor."[31] Article 3221 states: "A succession representative shall preserve, repair, maintain, and protect the property of the succession."[32] Both of these articles imply the succession is a thing that the succession representative must take possession of and administer before it is turned over to the heirs and legatees. As a result of the varied content of the Civil Code and Code of Civil Procedure articles, the cases involving this issue have been anything but predictable.

In fact, the cases can be divided into those which follow one of two "theories" on the subject of ownership via inheritance. The first, referred to as the "entity theory,"[33] holds the succession is a distinct legal entity that does not transfer ownership to the heirs until unqualified acceptance by the heirs, or an administrative proceeding conducted by an administrator or executor. The second, referred to as the "transfer theory,"[34] proposes that the ownership of the succession transfers immediately upon the death of the deceased, and as such the heirs are able to do what they wish with their inherited property. Although the two seem to be direct opposites, they still have existed and been used by courts throughout Louisiana's legal history.

III. CONFUSION BY THE MODERN COURTS

The twentieth century has brought forth a number of cases considering when an heir has the right to dispose of the succession property. As can be expected, the cases clearly fall into either the "entity theory" or "transfer theory" categories, with no way to predict which way a given court will go.

Tulane University v. Board of Assessors,[35] one of the first cases to confront the issue, appeared to chart a course for following *le mort saisit le vif*. In *Tulane*, the court held that property given to Tulane University as the universal legatee passed immediately to Tulane. As such, the property was exempt from city and state property taxes from the moment of death because Tulane was a tax exempt entity. In this decision, a unanimous court stated, "[t]he maxim, '*le mort saisit le vif*' is expressly embodied in our Civil Code, and excludes the interposition of any

31. La. Code Civ. P. art. 3211.
32. La. Code Civ. P. art. 3221.
33. This is an original term, coined by the author, and used throughout this article.
34. This is also an original term, coined by the author, and used throughout this article.
35. 115 La. 1025, 40 So. 445 (1905).

temporary and qualified ownership, such as that of administrators, between the deceased and his heirs."[36] Thus, it appeared the court had accepted the intended change from the Code of 1807 and affirmed *le mort saisit le vif.* Just two years later, however, the same court came to a contradictory finding.

Succession of Stauffer[37] again confronted the court with the question of interpreting the Code articles on ownership via inheritence. Isaac Stauffer died in 1903, leaving a will with particular legatees who were paid their shares by the executors. The succession stayed under administration until 1907. In 1904, however, an inheritance tax was passed, and then amended in 1906, which imposed a tax on all successions "not finally closed and administered upon."[38] The court held that the portion of the estate still in possession of the executors at the time the tax was passed was subject to the tax.[39] They did so by presuming that the property had not been transmitted at the time the tax had passed because the executors were still administering the estate.[40] Note, however, that the majority opinion focused more on the power of the legislature to levy a tax on inheritances than upon when the property moved from the decedent to the heirs.[41] The court, however, seemed to backtrack from their ruling in *Tulane* and to return to the "entity theory" used prior to the revision.

In a vigorous dissent, Justice Provosty, who had also written the majority decision in *Tulane*, criticized the *Stauffer* majority for their lack of adherence to the plain provisions of the Code.[42] His dissent cited over twenty cases in prior Louisiana jurisprudence holding that an heir acquires the succession immediately after the death of the deceased person to whom he succeeds and this right is acquired by operation of the law alone, before he takes any steps to place himself in possession.[43] Commenting on the holding of the *Stauffer* majority, Justice Provosty stated: "What is going to be the effect of its adoption I cannot undertake at present to say; but that it is going to create much confusion, and prove embarrasing, I am perfectly satisfied."[44]

In the 1960s, different courts continued to use both the "entity theory" and the "transfer theory" to decide issues of when an heir acquired the succession. In 1969, the Louisiana First Circuit Court of Appeal held in *Danos v. Waterford Oil Company* that the succession exists as a distinct legal entity until terminated by proceedings pursuant to an administration by an administrator or executor, or its unqualified acceptance by all the heirs concerned.[45] The court completely ignored

36. *Id.* at 1029, 40 So. at 448 (citing State v. Brown, 32 La. Ann. 1020 (1880)).
37. 119 La. 66, 43 So. 928 (1907).
38. *See* 1904 La. Acts No. 45, § 1; 1906 La. Acts No. 196, § 25.
39. 119 La. 66, 43 So. 928 (1907).
40. *Id.*
41. *Id.*
42. *Id.*
43. *See, e.g.*, Tureaud v. Gex, Administrator, 21 La. Ann. 253 (1869).
44. Succession of Stauffer, 119 La. 66, 43 So. 933 (1907).
45. 225 So. 2d 708 (La. App. 1st Cir. 1969).

the jurisprudence imposing *le mort saisit le vif* and instead relied on one case, *Kelley v. Kelley*,[46] to rule that a succession is "an ideal being, a unity."[47] It cannot exist as to one heir and be extinct as to another.[48]

During this same time frame, other courts were using the "transfer theory" to hold that the succession is acquired immediately upon the death. In *Giroir v. Dumesnil*,[49] the supreme court interpreted Louisiana's inheritance tax penalty[50] as applying only to the heir or legatee by depriving him of the right of renouncing the succession and saddling him with personal liability for payment of the taxes. Violation of the statute would not invalidate a transfer of the succession property.[51] Thus, the court accepted the idea that the property became the heirs upon death, and allowed the heir to dispose of it as he wished, while remaining liable for the inheritance tax.

Jones v. Dibert Bankroft & Ross Co., Ltd.[52] dealt with an administratrix of a succession of her deceased father who sued the defendant company for failing to disclose certain company financial records, as required by Louisiana Revised Statutes 12:102.[53] The plaintiff argued that as she acquired the succession at the moment of death of her father, she was a stockholder, and thus could assert the rights prescribed by the statute.[54] The court did not agree and, citing *Danos*, held the succession evolves and exists as a separate and distinct legal entity and will continue in existence until terminated by proceedings pursuant to an administration conducted by an administrator or executor, or an unqualified acceptance by all of the heirs.[55]

In 1979, the Louisiana Supreme Court attempted to clear up the confusion in this area with the decision in *Baten v. Taylor*.[56] This case involved a provision in the deceased's will which bequethed his property to his wife, but in the event that she did not survive him for thirty days, the property would devolve to his nephews.[57] The decedant's sister attacked the will, claiming it contained a prohibited substitution and was therefore null. The district court rejected the attack, but the court of appeal reversed.[58] The Louisiana Supreme Court reversed the appellate decision, stating the flaw in the reasoning by the appellate court was that

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46. 198 La. 338, 3 So. 2d 641 (1941).
47. 198 La. at 355.
48. *Kelley*, 198 La. at 338, 3 So. 2d at 641.
49. 248 La. 1037, 184 So. 2d 1 (1966).
50. The Louisiana tax provision today provides that an heir or legatee may not dispose of any part of the succession property. 1920 La. Acts No. 199.
51. Giroir v. Dumesnil, 248 La. 1037, 184 So. 2d 1 (1966).
52. 308 So. 2d 369 (La. App. 1st Cir. 1975).
53. La. R.S. 12:102,103 (1972).
54. *Jones*, 308 So. 2d at 371.
55. *Id.* For a criticism of the *Jones* decision, see Carlos E. Lazarus, *Work of Appellate Courts—1974-1975, Successions and Donations*, 36 Tul. L. Rev. 362, 363 (1976).
56. 386 So. 2d 333 (1979).
57. *Id.* at 335.
58. 364 So. 2d 226 (1978).

they "mistakenly equated seizin with ownership."[59] Writing for the majority, Justice Dennis explained that seizin is not ownership, but the investiture of one class of heirs with possession of the succession upon the death of the deceased, enabling the heirs who acquire seizin, from the instant of death, to bring all actions the deceased could have brought.[60] Ownership, on the other hand, is transmitted by operation of law at the moment of death to heirs and legatees designated by the Code, regardless of whether they have seizin of a particular succession, or can ever have seizin.[61] Thus, for example, although a legatee under a particular title cannot acquire seizin, he has ownership of the thing bequeathed to him from the day of the testator's death.[62]

In the 1980s, only a few years after the *Baten* decision, courts were deciding cases based on both the "entity" theory and the "transfer" theory. In *Succession of Christophe v. Lotten*,[63] the fourth circuit once again relied upon *Danos v. Waterford Oil* and held the succession to be a distinct legal entity.[64] The court in *Lotten* upheld a district court decision giving the succession the right to collect rent from a co-heir in possession of the succession property.[65]

In *Succession of Caire*,[66] the Louisiana Fifth Circuit Court of Appeal relied on the early case of *Succession of Stauffer*[67] and found "[a]s long as the property is under administration it remains in the custody of the law, and the rights of the heirs and legatees are in abeyance until the administration is closed."[68] The court found that the increased value of the deceased's one-half interest in the property sold should remain in the succession, and not be transferred immediately to the forced heirs. Once again, Justice Provosty's prediction of confusion in his *Stauffer* dissent was correct.[69]

Some courts did, however, begin to follow the *Baten* decision and to recognize the important distinction between seizin and ownership. In *Mingledorff v. American Bank and Trust Company*,[70] the court found that ownership in a succession vested at the death of the deceased, and as such the interest could be attached by creditors holding a judicial mortgage.[71] The court pointed out that

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59. *Baten*, 386 So. 2d at 339.
60. *Id.* at 340.
61. *Id. See also* Carlos E. Lazarus, *The Work of the Louisiana Appellate Courts for the 1971-72 Term*, 33 La. L. Rev. 199 (1973).
62. *Baten*, 386 So. 2d at 340.
63. 487 So. 2d 529 (La. App. 4th Cir. 1986).
64. *Id.* at 531. *See also* Succession of Lasseigne, 488 So. 2d 1303 (La. App. 3d Cir. 1986).
65. *Christophe*, 487 So. 2d at 530.
66. 554 So. 2d 297 (La. App. 5th Cir. 1989).
67. 119 La. 66, 43 So. 928 (1907).
68. *Caire*, 554 So. 2d at 299 (citing *Stauffer*, 199 La. at 66, 43 So. at 929).
69. *Stauffer*, 119 La. at 67, 43 So. at 930.
70. 420 So. 2d 463 (La. App. 2d Cir. 1982).
71. *Id.* at 468.

what is seized is not the property of the succession, but rather it is the heirs interest in the succession.[72]

In *Jones v. McDonald's Corporation*,[73] the courts again revisited the question of when an heir acquires the succession. *Jones* involved a zoning dispute between a deceased property owner's daughter and a restaurant on adjacent property. The daughter challenged the waiver by the city council of the residential zoning ordinance, and the trial court sustained the defendant's exception of no right of action. The court of appeal reversed, holding that at the moment of death the right of seizin was transferred to the daughter, and thus she was authorized to bring all actions which the deceased had a right to institute and to prosecute those already commenced.[74]

IV. *SUCCESSION OF STOUFFLET*

Oswald Stoufflet Sr. died in 1985, and his wife died in 1987. They left behind four children, including Oswald Stoufflet, Jr. and Paul Stoufflet. The only property in the Stoufflet succession was the family home, valued at $40,000. In June of 1991, Houma Mortgage & Loan obtained a judgment against Paul Stoufflet, and properly recorded said judgment. Thereafter, they attempted to enforce the judgment by causing a writ of fieri facias to be issued, directing the sheriff to sell the Stoufflet home. Oswald, Jr. intervened in the proceeding, objecting to the seizure and sale of the home. The court held that since the succession had not yet been opened, a judgment creditor could only seize an heir's interest in the succession, but could not seize the heir's undivided interest in one specific piece of property of the succession.[75] Thus, the writ of fieri facias was recalled and the home released from siezure.[76]

Thereafter, in February of 1993, Oswald Jr. filed a petition to open the succession and was appointed as succession representative.[77] The sworn descriptive list of the succession consisted of only the family home. Houma Mortgage then filed a petition of intervention in the succession as a creditor of Paul Stoufflet. Oswald, Jr. again objected and filed an exception of no right of action, urging that Paul had sold his interest in the Stoufflet family home to him prior to the date on which Houma Mortgage had recorded their judgment.[78] In support of his exception, Oswald, Jr. introduced into evidence an act of sale dated September 1, 1988, by which Paul sold his undivided interest in the family home to Oswald,

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72. *Id.* at 468. *See also* First Nat'l Bank and Trust Co. of Vicksburg v. Drexler, 171 So. 151 (La. App. 2d Cir. 1936); Van Der Kar v. Stead, 21 So. 2d 111 (La. App. 1st Cir. 1945); Jackson-Hinds Bank v. Davis, 224 So. 2d 633 (La. App. 4th Cir. 1971).

73. 618 So. 2d 992 (La. App. 1st Cir 1993).

74. *Id.* at 996.

75. Houma Mortgage v. Stoufflet, 602 So. 2d 1147 (La. App. 1st Cir 1992).

76. *Id.* at 1149.

77. Succession of Stoufflet, 665 So. 2d 98, 99 (La. App. 1st Cir. 1995).

78. *Id.* at 99.

Jr. for $10,000.[79] Additionally, on November 25, 1991, Paul and Oswald, Jr. had executed another act of sale in which they acknowledged that the September 1, 1988 sale was intended by the parties to transfer all of Paul's rights, title, and interest in and to the succession of his deceased parents to Oswald, Jr., not just his interest in the family home.[80]

Oswald, Jr. argued that Houma Mortgage had no right to intervene in the succession proceeding because Paul had transferred his *entire interest* in the succession prior to the date upon which the judicial mortgage was recorded, and therefore, as of that date, there was nothing for Houma Mortgage's judgment to "attach to."[81]

The court disagreed with Oswald, Jr., and began their analysis of the case by setting forward the premise that an heir may sell his entire interest in a succession subject to the charges with which it is burdened.[82] However, the sale of an heir's undivided interest in a specific piece of property belonging to a succession is an absolute nullity.[83] Interpreting the 1988 act of sale from Paul to Oswald, Jr. as intending to convey Paul's undivided interest in the Stoufflet home, the court held that under longstanding jurisprudence the attempted sale was absolutely null.[84] Under the authority of Louisiana Civil Code article 2030,[85] the court declared the sale an absolute nullity and deemed it neither to have existed nor to have had any legal effect.[86]

The court then ruled that a properly recorded judicial mortgage attaches to an heir's undivided interest in the mortgageable property from the moment the heir becomes a joint proprietor of the mortgageable inherited property.[87] Thus, because the sale of the property never existed, it was still owned in indivision by Paul at the time the mortgage was recorded. Accordingly, Houma Mortgage's lien attached to Paul's interest in the home at the time of recordation.[88] Thus, Houma Mortgage had a right to intervene in the succession proceeding to enforce its interest in the judgment debtor's share of his parents estate.[89]

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79. *Id.* A check dated September 2, 1988, from Oswald, Jr. to Paul was also introduced into evidence.

80. *Id.* at 99.

81. *Id.*

82. *Id.* at 100.

83. *Id. See also* Griffin v. Davidson, 125 So. 2d 30 (La. App. 2d Cir. 1960); Houma Mortgage & Loan, Inc. v. Stoufflet, 602 So. 2d 1147 (La. App. 1st Cir. 1992), and cases cited therein.

84. *Stoufflet*, 665 So. 2d at 100.

85. La. Civ. Code art. 2030 states:

> [a] contract is absolutely null when it violates a rule of public order, as when the object of a contract is illicit or immoral. A contract that is absolutely null may not be confirmed. Absolute nullity may be invoked by any person or may be declared by the court on its own initiative.

86. *Stoufflet*, 665 So. 2d at 100.

87. *Id.* at 101. *See also* Succession of Quartararo, 541 So. 2d 243 (La. App. 4th Cir. 1989).

88. *Stoufflet*, 665 So. 2d at 101.

89. *Id.*

V. ANALYSIS

Succession of Stoufflet raises an issue that has existed in Louisiana law since the 1825 revision of the Civil Code: if under *le mort saisit le vif* the property devolves at the moment of death, why is it an absolute nullity for the heir to sell what he owns? The emergence of the two aforementioned theories only serves to support the proposition that this anomaly in the law needs resolving. And the failure of the *Stoufflet* court to apply "le mort saisit le vif" indicates this issue is still causing confusion among our courts.

A. *Considerations of the Rights of Creditors*

One possible reason for not permitting an heir to sell his interest in a specific piece of property is the idea that the succession property is thought to be the common pledge of the creditors of the sucession. Embodied in this reason is the idea that should an heir desire to keep a certain creditor from receiving what he is properly owed, he should not be able to do so. For example, suppose A's deceased parent was involved in a bitter dispute with a particular creditor. Further suppose A's deceased parent had only two assets—a large yacht and a home. Could A keep that particular creditor from recovering the judgment owed him by selling the property as soon as his parent died? Were the answer yes, declaring the sale an absolute nullity would be a perfectly sensible solution. However, the answer is not yes.

Louisiana Code of Civil Procedure article 427 reads as follows:

> An action to enforce an obligation, if the obligor is dead, may be brought against the heirs, universal legatees, or legatees under a particular title, who have accepted his succession, except as otherwise provided by law. The liability of these heirs and legatees is determined by the provisions of the Civil Code.

Thus, should an heir or legatee accept the succession, he is liable for the debts of the succession, subject to the Civil Code provisions. Further, should an heir to a deceased debtor refuse to substitute himself in an action against the succession, the court can compel the heir by summons.[90] Finally, should the heir not respond to the summons, an attorney may be appointed by the court to represent the succession and the heir, and the action will continue against the attorney.[91] In light of these articles, let us return to the hypothetical set out above.

Suppose A and B are the only heirs to their parent's estate. On the death of the parents, the parents' debts are not extinguished. They continue to exist against the succession and must be extinguished by either the heirs or the

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90. La. Code Civ. P. art. 802.
91. La. Code Civ. P. art. 804.

succession representative. Under the Code of Civil Procedure articles, the heirs or legatees who have accepted the succession[92] or the succession representative may be sued for enforcement of the obligations of the deceased. Further, simple acceptance[93] of the succession may be either express[94] or tacit.[95] Thus, should A or B exercise any acts of ownership over the succession property, acceptance is presumed.[96] This means that very little is required for acceptance by the heirs. Thus, after the death of the parents, should A or B sell their interest in either the yacht or the home, an acceptance of the succession can be presumed. This will allow the creditors of the parents to proceed directly against whomever acted on the property for the debts owed to them by the succession. It follows that the creditors are not hurt by the sale of an heir's interest in the succession property. The heir, by selling the property, has accepted the succession and is now liable to the creditors. Whether the heir still has what he received in return for the property is of no consequence. The creditor's action is against him personally for the amount of property in the succession.

Additionally, Louisiana Revised Statutes 9:1421 provides protection for the heir who does accept the succession. It provides that "every successor is presumed and is deemed to have accepted a succession under the benefit of inventory,[97] even though the acceptance is unconditional . . ." and "shall not in any manner become personally liable for any debt or obligation of the decedant or his estate, except to the extent and value or amount of his inheritance . . . ."[98]

Under the framework set out by the above articles, should either A or B sell his interest in the home or yacht, this is considered an acceptance of the succession. Further, this acceptance is deemed to be with benefit of inventory. Therefore, the creditors of the succession have an action against A or B for their respective amounts of the succession. Should A have sold his interest in the home, he is still liable for the amount it was worth at the time of the death. He does not, however, become liable for all of the charges on the estate. Thus, whether or not he converts the property does not matter. He is still liable for a determined amount; an amount he was aware of at the time of the disposal of the specific piece of succession property.

Another possible reason for making this sale an absolute nullity is to prevent heirs from fraudulently preventing their own creditors from recovering out of the

92. La. Code Civ. P. art. 427.

93. La. Civ. Code art. 988.

94. La. Civ. Code art. 989.

95. La. Civ. Code art. 990.

96. La. Civ. Code art. 994.

97. Louisiana Civil Code article 1032 defines benefit of inventory as "the privilege, which the heir obtains, of being liable for the charges and debts of the succession only to the value of the effects of the succession, by causing an inventory of these effects to be made within the time and in the manner hereinafter prescribed."

98. La. R.S. 9:1421 (1986). *See* Katherine S. Spaht, *Developments in the Law—Successions*, 47 La. L. Rev. 471, 479-86 (1986).

inherited property. However, this too is a proposition that cannot be supported. First, should A or B renounce the succession, "the creditors of the heir who refuses to accept or renounce an inheritance to the prejudice of their rights, can be authorized by the judge to accept it, in the name of their debtor and in his stead, according to the forms prescribed on this subject in the following section."[99] Thus, if there be a renunciation on the part of the debtor, the renunciation is annulled only in favor of the creditors, for as much as their claims amount to, but it remains valid against the heir who renounced.[100] If, therefore, after the payment of the creditors, any balance remains, it belongs to his coheirs who may have accepted it, or if the heir who has renounced be the only one of his degree, it goes to the heirs who come after him.[101]

Still additional protection is afforded creditors in Civil Code article 2036, which states:

> An obligee has a right of action to annul an act of the obligor, or the result of a failure to act of the obligor, made or affected after the right of the obligee arose, that causes or increases the obligor's insolvency.[102]

The comments to this article point out that the "revocatory or Paulian action, an institution derived from the Roman law, is the civil law analogue to the common law suit to set aside a fraudulent conveyance."[103] Thus, the revocatory action was created to enable the obligor to annul acts of the obligee which were undertaken for the purpose of preventing the obligor from recovering his debt. With this in mind, let us again return to the hypothetical set out above.

Should A attempt to sell his half interest in the yacht fraudulently to a friend for a price that is well below the value of the yacht in order to prevent a creditor from having property to attach, the creditor may annul the sale. It follows that there is no need for the sale to be an absolute nullity for the creditor to be protected.

The same protections are afforded to creditors should a heir fail to act in an attempt to increase his insolvency with an aim at hurting one creditor. Article 2036 of the Civil Code quoted above states a creditor can annul the result of a "*failure to act*" on the part of the obligor. Further, Article 2044 states:

> If an obligor causes or increases his insolvency by failing to exercise a right, the obligee may exercise it himself, unless the right is personal to the obligor.

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99. La. Civ. Code art. 1021.
100. *Id.*
101. *Id.*
102. La. Civ. Code art. 2036.
103. La. Civ. Code art. 2036 cmt. c.

> For that purpose, the obligee must join in the suit his obligor and the third person against whom the right is asserted.[104]

Thus, using either the revocatory action or the oblique action, the creditor can prevent an heir from purposefully failing to act and can recover what is owed.

All of the above scenarios support the idea that a sale of a specific piece of succession property should not be classified as an absolute nullity. Should an heir sell his interest in a specific piece of succession property, this is an acceptance of the succession. Thus, the heir is liable for the debts of the succession, under benefit of inventory. Should the heir renounce the succession in an attempt to harm a creditor, the creditor can step into the heir's place and accept enough of the succession to satisfy the debt. Or if the heir attempts to fraudulently act in a manner which will increase his insolvency, the creditor can annul the action under a revocatory action. Thus, the idea that the sale of an interest in a specific piece of succession property should be an absolute nullity in order to protect creditors cannot hold true.

B. Policy Considerations

Further support for the idea that the sale of a piece of inherited property should not be classified as an absolute nullity is found in the definition of an absolute nullity. Article 2030 of the Civil Code provides, "[a] contract is absolutely null when it violates a rule of public order, as when the object of a contract is illicit or immoral."[105] A contract that is absolutely null may not be confirmed, and the nullity may be invoked by any person or may be declared by the court on its own initiative.[106] In interpreting this law, Louisiana courts have applied it in a variety of subject matter, including divorce,[107] political elections,[108] drug paraphenalia,[109] promises to marry,[110] and gambling debts.[111] However, despite the wide range of issues the article has been

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104. La. Civ. Code art. 2044.

105. La. Civ. Code art. 2030.

106. La. Civ. Code art. 2030.

107. La. Code Civ. P. art. 3953 (providing that failure to comply with the 180-day requirement for a Civil Code article 102 divorce renders the resulting divorce judgment an absolute nullity).

108. *See* Glover v. Taylor, 38 La. Ann. 634 (1886) (holding an agreement between rival political candidates, providing that one would pay the other half his salary if elected, was against public policy and absolutely null).

109. *See* A Better Place, Inc. v. Giani Inv. Co., 454 So. 2d 728 (La. 1984) (holding that commerce in objects designed for use with controlled substances has been prohibited by statute, and such products are no more proper objects for contracts and lawsuits than are illegal drugs themselves).

110. *See* Sanders v. Gore, 676 So. 2d 866 (La. App. 3d Cir. 1996) (holding a promise to marry by persons already married unenforceable, as against public policy; such promise includes promise that persons would divorce their present spouses).

111. *See* Mobley v. Harrel, 571 So. 2d 662 (La. App. 2d Cir. 1990) (holding a promissory note given to satisfy gambling debts was for an illegal cause and thus absolutely null).

applied to, the cases do have one common trait: they "derogate from laws enacted for the protection of the public interest, violate a rule of public order, or produce a result prohibited by law or public policy."[112] This points out once again the difference between the majority of actions which are held to be absolutely null and the sale of a piece of inherited property. When creditors are protected, it cannot be argued that the sale of the succession property could be violating public order. Nor could it be argued that the sale of succession property is of the same character as the other acts mentioned above classified as absolutely null. Thus, the sale of succession property should not be classified as a nullity at all. Rather, Louisiana should truly adopt "le mort saisit le vif" and permit the sale of a piece of succession property.

However, should the change to no nullity at all be too drastic, perhaps a change from absolute to relative nullity would at least alleviate some of the confusion. Article 2031 defines a relatively null contract as one which "violates a rule intended for the protection of private parties, as when the party lacked capacity or did not give free consent at the time the contract was made."[113] Article 2031 also provides that a relatively null contract may be confirmed, and that the nullity may be invoked only by those persons for whose ground nullity was established, and may not be declared by the court on its on initiative.[114] A common example of a relatively null contract is one entered into by a person lacking capacity to contract—a minor. In that situation, the minor has the right to either void the contract, or to have it held valid by his ratification upon becoming a major.[115]

The difference between absolutely and relatively null contracts is made clear by Article 2032, which gives the prescriptive periods for actions to annul contracts on the grounds of nullity. Actions to annul absolutely null contracts have no prescriptive period, while actions to annul relatively null contracts must be brought within five years from the time the ground for the nullity either ceased (as in incapacity or duress) or was discovered (as in cases of fraud or error).[116] These periods seem appropriate given the definitions of each type of nullity, for if a contract violates public morals or is illicit or illegal, it should not be allowed to become valid merely by the passage of time. Further, should a party to a relatively null contract have five years to act to annul it and fail to do so, it seems correct that it should then become valid. As the Louisiana Supreme Court stated in *Nelson v. Walker*,[117]

> [t]his court has differentiated between absolute nullities in derogation of public order and good morals and those which are established in the

112. Daigle v. Clemco Indus., 613 So. 2d 619, 624 (La. 1993).
113. La. Civ. Code art. 2031.
114. *Id.*
115. *See, e.g.*, Taylor v. Rundell, 2 La. Ann. 367 (1847).
116. La. Civ. Code art. 2032.
117. 250 La. 545, 197 So. 2d 619 (1967).

> interest of individuals. The latter nullities are susceptible of ratification, either expressly or impliedly, and may be prescribed against, while the former are never susceptible of ratification and can never be prescribed.[118]

As these articles demonstrate, the policy reasons behind an action being absolutely null are a far cry from the sale of a piece of succession property. For example, most of the early cases dealt with subjects that would common sensically seem to be illicit or immoral to some members of the population. However, the sale of an heir's interest in succession property seems a bit removed from these "illicit or immoral" acts.

VI. CONCLUSION

The most reasonable solution to this problem in Louisiana's successions law is to truly adopt *le mort saisit le vif* and legalize the heir's right to alienate a specific piece of the succession property. This would be in accordance with the intent of the redactors of the Code of 1825 and their adoption of Article 934 of the Code of 1825.[119] It would also comport with Article 477 of our current Code and the principles of ownership.

Further, it may finally help end the confusion over the difference between ownership and seizin. If the heir can alienate a specific piece of succession property, it will be clear that he is the owner of the property. This will, however, have no effect on the rights of those given the right of seizin—testamentary heirs, instituted heirs, and universal legatees.[120]

Finally, the persons most needing protection from this type of sale, the creditors of the succession, are still protected by the other provisions of the Civil Code. As seen above, the creditors have a variety of possible actions to keep an heir from purposefully attempting to keep the creditor from receiving what he is owed.

However, should this be too drastic a change for some, another option is to change the sale from an absolute nullity to a relative nullity. As illustrated above, an absolutely null action is thought to be violative of public order or good morals, while relatively null acts are classified as such for the protection of those involved in the act. The sale of succession property does not fit into those situations which could be classified as violating public order. It is simply a matter of allowing an heir to act on property he has inherited. Should something go wrong in the sale, there would be a five year period for the sale to be rescinded. Thus, should a third party purchase the succession property that becomes subject to a dispute between a succession creditor and the heir, the third

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118. *Id.* at 561, 562, 197 So. 2d at 620.
119. *See supra* text accompanying notes 13-16.
120. La. Civ. Code art. 940.

party could rescind the sale. Further, the five year period would provide enough time to protect the third party, as most successions are administered immediately after the death of the deceased.

Either of the above solutions would improve an area of Louisiana successions law that is riddled with confusion. And although it would be 172 years after the Code of 1825 attempted to first implement *le mort saisit le vif*, as the saying goes, "better late than never."

J. Don Kelly, Jr.[*]

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[*] Recipient of The Association Henri Capitant, Louisiana Chapter award for the best paper on a civil law topic, 1996-97.