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Repository Citation

John H. Tucker jr., *Substitutions, Fideicommissa and Trusts In Louisiana Law: A Semantical Reappraisal*, 24 La. L. Rev. (1964)

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LOUISIANA LAW REVIEW

VOLUME XXIV
APRIL, 1964
NUMBER 3

SUBSTITUTIONS, FIDEICOMMISSA AND TRUSTS IN LOUISIANA LAW: A SEMANTICAL REAPPRAISAL

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PART I: THE TEXTS

The shift of the principal source of wealth from immovable to movable property largely represented by stocks and bonds has made investment expertise a necessity of sound financial policy. High estate and inheritance taxes have become a compelling cause for estate planning, frequently involving the separation of income beneficiary from principal beneficiary.

These needs for intelligent financial management of property and sound estate planning are frequently met in states other than Louisiana by the trust device.

In Louisiana, trusts for individuals are of recent origin and restricted operation, a condition brought about by its acceptance of the French prohibition against substitutions in its first civil code adopted in 1808.

This prohibition against substitutions is contained in article 896 of the French Civil Code.

Article 1520 of the Louisiana Civil Code corresponds to article 896 of the French Code, and is a repetition with editorial mutation of the text of article 1507 of the Code of 1825, which in turn reproduces article 40 of Book III of Title II of the Code of 1808 (p. 216).¹

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1. Title II of Book III of the Civil Code of France "Donations and Testaments" was adopted 3 May 1803, and promulgated ten days later. The Code as a whole was adopted 21 March 1804.

On 31 March 1808 the Territorial Legislature of Orleans (now Louisiana) adopted its first civil code with the title "A Digest of Laws Now in Force in the Territory of Orleans." This code was followed by the Code of 1825, actually

A comparison of the text of article 896 of the Code Napoleon with the texts of the corresponding articles of the Louisiana Code is a necessary prerequisite to the study. These texts read:

French Civil Code article 896:

"Substitutions are prohibited.

"Every disposition by which the donee, the instituted heir or the legatee will be charged to preserve for and deliver² to a third person will be null even with regard to the donee, the instituted heir or the legatee."

The French text of article 896 reads:

"Les substitutions sont prohibées.

"Toute disposition par laquelle le donataire, l'héritier institué, ou le légataire, sera chargé de conserver et de rendre à un tiers, sera nulle, même à l'égard du donataire, de l'héritier institué, ou du légataire."

Article 1507 of the Code of 1825 and article 1520 prior to the amendment of 1962, with inconsequential differences in punctuation, read:

"Substitutions and *fidei commissa* are and remain prohibited.

"Every disposition by which the donee, the heir or legatee is charged to preserve for or to return a thing to a third person is null even with regard to the donee, the instituted heir or the legatee.

adopted April 12, 1824, but its promulgation was delayed because of printing difficulties.

The present Civil Code is the result of an editorial revision adopted in 1870 (La. Acts 1870, No. 97). It is known as the Revised Civil Code.

The two earlier codes were written in French and translated into English, sometimes erroneously, which is discussed hereafter. The Code of 1870 was adopted in English only.

2. "*Rendre*," in the French text, is translated "Return" in the Compiled Edition of the Civil Codes of Louisiana (Louisiana Legal Archives), and the present tense is used instead of the future used in the French Civil Code, thereby conforming the translation to the English edition of the Louisiana Civil Codes of 1808, 1825 and 1870. But the 1808 and 1825 Codes were written in French and translated into English by translators employed by the legislature. Their work was not altogether satisfactory (as to Code of 1808), see Moreau Lislet's argument in rebuttal in *Dufour v. Camfranc*, 11 Mart.(O.S.) 675, 701 (La. 1822) and in *Egerton v. Third Municipality of New Orleans*, 1 La. Ann. 435, 437 (1846); see also Dubuisson, *The Codes of Louisiana (Originals Written in French; Errors of Translation)*, 25 LA. BAR A.R. 143 (1924).

The French text of the corresponding article of the Louisiana Codes of 1808 and 1825 uses the present tense, and no doubt the translators for the Compiled Edition of the Louisiana Civil Codes thought and properly so that this interversion was unimportant and justified for comparative purposes.

"In consequence of this article, the Trebellianic portion of the Civil Law, that is to say the portion of the property of the testator which the instituted heir had a right to detain, when he was charged with a *fidei commissa* or fiduciary bequest is no longer a part of our law."

The French text of article 1507 of the Code of 1825, and article 40, p. 216, of the Code of 1808 (with inconsequential changes) reads:

"Les substitutions et les fidei-commis sont prohibés.

"Toute disposition, par laquelle le donataire, l'héritier ou le légataire est charge de conserver et de rendre à un tiers, est nulle, meme à l'égard du donataire, de l'héritier institué, ou du légataire. Au moyen du contenu en cet article, il n'y aura plus lieu à la quarte trébellianique en usage dans la loi civile c'est-à-dire, à la portion des biens du testateur, que l'héritier institué avait le droit de retenir, lorsqu'il était chargé d'un fideicommissis."

Here it should be noted that the translated English versions of the Louisiana Codes differ from the French versions of the Codes of 1808 and 1825 in several respects, which will be discussed later in this study. They are of some importance to this re-examination of this question of Louisiana law.³

There can be but little doubt that the commissioners who prepared the Code of 1808 had the text of what is now article 896 of the Code Napoleon before them. In nearly every respect, the texts are identical.

But when they added to the first sentence "*et les fidei-commis,*" so as to make it read: "*Les substitutions et les fidei-commis sont prohibés,*" they brought about a veritable phantasmagoria of judicial and professional speculation which justifies an extensive excursion back to sources and derivative texts to ascertain the meaning of the terms "substitutions" and "fideicommissa" as they were developed and applied in Roman, Spanish, and French law and accepted in the Louisiana Civil Code.

This prohibition was given constitutional stature in the Constitution of 1921,⁴ but with an exception permitting trust estates

3. See note 2 *supra*.

4. LA. CONST. art. IV, § 16. It was amended in 1962. It will be discussed later. See p. 472 *infra*.

for a limited period. There has been legislation permitting trusts within constitutional limits,⁵ but the confusion resulting from the redundant use of the terms "substitutions" and "fidei commissa" has made the interpretation and application of these laws difficult and restricted, and sometimes uncertain.

I believe that a comprehensive and critical study of the sources and historical development of substitutions and fidei-commissa in the civil law is of compelling importance.

For if it can be established that the term *fideicommissum*, as it was used and understood in the laws of France and of Spain when they respectively applied to Louisiana, was included in the term substitution, and was in fact the very substitution that was permitted in Spain by *Las Siete Partidas*, but which was first suppressed in France during the Revolution and then by article 896 of the Code Napoleon, there will be no basis whatsoever for the restrictive jurisprudence founded on the erroneous belief that they are not the same thing.⁶

This inquiry will, therefore, be made first into Roman law, then into the laws of Spain and France, which on this subject were derived directly from Roman law, and finally into the law of Louisiana, their lineal descendant. Afterwards a comprehensive critique will be made of the jurisprudence and professional writing that this tautological sentence has inspired, upon the basis of this semantical reappraisal of the texts.⁷

Roman Law

The Roman Law with which we are concerned is not the law as it existed at the fall of the Western Empire in 476. It is true that the Teutonic conquerors, following the principle of the personality of laws, adopted two codifications of Roman law for their Roman subjects in Spain and Southern France (*Lex Romana Visigothorum*, also called Breviary of Alaric in 506) and in Southeastern France (*Lex Romana Burgundiorum* 467-516). These codifications were based largely on the Theodosian

5. A chronological list of Louisiana acts authorizing and regulating trusts will appear in Part II hereof.

6. I realize that it may seem temerarious to thus enter the lists against the host of scholars and judges that have adorned the profession throughout so many years who have written otherwise. But I have been unable to find in the authorities available to me any evidence to refute my thesis. So far I have found in my investigation of Louisiana jurisprudence very few references to most of the essentially important sources that are cited herein. I believe they were not generally available in Louisiana at critical times in the development of this jurisprudence.

7. This critique will appear in a later issue of this *Review* as Part II hereof.

Code of 438, and an abridgment of the Institutes of Gaius, The Sententiae of Paulus and a fragment from Papinian.

These codes related principally to imperial enactments and contained but little of the wealth of the juristic writings of the classical period. These Visigothic codifications of ante-Justinian law had little effect in the development of the civil law of Spain and France that is founded on the works of Justinian, introduced there following the revival of Roman law at the University of Bologna in the twelfth century.

But the ante-Justinian Roman law concerned with the subject of this study, as revealed in the Institutes of Gaius,⁸ must be used as a starting point, in order to understand the origin and development of substitutions and the fideicommissum as they are established in Justinian's great codification.

A. Substitutions

In Roman law there were only two basic substitutions — the vulgar substitution and the pupillary substitution, with the exemplary substitution developing analogically from the latter, and modifications or combinations producing some others derivative from these basic classes.

The *vulgar* substitution, so-called because of the frequency of its use, was simply the means by which a testator could prevent intestacy by naming a substitute for an heir or legatee first named who might not succeed because of his predecease, renunciation, or incapacity to receive the succession. This substitution is fully recognized in the Code Napoleon (*Article 898*) and in the Civil Code of Louisiana (*Article 1521*).⁹

8. The Institutes of Gaius, at the critical times discussed in this study, like the works of practically all of the classical Roman jurists, were known only so far as they could be reconstructed from attribution made in Justinian's codifications, particularly in his Digest or Pandects, and in his Institutes, acknowledged to have been derived more than half from Gaius' Institutes.

A palimpsest of Gaius' Institutes of the 5th or the 6th century was found at Verona in 1816, and laboriously deciphered by 1874 and published in 1884 (See 2 ZULUETA, *INSTITUTES OF GAIUS 1-11* (1953); and GAIL, *INSTITUTIONUM JURIS CIVILIS, Preface* (Poste's Transl. 3d ed. 1890).) This discovery confirmed the scholarship of the earlier reconstructions, evidenced in many of the earlier French authorities mentioned through this discussion. Gaius' Institutes was written about 161 A.D. Justinian's Institutes was published as a statute in November 529.

Moyle's annotated translation of the Institutes of Justinian (5th ed. 1916) makes it easy to determine the contributions made by Gaius, by printing in heavy type that of the text taken from Gaius. 10 POTHIER, *PANDECTS DE JUSTINIAN 521*; see also COIN-DELISLE, *COMMENTAIRE DU TITRE DES DONATIONS ET TESTAMENTS 7, 8* (new ed. 1855).

9. (A) *INSTITUTES OF GAIUS*, Book II, §§ 174-178, *Substituto Vulgaris*; 1

The *pupillary* substitution was that by which a father instituted an heir to the child under his authority in the event he die after becoming heir but before attaining testamentary capacity—Pothier says it comes from the law of the XII Tables.¹⁰

The *exemplary* substitution was that by which a parent instituted a substituted heir for his child of unsound mind who died before recovering his sanity. It is so-called because it was introduced after the manner of the pupillary substitution.

Pupillary and exemplary substitutions were undoubtedly effective in Louisiana during the Spanish regime, for they are included in the *Siete Partidas* in Title V of Partida VI under the Rubric, "Substitutions," as will be more fully discussed hereafter.

They may have been effective under the French colonial regime, when Louisiana was under French pre-revolutionary law, by oblique derivation from Roman law, for that law was often used as a supplement to the *Customs* when they were silent. The Custom of Paris was effective in Louisiana during the French Colonial period.

These substitutions are found today in the codes in many countries of the civil law which derive their laws from Spanish legal institutions.

The point here is that in the Roman law the word "substitution" was applied only to the kinds of substitution above described. Substitution was not the name applied to the device by which a testator charged his donee, instituted heir, or legatee to preserve and deliver the bequest to a third person. We call such a bequest a prohibited substitution, the French writers call it a "*substitution fideicommissaire*," or simply a "*fideicommiss*" and the Romans called it a "*fideicommissum*."

B. *Fideicommissa*

About the end of the Republic, a testator in Rome, in order

ZULUETA, *op. cit. supra* note 8, at 117, (Commentary) Vol. 2, at 104; POSTE, *op. cit. supra* note 8, at 244. (B) INSTITUTES OF JUSTINIAN, Book II, Title XV, *De Vulgari Substitutione*; SANDARS, INSTITUTES OF JUSTINIAN 270 (1st Am. ed. of 5th London ed. 1876); MOYLE, INSTITUTES OF JUSTINIAN 73 (5th ed. 1913); MOYLE, INSTITUTES OF JUSTINIAN ANNOTATED 270 (5th ed. 1913).

10. (A) INSTITUTES OF GAIUS, Book II, §§ 179-184, *Substitutio Pupillaris*; ZULUETA, *op. cit. supra* note 8, Vol. 1, at 117, (Commentary) Vol. 2, at 105; POSTE, *op. cit. supra* note 8, at 246. (B) INSTITUTES OF JUSTINIAN, Book II, Title XVI, *De Pupillari Substitutione*; SANDARS, *op. cit. supra* note 9, at 74; MOYLE, *op. cit. supra* note 9, at 74; (Annotated); *op. cit. supra* note 9, at 272.

to transmit property to one incapable of receiving, would name a legatee or institute an heir with the request, or prayer, that the bequest be delivered to the incapable. This request was not obligatory, but rested on trust, hence the name.

When the practice of ignoring these requests became quite prevalent, Augustus made them obligatory, and in time a praetor was appointed to administer them. At first, these fideicommissa differed from *legata*, and considerable difficulty arose because the heir who turned over the bequest to the second beneficiary remained bound as an heir, and frequently would be required to turn over the entire inheritance. Often he would not accept, and thus deprive the substituted heir of the bequest. Two decrees were adopted to obviate these difficulties:

The *Senatus Consultum Trebellianum* A.D. 56, under Nero, regulated the relationship and responsibilities between the *heres* and *fideicommissarius*; and the *Senatus Consultum Pegasianum*, about A.D. 73, under Vespasian, provided that the "donee, instituted heir or legatee" could retain one-fourth of the whole of the inheritance he was required to deliver to a "third person." This is the counterpart of the portion retained by the heir from excessive legacies impinging on his inheritance under the *Lex Falcidia*, 40 B.C.

Under Justinian, the distinction between *legata* and *fideicommissa* practically disappeared. The Trebellianic and Pegasian decrees were merged, and the portion of the thing bequeathed to be retained by the instituted heir when he made delivery to the substituted heir was called thereafter the Trebellianic portion.

By the time of Justinian's codification, the character of the *fideicommissum* had drastically changed from the voluntary and fiduciary nature it originally had before Augustus to such a degree that by means of the *fideicommissum* it was possible to pass property expressly or by necessary implication from one successor to another successively, an indefinite number of times.¹¹ Justinian stopped this practice at the fourth successor

11. This development of the *fidei commissum* is often overlooked by writers discussing it in comparison with common law trusts.

There seems to be no question but that the *fidei commissum* as it existed at the time of Justinian was the source of its counterparts in French and Spanish law.

by his 159 *Novel*,¹² just as France limited the substitution fideicommissaire to three degrees a thousand years later.¹³

There are now available English translations of Gaius' Institutes and Justinian's Institutes. They give a succinct history of fideicommissa.¹⁴ But in this area these translations are confusing, because technical terms of the common law have been used to translate technical terms of Roman Law, when they are not equivalent. For example, Gaius' Institutes begins the discussion at Book II, Section 246, with this statement. "*Nunc transeamus ad fideicommissa*," which is translated, "Let us now pass on to trusts." Justinian's Institutes, Book II, Title XXIII, begins with the same sentence, with the same translation.

Much of this difficulty has been obviated in the Louisiana Civil Code by keeping intact or anglicizing the terms used in the Code Napoleon from which the Louisiana Code is derived. In the area we are discussing, the translation of the word "fideicommissa" (used in the Roman texts) as "trusts," "trust inheritances," "fiduciary bequests" and "entails," undoubtedly is the cause of considerable difficulty and confusion.

Not all translators, however, use this method. For example, Sandars says:¹⁵

"The word fideicommissum has been generally retained in the translation, instead of trusts, because the fideicommissa include only trusts carrying out the wishes of deceased persons. The word 'trusts' which is used much more widely in its application, might lead to confusion."

To the same effect is the note of the translator of Brissaud's *History of French Private Law*:¹⁶ "Trust has been rather badly

12. 159 NOVEL, ch. II (Ninth Collection, Title XLII), Scott's Trans., Vol. 17, p. 190.

13. Ordinance of Orleans of 1560 limited substitutions *fideicommissaire* to two degrees, not including the first institution. The Ordinance of Moulins of 1566 limited anterior substitutions to four degrees. 3 COLIN & CAPITANT, COURS ELEMENTAIRE DE DROIT CIVIL FRANCAIS n° 1968 (10th ed. 1950).

14. (A) INSTITUTES OF GAIUS, Book II, §§ 246-289, *Fideicommissa*; 1 ZULUETA, *op. cit. supra* note 8, at 139; (Commentary) Vol. 2, at 113; POSTE, *op. cit. supra* note 8, at 271 (B) INSTITUTES OF JUSTINIAN, Book II, Title XXIII, p. 309, *De Fideicommissariis Hereditatibus*, Title XXIV, p. 318, *DE SINGULIS REBUS PER FIDEICOMMISSUM RELICTIS*; SANDARS, *op. cit. supra* note 9, at 325; MOYLE, *op. cit. supra* note 9, at 94; MOYLE (Annotated) *op. cit. supra* note 9, at 309.

15. SANDARS, *op. cit. supra* note 9, at 325.

16. 3 BRISSAUD, HISTORY OF FRENCH PRIVATE LAW, CONTINENTAL LEGAL HISTORY SERIES pp. 726-727 (Trans. Note 6.) (1912).

translated by fideicommiss. The converse is also true in this translation for the word 'fideicommiss' has been rendered 'trust' for want of a better term."

One of the latest works on Roman law in English, *An Introduction to Roman Law* (1962) by Professor J.K.B. Nicholas, of Brasenose College, Oxford, retains the Latin names of "fideicommissum" and "substitution" and does not attempt to translate them with English technical terms.

Finally, it may be appropriate to conclude this particular discussion with the note of the translator of Voet's great commentary on the Pandects. At the beginning of Book XXXVI, Title 1, which in Latin is "*Ad senatusconsultum Trebellianum*," and in the translation "The Senatorial Decree Named After Trebellius — Fideicommissa," the translator's note says:

"Because from a modern point of view the value of this title lies in its treatment of fideicommissa, it has been given a second supplementary title in the heading. The word *fideicommissum*, clumsy though it is, has been generally retained in translation in order to avoid confusion with the English law of trusts."

This translation of Voet was made by a distinguished judge from South Africa, for use there, where Roman-Dutch law is in force.¹⁷

Conclusion

If we retain the name and look to the substance of what the term means, there cannot be the slightest doubt that in Roman law substitutions meant only the vulgar and pupillary substitutions and derivatives from them as they are described above; and that fideicommissum in Roman law meant exactly the same thing as the prohibited substitution described in article 1520 of the Louisiana Civil Code and article 896 of the Code Napoleon, and which in French law and legal literature is called "fideicommiss" or substitution "fideicommissaire," indiscriminately, or simply "substitution."

There is attached, as Annex 1, a bibliographical note that

17. The Selective Voet, being the Commentary on the Pandects [Paris Edition of 1820] by Joannes Voet, [1647-1713] and the supplement to that work by Johannes Van Der Linden (1756-1835) translated by Percival Gane formerly judge of the Supreme Court at South Africa [Durban — 1956], Vol. 5, p. 331.

lists Roman and other law sources consulted in preparing this precis. No quotations from Justinian's Great Digest or Pandects have been given. His Institutes, like that of Gaius, from which it is derived to a very considerable extent, was a condensation for teaching law and for ready reference. The format of the Digest cannot serve the needs of concise statement in semantical dialectic. References, however, are given to Scott's translation and to the monumental works of Pothier and Domat who organized and gave facility of application to the civil law in France in the period preceding the Code Napoleon.

*France — Pre-Revolutionary Law (Ancien Droit)*¹⁸

Before the Revolution, France had a great many local jurisdictions originating in the practice of the personality of laws, according to which the law applicable to an individual was that of his national origin. Accordingly, the South of France, predominately Roman, had Roman law, codified out of pre-Justinian sources when the Western Roman Empire fell to the Visigoths and Burgundians in 476. (It is called "*Pays De Droit Ecrit*" or Region of the Written Law.) At a somewhat later date Northern France was occupied by the Franks, whose law was composed of unwritten Customs of Germanic origin. (It is called "*Pays Coutumieres*" or Regions or Localities of Customary Law.)

With the rise of feudalism, laws ceased to be personal and individual, and became territorial in application. In the North, many local customs developed with considerable territorial rigidity. These numerous territorial customs were codified in the early sixteenth century and revised during the latter part of that century.

The revival of Roman law based on Justinian's Great Codifications which started at the University of Bologna, in the twelfth century, soon spread to France and the Corpus Juris Civilis became the basic law of the South of France, of Roman tradition. Because of its organization, extent and intrinsic

18. For a concise account of French law during this period see I PLANIOL, *TRAITE ELEMENTAIRE DE DROIT CIVIL* (12th ed. 1939), LOUISIANA STATE LAW INSTITUTE TRANSLATION, Vol. I, ch. II, p. 23 (1959). An extensive account of the development of the *fidei commissum* in Rome and its adoption in France is given in SOUM, *LA TRANSMISSION DE LA SUCCESSION TESTAMENTAIRE* nos. 22-26, 27, 30-37 (1957).

merit, this Roman law was frequently applied in the *Customary* region of the North, whenever the *Customs* were silent.

The several substitutions of the Roman law were generally admitted in that part of France deriving its law from Rome (*Pays De Droit Ecrit*—Region of Written Law).¹⁹ Only two substitutions were admitted in the part having the Germanic customs (*Pays Coutumieres*—Customary Regions); *viz.*, the vulgar, or direct substitution, and the substitution fideicommissaire, or oblique substitution.²⁰

The vulgar substitution was permitted everywhere.²¹ The substitution fideicommissaire was valid in the Region of the Written Law, and permitted in most of the Customary Regions or Localities, but several of them prohibited substitutions fideicommissaires absolutely or when it was made by act of last will.²²

The fideicommissum of the Roman law as it was established by Justinian was adopted in France under the designation of "substitution fideicommissaire," and is frequently referred to in all French commentaries and civil law literature as "substitution" without any other qualification.²³

But the substitutions fideicommissaires of the French law "have played an important role in the past; they are meant when one uses the simple term 'fideicommissa.'" ²⁴ "It bears the name of fideicommissaire because it found its first origin in the Roman fideicommissum. When the word 'substitution' is used without any qualification, that is always meant."²⁵

Domat, whose *Les Loix Civiles Dans Leur Ordre Naturel*

19. 34 CARPENTIER—DU SAINT, REPERTOIRE DE DROIT FRANCAIS, *Verbo Substitutions*, no. 12, at 1105 (1904).

20. 7 POTHIER, OEUVRÉS—*Traite des Substitutions* 547 (ed. Dupin 1835): "We have, in the region (localities) of the customs, only two kinds of substitutions: The vulgar, or direct substitution, and the substitution fideicommissaire."

21. CARPENTIER—DU SAINT, *op. cit. supra* note 19, *Verbo Substitutions*, no. 13, at 1105.

22. 11 AUBRY & RAU, COURS DE DROIT CIVIL FRANCAIS 159, § 692 (6th ed. 1956); 16 MERLIN, REPERTOIRE DE JURISPRUDENCE—*Verbo Fideicommissaire*, Section I, § 12 (5th ed. 1827).

23. 16 MERLIN, *op. cit. supra* note 22, at 507. 5 PLANIOL & RIPERT, *TRAITE PRATIQUE DE DROIT CIVIL FRANCAIS* 392, n. 3 (2d ed. 1957) say that the Romans used the term "*fidei-commissum*" (French: *fidei-commis*) and did not use the term "substitution" in connection with *fidei-commissum*, nor did they classify it as a substitution, reserving that term for the direct substitutions, *viz.*, vulgar, pupillary, exemplary.

24. 3 PLANIOL, *op. cit. supra* note 18, at no. 3266.

25. 4 RIPERT & BOULANGER, *TRAITE DE DROIT CIVIL* no. 3855 (1959).

has enriched the legal literature of the world, was an outstanding figure in this early period of French law. His writings and those of Pothier are a prime source of information concerning the law of that period.

In his great work, which was published first in 1694, he had this to say in the preamble to Book V, under the rubric "Des Substitutions Et Des Fideicommiss" :²⁶

"This word substitution in general has two significations (meanings) which must be distinguished: One comprehends the dispositions of testators, who, having instituted an heir and fearing that he might be incapable or not desirous of accepting the appointment, name another on his default to be heir; the other comprehends the dispositions of testators who desire to pass their properties from one successor to another, so that the first one called having succeeded, transmits these things after his death to a second; and that if several are called, the property will pass from one to the other successively from degree to degree.

"The first of these two sorts of substitutions is that which is called vulgar, from the name that it had in Roman law, because it was frequently used to prevent the situation where it might happen that the first instituted heir might not succeed, as if he should die before the testator; as if he should renounce the inheritance; as if he should be incapable of succeeding; as if he should have made himself unworthy to succeed.

". . . The other kind of substitution which made the inheritance pass from one successor to another, is that which is properly called fideicommissum in Roman law, because it was used frequently through dispositions in terms of entreaty or prayer that the testator made to his heir to deliver either the inheritance, or some particular thing to the person he named, relying on the fidelity of his heir for the execution of his will. Fideicommissa in the beginning depended on the good faith of the heirs [a 1. Inst. De Fideicomm. Hered. (Lib. II — Tit. XXIII)], but afterwards they had the same force and effect as other dispositions of testators [D. ϕ Inst. De

26. 7 DOMAT, OEUUVRES DE J. DOMAT 2-4 (ed. M. Carre, 1824); for an English translation see DOMAT, THE CIVIL LAW IN ITS NATURAL ORDER (translated by William Strahan, edited from Second London Edition by Luther S. Cushing, 1850).

Fideicomm. Hered.]; and they were used very frequently as well as vulgar substitutions. But the name substitution in Roman Law is properly applied to vulgar substitutions, and substitutions fideicommissaire are hardly known there except under the name of fideicommissum; because a substitution passing property from one successor to another could be made only in terms of entreaty, or other similar terms, as described in Section 4 of Testaments, and not in direct and imperative terms [L7. De Vulg. Pupill. Subst. & Ult. De Pupill. Subst.] discussed in the same place and not necessary to be repeated here

“But in our usage, the testator may express himself either in direct and imperative terms, or in terms of fideicommissum; and in whatever manner may be conceived the substitution which causes property to pass from one successor to another, it has its effect if the intention of the testator is clearly expressed; and this kind of substitutions are called either substitutions fideicommissaire because of their origin in Roman law through use of the fideicommissum, or gradual substitutions because they cause the property to pass to the substitutes one after the other through several degrees; and they are also called purely and simply substitutions; so much so, in our common usage, that the simple word substitution is extended to those of this nature, because they are more frequently used than either the vulgar or the pupillary substitution, and it makes no difference whether they be conceived in terms of fideicommissum, or in direct and imperative terms, they have quite the same effect, as we have said before.”

These substitutions fideicommissaire were not introduced in France until the twelfth century — and then as a result of the Renaissance of the Roman law. Their use was greatly expanded in the fifteenth and sixteenth centuries.²⁷ They became for the

27. The extent to which use of these substitutions *fidei-commissaire* expanded in France during this period may be appreciated from the elaborate discussions given them by both Domat and Pothier, reflected in the Tables of Contents of their works.

(a) 7 DOMAT, *op. cit. supra* note 26, Vol. 7, reads:
 Book V, *Of Substitutions and Fideicommissa*, p. 1.
 Title I, *Of The Vulgar Substitution*, p. 6.
 Title II, *Of The Pupillary Substitution*, p. 16.
 Title III, *Of Direct and Fideicommissary Substitutions*, p. 50.
 Title IV, *Of The Trebellianic Decree*, p. 121.

Corresponding references to the Strahan translation, *op. cit. supra* note 26, are:

nobility the means of conserving the integrity of their fortunes, generation after generation, and of assuring its transmission to the eldest son who bore the title of the family and was representative of the name. And the substitution, or fideicommissum, transferring the patrimony through an indefinite number of generations protected it from the prodigality of the heirs themselves.

At a time when landed property constituted the chief source of wealth, and noble families were being destituted slowly but surely through the effects of the partition of estates and the prodigality of heirs, the institution of fideicommissa, or substitutions fideicommissaire, became the means of preserving a rich and numerous nobility around the throne. An aristocracy, it has been said, can only maintain itself by the use of substitutions.

But this system, which was completely free in its exercise, up to the middle of the sixteenth century, inevitably led to grave consequences to cope with which restrictive legislation was enacted before the Revolution.

This included:

- (a) Edict of 3 May 1553, requiring publicity and registration for substitution fideicommissaire.
- (b) Ordinance of Orleans of 1560 limiting these substitutions to two degrees, not including the first institution.
- (c) Ordinance of Moulins of 1566, limiting anterior substitutions to four degrees.
- (d) Ordinance of August 1747, by D'Aguesseau, established a uniform law regulating substitutions for all of France. It is entitled "Des Substitutions."²⁸

Book V, p. 617.

Title I, p. 621.

Title II, p. 628.

Title III, p. 647.

Title IV, p. 676.

(b) POTHIER, PANDECTS DE JUSTINIAN (Breard—Neville Translation, revised and corrected by Moreau de Montalin 1821).

Vol. 10, *Substitutions Properly Speaking*, p. 519; Vols. 11 and 12, *Legacies and Fideicommissa*; Vol. 14, *Of The Trebellianic Decree*, p. 187.

(c) 7 POTHIER, *op. cit. supra* note 20, *Traite Des Substitutions*, at 547-647.

28. The text of this ordinance is given in full in 22 ISAMBERT, DECRUSY AND TAILLANDIER, *RECUEIL GENERAL DES ANCIENNES LOIS FRANCAIS DEPUIS L'AN 420 JUSQUA LA REVOLUTION DE 1789 (1737-1774)*, no. 629, at 193 (1830). Some

The preamble to this Ordinance²⁹ of August 1747 shows the restrictions that had been placed on the free and unlimited exercise of the substitution fideicommissaire and the motives for the restrictions. It is interesting to compare this Ordinance and those of 1560 and 1566, limiting the degrees for substitutions, with Justinian's 159 *Novel*, doing exactly the same thing. And the Ordinance of 1747 conclusively shows the identity of this substitution with the Roman fideicommissum, and with the substitution prohibited by Code Napoleon article 896.³⁰

*France — Intermediate Period
(Revolutionary Period)*

The fideicommissum, or substitution fideicommissaire, or as frequently called substitution, was abolished during the Revolution, perhaps as much for political reasons as for sound and logical dissatisfaction with its operation.³¹

Planiol, in the Louisiana Law Institute's translation, says:

"The Revolution suppressed fiduciary substitutions (substitutions fideicommissaires) together with the feudal and aristocratic system. This legislation is usually justified on

interesting letters written by Chancellor D'Aguesseau about this ordinance are reproduced in *Oeuvres de M. Le Chancelier D'Aguesseau (1776) Tome IX, Contenant Les Lettres Sur Les Matiers Criminelles and Sur Les Matieres Civiles*:

Letter CCCLXI 25 August 1730, p. 508

Letter CCCLXII, 6 September 1730, p. 508

Letter CCCLXIII, 15 March 1747, p. 509

Letter CCCLXIV, 24 May 1748, p. 512

Letter CCCLXV, 9 July 1748, p. 516

Letter CCCLXVI, 30 August 1748, p. 516

Letter CCCLXVII, 6 November 1748, p. 524

Letter CCCLXVIII, 16 July 1749, p. 524.

29. The preamble of the Ordinance of 1747 on substitutions in translation is attached as Annex 2. An early commentary on this Ordinance was written by Furgole and published in 1775.

30. The Ordinance of August 1747, should be compared with the Exposes Des Motifs made in the French legislative bodies about the abolition of substitutions, when the Code Napoleon was adopted.

These motifs are discussed in all of the basic French Treatises such as 3 PLANIOL, *op. cit. supra* note 18, no. 3269; 5 PLANIOL & RIPERT, *op. cit. supra* note 23, no. 285; 3 COLIN & CAPITANT, *op. cit. supra* note 13; 11 BAUDRY-LACANTINERIE, *TRAITE THEORIQUE ET PRATIQUE DE DROIT CIVIL* (3d ed. 1905); 11 AUBRY & RAU, *op. cit. supra* note 22; 16 MERLIN, *op. cit. supra* note 22; 34 CARPENTIER — DU SAINT, *op. cit. supra* note 19; 4 RIPERT & BOULANGER, *op. cit. supra* note 25, no. 3852.

31. The revolutionary legislation abolishing substitutions was adopted November 14, 1792. This action by the Revolution is discussed in: 3 PLANIOL *op. cit. supra* note 18, no. 3272; 4 RIPERT & BOULANGER, *op. cit. supra* note 25, no. 3272; 5 PLANIOL & RIPERT, *op. cit. supra* note 23, no. 394; 3 COLIN & CAPITANT, *op. cit. supra* note 13, no. 1969; 34 CARPENTIER — DU SAINT, *op. cit. supra* note 19, *Verbo Substitution*, no. 39s; SOUM, *op. cit. supra* note 18, at 67.

the ground that the Revolution sought to facilitate mobility of property, and release land from the limitations which kept it out of commerce. That may have been part of the consideration at the time, but the real motives were political, as contemporary documents show."³²

*France — Modern Period Adoption
Of Code Napoleon*

The record of the proceedings in the three legislative branches under the consulate which resulted in the adoption of the Code Napoleon shows that the abolition of substitutions effected during the Revolution was maintained for some of the reasons alluded to in the preamble to the Ordinance of 1747 regulating them. That action is reflected in article 896, quoted earlier in this discussion and which, in effect, defines the substitution which caused their abolition during the Revolution.

The objections to substitutions, of decisive effect in causing their restriction under pre-Revolutionary law, and their abolition during the Revolution, confirmed and restated in article 896 of the Code Napoleon were:

(1) They established an order of succession other than that provided by law;

(2) They retired large amounts of property from commerce and circulation;

(3) They tended to the deterioration of property by withholding from possessors obligated to deliver to a substitute the benefits of ownership, and consequently any incentive to make repairs;

(4) They might mislead creditors of the possessor into thinking they had security in the property possessed by him, when actually that property was burdened with a substitution;

(5) They would be a constant source of discord and discontent in the family resulting in frequent litigation.³³

32. 3 PLANIOL, *op. cit. supra* note 18, Part 2, no. 3272. The author's notes for this quotation are "(4) Act. November 14, 1792, absolutely prohibiting substitutions in the future, and making void all that have been already made but not yet executed. An execution of a substitution is the death of the fiduciary and the existence of cestuis capable to receive the property in question."

"(5) Letter of Bonaparte, cited in DuCasse 'Memoires Et Correspondence' . . . Du Roi Joseph (3rd Ed.) Vol. II, pp. 299-300 (1856)"

33. 3 MARCADE, *EXPLICATION THEORIQUE ET PRATIQUE DE CODE CIVIL*, art. 896 C.N., no. 457, p. 370 (6th ed. 1866).

Bigot-Preameneu, one of the four jurists commissioned to prepare the projet of the Code Napoleon, was the orator who presented to the Corps Legislatif the motives of the government for that part of the projet relating to donations and testaments. Speaking to the Conseil d'Etat at the Seance of 14 Pluivoise (3 February 1803), held at the Tuileries under the presidency of the First Consul, he said:

“In order that his opinion be well understood there are, in this matter, some general notions which should be remembered.

“Substitution is defined by the Roman jurisconsults ‘Secundi vel deinceps haeredis institutio.’

“This definition is applied to two very different kinds of substitutions.

“One is the disposition by which the testator, fearing that the heir whom he has instituted may not or will not accept, names another who, in this default, will be heir.

“This kind of substitution was called vulgar in Roman law, because its usage was very frequent. Each testator had the intention of foreseeing that it might happen that the heir first instituted would not succeed either by his predecease or by his renunciation of the succession, or by his incapacity to receive the succession or because he was unworthy.

“The other kind of substitution is that by which the things of a succession pass to another in such a manner that the one first instituted possesses only under the charge of delivering to him or them who are appointed after him.

“This is what is called a fideicommis because at first a formula of prayer (or entreaty) was addressed to him who was charged to deliver and on whose good faith the testator relied; but later the restitution was made obligatory; and in place of a simple fideicommis, testators openly made substitutions of one heir to another.

“These substitutions were called gradual because they made the things pass to the substitutes, one after another, following the order, that is to say in the language of the law, according to the degree in which they have been called.

“The right to substitute several successors, the ones after

the others was not limited to heirs; it was applicable to simple legacies or to dispositions *inter vivos*.

"Its usage was thus very frequent. Testators found by this means an unlimited right of disposition; they saw in it a means of preserving their properties in their families; they also sheltered their descendents or other relatives from the bad conduct of those whom nature called to possess their properties."³⁴

It is quite interesting to read the record of the legislative procedure kept during the period when the Code Napoleon was adopted. A descriptive index to that record is given in the cited source.

From that record it is quite clear that the substitution meant to be abolished was that described in the second paragraph of article 896, namely, "every disposition by which the donee, the instituted heir or the legatee is charged to preserve and deliver to a third person will be null, etc."

M. Jaubert, in making his report to the Tribunal said this: "Nevertheless it is necessary to understand what this law prohibits. It is nothing else than that which was known in ancient law under the name of *fideicommissum*."³⁵

One of the most respected modern commentaries — Aubry and Rau — confirms this statement by saying, "Hereafter, we will employ the term *substitution* in the restricted acceptation which our *ancient* authors and the redactors of the Civil Code attribute to it, to designate substitution *fideicommissaire*."³⁶

Baron Grenier was one of the earliest writers who discussed donations and testaments, the first edition of his work on that subject having been published only three years after the adoption of the Code Napoleon and one year before the promulgation of the Louisiana Code of 1808. Writing under a sectional rubric "of substitutions, *fideicommissa* and of the right to elect in the principles of Roman law and according to French legislation" he said, in pertinent part:

"Roman legislation was prodigiously enlarged by the introduction of substitutions.

34. 11 LOCRE, *LA LEGISLATION CIVILE COMMERCIAL ET CRIMINELLE DE LA FRANCE* Book III, Title II, Of Donations and Testaments, pp. 109-11 (1827).

35. 11 LOCRE, *op. cit. supra* note 34, at 437.

36. 11 AUBRY & RAU, *op. cit. supra* note 22, at 161.

"There were several kinds — They may be reduced to three: The direct or vulgar substitution, the pupillary substitution and the substitution fideicommissaire . . . (Here follows descriptions of vulgar and pupillary substitutions and others derivative therefrom) . . . But the most important substitution which, like the others, passed into French legislation, and which has given rise to so many law suits and caused so many volumes, is that by which the testator charged his heir or a legatee, to deliver the succession or legacy to another; that one was charged to deliver to a third; this last to a fourth, etc. The objects should be delivered at at determined time, or after the death of each of the substitutes (Appelés).

"This substitution derived its principles from fideicommissum [Roman]. . . . It may be said that it is principally in French legislation that this species of disposition has received the name of substitution, with the qualification fideicommissaire."³⁷

It is interesting to note that Baron Grenier makes the same tautological use of "substitutions and fideicommissa" in his section heading that the redactors of the Louisiana Code of 1808 used in writing the prohibition against substitutions, *viz.*: "substitutions and fideicommissa are and remain abolished."³⁸

Conclusion

This record establishes beyond doubt or question that the substitution prohibited by article 896 of the Code Napoleon, as it is defined in that article, is the fideicommissum of the Roman law of Justinian. It came to France with the revival of Roman law in the twelfth century, and was unified for the many independent jurisdictions of France by the Ordinance of 1747. The evidence of those who developed its usage in France by their writings, and the testimony of those who abolished it in the Code Napoleon are unanimous and decisive on this point.

SPANISH LAW

Roman law was introduced into Spain and Southern France by the Visigoths, for their Roman subjects, by means of the

37. 1 GRENIER, *TRAITÉ DES DONATIONS, DES TESTAMENTS* p. 85 (4th ed. 1826).

38. *Id.* § IV, at 85.

Breviary of Alaric, or *Lex Romana Visigothorum*, in A.D. 506, as explained earlier in this study. Earlier the Code of Euric, or *Codex De Tolsa* (A.D. 466-484) had been prepared in order to codify Germanic customary law. These two sources of law coalesced to form the basis for the earlier Spanish codifications [*Antiqua (Lex Visigothom)* A.D. 586-601; later to become the *Forum Judicum* or *Fuero Juzgo*] and contributed much to later codifications.

But at the time of redaction of the greatest of all Spanish Codes, *Las Siete Partidas* (A.D. 1265), the revival of Roman law based on Justinian's *Corpus Juris Civilis* had taken place in Bologna, and the redactors had the benefit not only of that great work but also of the commentaries of the Italian jurists who brought about this renaissance. Consequently, several *Partidas*, viz., III, V & VI *Partidas*, derive directly from the *Corpus Juris*. The *Siete Partidas* was not promulgated and its status fixed until 1348, by the *Ordenamiento of Alcalá*, and it was succeeded by other codifications, the *Nueva Recopilacion*, 1567; the *Recopilacion De Las Indias*, 1680 (for Spanish-American colonies); the *Novisima Recopilacion*, 1805; and other less comprehensive codifications or collections of laws.

The Spanish did not repeal earlier codes when a new code was enacted, and the *Siete Partidas* remained as the most important Spanish legal institution when Louisiana was under Spanish dominion. In fact, soon after Spanish law was revived in Louisiana by the Supreme Court in *Cottin v. Cottin*,³⁹ in 1817, the legislature authorized the translation of the *Siete Partidas* as the most comprehensive and best of the Spanish codifications.

The Sixth *Partida* treats of Testaments and Inheritance, and Title V thereof is concerned with substitutions. Law I defines the word "substitution" and states how many kinds of substitutions there are. In translation it reads:

"The word *substitutus* in Latin, means, in Castilian, another heir appointed by the maker of a will to the second place after the first one. This would be the case when he says; 'I appoint so-and-so my heir, and, if he is unwilling, or cannot accept, let so-and-so take his place.' A substitution of this kind is called in Latin *vulgaris*, which means an appointment which anyone of the people can make of whomsoever

39. 5 Mart.(O.S.) 93, 94 (La. 1817).

he wishes. There is another substitution called, in Latin, *pupillaris*, which means an appointment made only of a boy who is under fourteen years of age, or of a girl who is under twelve. There is another kind of substitution, called in Latin, *exemplaris*, which means another appointment of an heir, made like that to which a minor is appointed. Fathers and grandfathers have the power to do this, when those who are descended from them are insane or have lost their minds, by appointing others their heirs, if they should die while demented. There is another kind, called in Latin, *compendiosus*, which means an appointment made in a few words. There is still another substitution called, in Latin, *breviloquens seu reciprocus*, which means a substitution made briefly in concise terms in which four substitutions are included, two of which are, *vulgares* and two *pupillares*. There is still another kind of substitution called, in Latin, *fideicommissarius*. And of each of these different kinds of substitutions we shall speak fully hereafter.”⁴⁰

Subsequent laws of Title V then define and give the rules concerning the several kinds of substitutions, *viz.*, vulgar or ordinary substitutions (Laws II-IV); pupillary substitutions (Laws V-X); exemplary substitutions (Law XI); substitutions *compendiosa* (Law XII); substitutions *breviloqua* (Law XIII); and finally *fideicommissaria*, in Law XIV, which in translation reads:

“Law XIV. Concerning the substitution called, in Latin, *fideicommissaria*.

“*Fideicommissaria substitutio*, in Latin means, in Castilian, the appointment of an heir which is made with the belief of anyone that he will deliver to another party the inheritance which he leaves in his hands, as if the maker of the will should say: ‘I *appoint* so-and-so my heir, and I request, ask or direct that he hold this my estate which I leave to him, for such-and-such a time, and that afterward he give and deliver it to So-and-So.’ An *appointment* like this can be made by any one of the people, provided he is not forbidden to do so by any of the laws of this our book. We decree, however, that he who is requested and *appointed* in this way, must give and deliver the estate to the other party just as the testator directed, deducting the fourth part of the same

40. LAS SIETE PARTIDAS 1210 (Trans. S. P. Scott 1931).

which he is entitled to keep. This fourth part is called *trebellianica*. If the party appointed in this way as heir should not be willing to accept the property or, after he has accepted it, should refuse to deliver it to the other, the judge of the district can compel him to do so."⁴¹

When O'Reilly, Spanish Governor of Colonial Louisiana, abrogated French law in Louisiana and substituted Spanish law, this undoubtedly was included in the Spanish law which was put in force in Louisiana and it so remained and was in force at the time of the French cession to the United States in 1803, the French Commissioner Laussat having done nothing to restore French law to Louisiana, in the very short interregnum between the transfer from Spain to France and the French cession to the United States.

However, the citizens of Louisiana, under the new regime, very early rejected attempts to establish the common law. They did not want to be regulated, either by laws which required recurrence to a "multiplicity of books, which being for the most part written in foreign languages, offer in their interpretation inexhaustible sources of litigation." Moreau Lisset and Brown, code commissioners, accordingly chose the Code Napoleon, only lately adopted in France, as the model for their code which became effective in 1808.

Spanish law was dormant thereafter until its virtual revival by the decision in *Cottin v. Cottin*, in 1817, which led to the translation of the *Siete Partidas* in 1820, as being the best exemplar of the Spanish law. This, too, was short lived, because Moreau, Derbigny, and Livingston were appointed two years later to prepare the projet for a new civil code. Their work was adopted and became effective in 1825. It is essential, however, to know something of the origin and history of the legal institutions of substitution and fideicommissa in Spanish law to understand fully the use of those terms in the Louisiana Civil Code.

There can be no doubt about the Roman law origin of these institutions in Spanish law. The very language of those portions of the *Partidas* which are quoted above indicate as much and scholars confirm the indication.⁴²

41. LAS SIETE PARTIDAS, *op. cit. supra* note 40, at 1216.

42. ASSO Y DEL RIO, IGNACIO JORDAN DE AND MIGUEL DE MANUEL Y RODRIGUEZ INSTITUTES OF THE CIVIL LAW OF SPAIN Book II, Title V, p. 132 (1st ed. 1771), (6th ed. Madrid 1805), (Trans. Johnson 1825). (Frequently

It is interesting to note that the principal substitutions with which we are concerned here, namely, the vulgar, pupillary, and exemplary substitutions and substitutions fideicommissa, have been adopted in the Modern Spanish Civil Code and the codes of some of the countries deriving their laws from Spain.

Thus, the Spanish Civil Code, in Book III, Chapter II "Inheritance," Section III "Substitutions," contains this article:

"Article 781. Substitution in trust (*fideicomisarias*), by virtue of which the heir is charged with keeping and transmitting to a third party the whole or a part of the inheritance, shall be valid, and shall be effective, provided they do not go beyond the second degree or when made in favor of persons living at the time of the death of the testator."

The translator says that the sources of this article are Toro, law 31; Part. 6. tit. 5; Inst. Part. 6, tit. 5, laws 1, 2, 3, 4, 5, 6, 7, 10, 11, 13, 14; id. 6, tit. 11, law 8; Law of Oct. 11, 1820, arts. 1, 4, 5, 14; and indicates that Chile, Colombia, and Mexico have similar legislation.⁴³

Manresa's Commentary on the Spanish Civil Code in discussing this section of the Code gives a succinct history of substitutions, including fideicommissa, in Spanish law, and is cumulative evidence of the correctness of their Roman origin and their identity through inheritance and motif with their counterparts in French law. A translation of an abridgement of Manresa's commentary is given in Annex 3, attached hereto.

Conclusion

This evidence clearly establishes that Spain, like France, adopted its law concerning substitutions from the Roman law of Justinian, and that this law included fideicommissa, called in Spanish, "*Las substituciones fideicomisarias*," exactly as the French called them "*substitutions fideicommissaire*." The conclusion is inevitable that the use of the term "*fideicommissum*" meant in the former law of Spain exactly the kind of substitution defined in article 781 of the Spanish Civil Code; in article 896 of the Code Napoleon; and in article 40, page 216 of the

cited as Asso and Manuel's Institutes); SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, HISTORICAL OUTLINE (1831); WALTON, CIVIL LAW OF SPAIN AND SPANISH AMERICA 273 (1900).

43. WALTON, *op. cit. supra* note 42, Book III, ch. II, § III, art. 781.

Louisiana Civil Code of 1808; article 1507 of the Code of 1825 and article 1520 of the Code of 1870.

Louisiana — The Civil Code

In 1806, James Brown and Moreau Lislet were appointed by the legislature of the Territory of Orleans to compile and prepare a civil code for the use of the Territory, and to make the civil law by which the Territory was governed the groundwork of the Code.

In 1808 they reported their work under the title, "A Digest of the Civil Laws Now In Force In The Territory Of Orleans, With Alterations And Amendments Adopted To Its Present System of Government." It was adopted by an act approved March 31, 1808, the preamble to which reads:

"Whereas, in the confused state in which the civil laws of this Territory were plunged by the effect of the changes which happened to its government, it has become indispensable to make known the laws which have been preserved after the abrogation of those which were contrary to the Constitution of the United States or irreconcilable with its principles, and to collect them in a single work, which might serve as a guide for the decision of the courts and juries, without recurring to a multiplicity of books which, being for the most part written in foreign languages, offer in their interpretation inexhaustible sources of litigation."⁴⁴

The laws of Spain were in effect at the time of the cession of Louisiana to the United States, but they were contained in a multiplicity of codes and enactments, with no fixed inter-code priorities. On the other hand, the Code Napoleon had just been adopted in increments in France, followed in March 1804 by its adoption as a unit. Now for the first time the world had a systematic, logical, modern restatement of the civil law, derived from Rome and the *Customs*.

It was natural, therefore, for Moreau Lislet and Brown to turn to the Code Napoleon for the model and guide for the civil code they were directed to make for Louisiana; particularly since the population of Louisiana at that time was largely French in origin, tradition, culture, and sympathy.

44. La. Acts 1808, pp. 120-128.

That they did so is apparent from the structure, arrangement, and language of the Code itself, which reproduces almost literally at least seventy-five percent of the Articles of the Code Napoleon.

But it must not be thought that the commissioners ignored the Spanish law which played a large, but as yet undetermined, part in the conception of the civil code. Moreau Lislet, particularly, must have been a Spanish law scholar, and familiar with Roman law as well, for he was chosen, with Henry Carleton, to translate the *Siete Partidas*, soon after the judicial revival of Spanish law in 1817. In that translation, each title is preceded by a list of the corresponding titles of the Roman and Spanish laws, and of the Civil Code, and each law by a note referring to the corresponding laws of the *Recopilacion* and of the *Auto Accordados*, according to quotations in the edition of the *Partidas* of Gregorio Lopez.⁴⁵

This is clearly illustrated in article 40, Code of 1808, p. 216, which prohibits substitutions. With a few slight differences, the French text of the first two paragraphs are the same as article 896 of the Code Napoleon. The last paragraph, however, has no counterpart in the Code Napoleon, but the Trebellianic portion referred to in that article is authorized in Law 14, Title V of the Sixth *Partidas*, relating to fideicommissaires. Surely the redactors of 1808 had both the Code Napoleon and the *Siete Partidas* before them when they prepared that Code.⁴⁶

There are several differences in the French text of article 40, p. 216, of the Code of 1808, and the corresponding English translation,⁴⁷ which are not critically important, but should be noticed. They are:

1. In the first sentence, the French text says, "*les substitu-*

45. MOREAU & CARLETON, THE LAWS OF THE SIETE PARTIDAS, WHICH ARE STILL IN FORCE IN LOUISIANA (1820).

46. For accounts of the early history of Louisiana law see: MARTIN, HISTORY OF LOUISIANA 344 (1822); 17 SAUNDERS, LOUISIANA CIVIL CODE (2d ed. 1920); 20 W. K. Dart, *Louisiana Judicial System*, 1 LOUISIANA DIGEST ANNOTATED (Bobbs-Merrill, 1917); H. P. Dart, (1) *The Influence of the Ancient Laws of Spain on the Jurisprudence of Louisiana*, 6 TUL. L. REV. 83 (1931); (2) *Sources of the Civil Code of Louisiana*, 13 LA. BAR A.R. 21 (1911); Wigmore, *Louisiana: The Story of its Legal System*, 1 So. L.Q. 1 (1916); Tucker, *Source Books of Louisiana Law*, 6 TUL. L. REV. 280 (1931); 8 TUL. L. REV. 82 (1933); reprinted 1 La. Legal Archives pp. XVII-XXXVI, and pp. L1—LX (1939); WALLACH, LEGAL RESEARCH IN LOUISIANA (1958).

47. These texts appear in full at pp. 440-441 *supra*.

tions et les fidei-commissa sont prohibés." The English text says they "are and remain prohibited" — this is inconsequential.

2. In the second paragraph, the French text reads ". . . est chargé de conserver et de rendre à un tiers . . ." The English translation reads, ". . . is charged to preserve for or to return a thing . . ." Here the addition of "a thing" is inconsequential, and the translation of "*et*," (and) by "or" is obviously an error to which no disjunctive effect should be given. The translation of "*rendre*" as "return" is inaccurate.⁴⁸

3. In the third paragraph, the French text reads, "*la quatre trébellanique*" is translated as "the Trebellianic portion," but that also is inconsequential.

In the same paragraph, referring to the Trebellianic portion, the French text reads, ". . . lorsqu'il était chargé d'un fidei-commissis." The English translation reads, ". . . when he was charged with a fideicommissa or fiduciary bequest." The addition of "fiduciary bequest" could not legally add something not implicit in the term "*fidei-commis*" in the French text.

Moreau Lislet himself said: "We have nothing to do with the imperfections of the translation of the Code — the French text, in which it is known that work was drawn up, leaves no doubt."⁴⁹ And the Supreme Court has said that "the definition relied on from the English side of the Articles of the Code, proves nothing but the ignorance of the person who translated it from the French."⁵⁰

In *Beaulieu v. Ternoir*, 5 Ann. 476, 480 (1850), the Supreme Court said: "Article 1507 of the Code which defines substitutions was transcribed without change from the Code of 1808, and the French text expresses the intention of the Legislature. The English text, taken literally is without meaning."

The French text controls in such cases and if the addition of the words "or fiduciary bequest" are to be given any meaning

48. See note 2 *supra*. "Deliver" or "transmit," or even "render" are to be preferred semantically to "return," for the first beneficiary holds the thing as owner from the testator, and he is obligated, not to "return" it to the substituted beneficiary who never had it, but to "deliver" or "transmit" it to him, who thereby comes into its possession for the first time. Etymologically it would seem to be better to translate the French "*rendre*" by the English "render," than by "return."

49. Moreau's argument in rebuttal in *Dufour v. Camfranc*, 11 Mart. (O.S.) 675, 701 (1822).

50. *Egerton v. Third Municipality of New Orleans*, 1 La. Ann. 435-37 (1846).

of connotation different from and not implicit in the French term "*fidei-commis*," under the doctrine of the Supreme Court, they must be reputed not written.⁵¹

There is, of course, a compelling reason why "or fiduciary bequest" can only be considered as synonymous and identical with "*fideicommiss*" (French), "*fideicommissum*," (Latin), as used in this context, and that is this: the Trebellianic portion was only authorized in case of a *fideicommissum*, and no other place. As above explained, this is readily apparent from Law XIV, Title V, *Partida* VI.

There are some trivial differences between the French text of article 40, Page 216, Code of 1808, and the text of article 896, Code Napoleon, *viz.*, the tense in which written, and the two references to the "*l'héretier*" are qualified only once as "instituted" in the Louisiana Code, while in the French Code both references are so qualified, which need no further comment.

The difference between the Louisiana Code and the French Code, however, which has caused so much difficulty, is the addition of the term "*fideicommissa*" to the first sentence of the article, making the Louisiana Code read, "*les substitutions et les fidei-commis sont prohibees*," while the French Code says, "*les substitutions sont prohibés*."

There has been some unjustified speculation that by the interpolation of "*fideicommiss*" in the French text which they copied, the redactors intended to prohibit trusts of the English common law.

It would seem to be completely unjustifiable to imagine that a scholar with the breadth of learning in the Civil Law of Moreau Lislet would have used a technical term of the Roman civil law, with the precise connotation of *fideicommissum*, to prohibit the use of an alien legal concept. If it was desired to prohibit the use of common law trusts, is it not reasonable to suppose that the redactors would have said: "Substitutions and trusts are prohibited"? On the other hand, is it not probable that Moreau Lislet and Brown, knowing substitutions as defined in the Code Napoleon, had been prohibited in France since 1792, and realizing that Spanish law permitted the very same kind of

51. Phelps v. Reinach, 38 La. Ann. 547 (1886); Straus v. City of New Orleans, 166 La. 1035, 118 So. 125 (1928); Sample v. Whitaker, 172 La. 722, 135 So. 38 (1931).

substitution under the title of "fideicommissaria," interpolated "fideicommissis" in the French text which they copied from the Code Napoleon out of an abundance of caution?⁵²

However, it must be said that a distinguished panel of French jurists, in reporting on the validity of the McDonough will, gave some credence to the unsupported speculation to the contrary. They said:

"In our opinion, the word fidei-commissa was added to Article 896 of the French Civil Code, in Article 1507 (Code of 1825, same as Art. 40, p. 216, Code of 1808) of the Louisiana Code on account of the English origin of the other states of the Union, and in order to prohibit at once both substitutions under old French law, and the Trust of English law. Now in no part of his will has McDonough appointed any trustee. The cities have the legal estate donated to them . . . The dispositions are, therefore, nothing more than legacies made to the cities, with the charge of investing them in a specific way and for municipal purposes. In all of this there is neither substitution nor fideicommissum."⁵³

And in this statement there is nothing to support the opinion that "*fideicommissa*" meant English common law trusts.

In opposition to that view, it is not inappropriate or impolite to cite a few quotations from Coin-Delisle, one of the signers of that report. In his *Commentaire du Titres Des Donations Et Des Testaments*,⁵⁴ he said:

"13. The inventive spirit of the jurisconsults did not stop there . . . [re codicils] They introduced in addition in the legislation substitutions and fideicommissa: Two very dis-

52. Strong support for this view can be found in one of the early commentaries on the Code Napoleon, *Les Pandectes Francaises by Riffe-Caubray and Delaporte* (1805), Volume 8 of which concerns Book III, Title II, "Of Donations and Testaments." The sixth part under the rubric "Preliminary Notions," p. 2, is entitled "De La Falcidie et des Fideicommissis" p. 213. In Section II of Part VI, with the heading, "Des Fideicommissis," p. 219, there is a discussion of the historical development of *fidei-commissa* substantially as it has been given here. Then follows immediately a discussion of the separate articles of the Code Napoleon which constitutes the title. The very first observation made under article 896 is this: "This disposition concerns only fideicommissis; the vulgar substitution may be used always, as may be seen in Article 898 hereafter." P. 241.

Moreau Lislet cites this work several times in the *Projet of the Code of 1825*. The volume to which I have referred and from which I have translated belonged to him, for on the inside cover it is signed "L. Moreau Lislet."

53. *State v. Executors of McDonough*, 8 La. Ann. 171, 231 (1854).

54. COIN-DELISLE, *op. cit. supra* note 8, Introduction, nos. 13 and 14, at 7, no. 16, at 8, no. 26, at 12.

tinct kinds of dispositions in Roman law, *although the name of substitutions had been affected specially in our French law by a remarkable branch of the matter of fideicommissa.*

"14. In Roman law three kinds of testamentary dispositions received the name of substitution — the vulgar substitution, the pupillary substitution and the exemplary substitution. They derived all of their origin from the unlimited power to dispose by will, and from the absolute authority over children which the law of the XII Tables gave to the father of a family

"It was particularly when the name of substitution became the language of the school common to fideicommissa that the vulgar substitution took the name of direct substitution, in opposition to the substitution fideicommissaire which was called oblique. In the first, the things came directly from the testator; in the second they came to the fideicommissaire only through the one instituted (institué) as intermediary.

"16. Let us pass on to the fideicommissum, which the jurisconsults at Rome had never called substitutions, and which nevertheless have taken this name in French law, when the one instituted (institué) delivers the things only at his death.

"26. The same spirit which introduced contractual institutions against the principles of the Roman law, borrowed substitutions from it. The reader knows that we do not wish to speak here of direct substitutions, but of fideicommissa subordinated to the decease of the first one instituted (institué) through whom the head of the family established as a new order of succession. They are called substitutions fideicommissaire, or more simply substitutions, in such manner that this word employed alone is extended always to those which cause the inheritance (*biens*) to pass from one successor to another."

Marcade, another French jurisconsult who signed the report in the *McDonough* case, in speaking of article 896 of the Code Napoleon said:

"Dispositions which this article prohibits under the name of substitutions are not the same as those called substitutions by the Romans.

"The Romans were known to have three kinds of substitutions, or secondary institutions (sub-institutio): 1. The vulgar substitution . . . ; 2. The pupillary substitution . . . ; 3. Lastly, the quasi-pupillary or exemplary substitution

"Those are not the substitutions spoken of in our Article. With us the vulgar substitution is permitted by the positive declaration of Article 898. Pupillary and exemplary substitutions are prohibited, but not by our Article 896. It is under general principles of French law that one can never make a will for another. A testator can bequeath his own estate only (Article 895).

"Our Article concerns only those dispositions which in Rome would be *fideicommissa*, and which in our former (*ancien*) law were known as *substitutions fideicommissaires*. We know, as a result, that the *fideicommissum* was the act by which one person received a thing with the command to deliver (*rendre*) it to another; and it is apparent from the second paragraph of our Article that the dispositions in question are precisely those which impose on a beneficiary the charge to deliver it to a third person."⁵⁵

In the light of their own writings, the undocumented opinion of these respected and eminent jurists who made the report in the *McDonough* will case, that the word "*fideicommissa*" was used in the Louisiana Civil Code article 1507 (Article 40, p. 216, Code of 1808, article 1520, Code of 1870) to prohibit the introduction of common law trusts, is entitled to little weight.

And the Supreme Court of the United States in *Executors of McDonough v. Murdoch*,⁵⁶ in which this same will of McDonough was at issue, had before it this same report of the French jurists. In the course of its opinion, the Court said:

"The *fideicommissa* of the Louisiana Code are estates of a similar nature implying a limitation over from one to another. *They are the fideicommissa of the Spanish and French laws*, insofar as those estates are not tolerated by other articles of the Code. We shall not attempt to define them from an examination of the Code and the reports of the Supreme Court of that state. It is not necessary for a decision of this

55. 3 MARCADE, *op. cit. supra* note 33, art. 896 C.N., no. 455, at 368.

56. *Executors of McDonough v. Murdoch*, 15 How. 367 (U.S. 1853).

case. *We are unable to see anything in the Code to justify the supposition that the English system of trusts whether in the limited system as applied in conveyancing, or in its broad and comprehensive imports, as applied by the Courts of Chancery, were within the purview of the authors of this Code in framing this prohibition.* The terms substitution and fideicommissa are words foreign to the English law. They are applied to no legal relation which exists in it, and describe nothing which forms a part of it. The technical words, of 'charged to preserve and to render' in Article 1507, which embrace so much to a continental lawyer, only provoke inquiries in the mind of one accustomed to the language of the common law. The allusion to the 'trebellianic portion' is to a right of which there has never been a counterpart in the English system. The whole Article refers exclusively to things of a continental origin." (Emphasis added.)

Dr. F. T. Gubler, who, with Dr. C. Reymond made reports, after the most detailed comparative examinations of the Anglo-Saxon "trust" and the continental "*fiducia*" to the Swiss Law Society, is reported to have "complained rightly about the frequent terminological confusion of the terms 'trust' and '*treuhand*' and demanded that the English terms 'trust,' 'trustee,' 'settlor,' 'beneficiary,' and '*cestui qui trust*' be accepted as '*unübersetzbare fremdworte*,' i.e., as being untranslatable foreign words. And on page 270, Dr. Gubler, after an exhaustive discussion of the main characteristics of an English "trust," arrived at the conclusion that "all attempts to explain the trust in terms of continental law must fail."⁵⁷

All of this array of authorities should completely dissipate the confusion that has resulted from the unsupported speculation that the use of the "fideicommissa" in article 1520 and its counterparts in the Codes of 1808 and 1825 was for the purpose of prohibiting the English common law trust.

Finally, an examination of the article itself will conclusively demonstrate the complete lack of any basis or foundation for that theory.

The fideicommissum of the Roman law, as finally developed in Justinian's *Corpus Juris Civilis*, was exactly as described in

57. Gubler, *Trusts on the Continent of Europe*, 4 INT. AND COMP. LAW Q. 550 (1955).

the second paragraph of the article — *i.e.*, a “disposition by which the donee, heir or legatee is charged to preserve for and deliver (the thing) to a third person.” It is exactly the same as the substitution (*fideicommissaire*) prohibited by the prototype article of the French Code.⁵⁸

And that is made certain by the third paragraph of article 1520 (article 1507 Code of 1825) which says:

“In consequence of this Article” (the Code of 1808 said “by means of what is contained in this Article”), the Trebellianic portion of the Civil Law, that is to say the portion of the property of the testator which the instituted heir had a right to detain, when he was charged with a *fideicommissa* or fiduciary bequest.” (The French text stops with “*fideicommissis*,” as pointed out above).

Now the Trebellianic portion was authorized only in the case of a *fideicommissum*, the characteristics of which were exactly as described in the second paragraph of the article, and exactly as described in Law 14, Title V, *Partida* VI, which authorized *fideicomisarias*, and the deduction of the Trebellianic portion in such cases.

The second and third paragraphs of article 1520, and its predecessor article, related and could only relate to *fideicommissa*. The article (particularly in the French text) says as much.

And it must be remembered that at the time article 40, p. 216 of the Code of 1808 was written, all the substitutions and the *fideicommissa* of the Roman law were authorized in Title V, *Partida* VI, of the Spanish *Siete Partidas*, which was then effective in Louisiana (Territory of Orleans), while in France substitutions *fideicommissaire* had been abolished since 1792.

So it was that Moreau Lislet and Brown made sure that these substitutions and *fideicomisarias* of the Spanish law were abolished in the Civil Code of Louisiana, and they are bound to have

58. Compare *In re* Courtin, 144 La. 971, 977, 81 So. 457 (1919), which says:

“The second paragraph of the article of the Code (1520) itself, in effect gives practically the same meaning to the term ‘*fideicommissum*,’ when it says: ‘Every disposition by which the donee, the heir or legatee is charged to preserve for or to return a thing to a third person is null, even with regard to the donee.’”

had these laws of the *Partidas* in mind when they wrote "substitutions and fideicommissaire are prohibited."

When Moreau Lislet and Carleton translated the *Partidas* (published 1820) they did not translate Title V of *Partidas* VI at all, and contented themselves with saying: "Substitutions have been abrogated by the civil code as well as *fidei commissa*, C. Art. 4, p. 216." And by that omission all of this Spanish law so important to a complete understanding of the import of our Code was denied to nearly all of the profession in Louisiana, for they did not understand Spanish. Scott's translation in 1931 was the first complete translation of the *Partidas* in English.

The Supreme Court has itself noted the lack of Spanish authorities in connection by a case involving this article of the Civil Code. It said; "The other point that the substitution had failed . . . was merely stated as an additional ground and reference was made to some French authorities; *as the will then under consideration was made under the laws of Spain, we would have consulted the Spanish commentators on the subject in preference to the French, had any been at hand. It was not believed that there could be much variance of opinion between them on the subject of substitutions, which it is well known descended into French and Spanish jurisprudence from the same source, the Roman law.*"^{58a}

Conclusion

This evidence establishes, beyond a doubt, that:

1. The redactors of the Civil Code of 1808 drafted article 40, page 216 (article 1507, Code of 1825; article 1520, Code of 1870) with both the Code Napoleon and the *Siete Partidas* before them. The third paragraph of the article was clearly inspired by Law 14, Title V, of *Partida* VI.

2. The fideicommissum of Justinian's codifications, the substitution fideicommissarias of the Spanish law, the fideicommiss (substitution fideicommissaire) of the French law and the disposition prohibited by the second paragraph of article 40, page 216 (article 1507, Code of 1825; article 1520, Code of 1870) are identical. They are exactly the same thing.

3. The use of the term "fideicommissa" in the first paragraph of that article envisaged the disposition described in the

58*. Bernard's Heirs v. Goldenbou, 18 La. 95 (1844).

second and third paragraphs and could not possibly have had reference to "trusts" or "trust estates" of the common law.

4. As a consequence, the commentaries of the French jurists in interpreting the prohibition against substitutions in the Code Napoleon are entitled to great weight here.

LOUISIANA — THE CONSTITUTIONAL PROHIBITION

In 1921, a constitutional convention was held in Louisiana from which the present constitution resulted. That convention, for the first time in our history, wrote into the Constitution a provision (article IV, section 16) which prohibits the legislature from abolishing forced heirship, or from authorizing substitutions, fideicommissa or trust estates; except that trust estates could be permitted for a specified period. This unusual, and in the opinion of many, unwarranted intrusion into the legislative function, has been amended several times, usually in direction of liberalizing the period for which trust estates might be authorized.

At this point in this study it suffices to discuss this provision as it was originally adopted.

At the outset, it might be said that the prohibition against "substitutions, fideicommissa and trust estates" surely means or implies that the convention thought that the phrase "substitutions and fideicommissa" used in the prohibitory article of the Civil Code was not intended to include by oblique implication the "trust estates" of the common law. It also means that trust estates which could be authorized by the legislature were intended to be something separate and apart from "substitutions and fideicommissa," which terms must be given their technical meanings according to the civil law. Otherwise the section does not make sense. This is borne out by the parliamentary history of the provision in the constitutional convention which adopted it.^{58b} As originally introduced in the convention, the ordinance proposing it read: "No law shall be passed abolishing the principle of forced heirship or legalizing substitutions, fideicommissa or trusts affecting immovable property." It was referred to the Committee on Limitations which reported it unfavorably. When it was returned to the calendar, an amendment was proposed which would make the last clause read:

^{58b}. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF 1921.

“Or legalizing substitutions or fideicommissa or trust estates; except that the legislature may authorize the creation of trusts for a period not exceeding ten years which may be made where a natural person is the direct beneficiary to run from the date of his majority; and provided further that this prohibition shall not apply in respect of donations strictly for educational, charitable or religious purposes.”

This amendment was adopted.

Another amendment was proposed which would have added to the first provision, “No law shall be passed abolishing the principle of forced heirship,” the following: “or impairing the legitime of forced heirs as now fixed by law.” This amendment was defeated.

Another amendment was adopted adding, after the phrase “for a period of not exceeding ten years,” the words “after the death of the donor.”

As thus amended, the ordinance was finally passed. But the chairman of the Committee on Limitations made a prophetic statement when he explained his vote, saying:

“I thoroughly favor the retention in our law of the principle of forced heirship. I favor also the limitation of trusts, though I believe a reasonable protection to woman and children as provided by Act 107 of 1920 is beneficial and meets a real necessity in many cases where relief would otherwise be denied. I do not think, however, that the restrictions contained in the ordinance find proper place in our constitution as they may ultimately prove embarrassing, and for that reason I vote ‘No’.”

After the Committee on Coordination had made and reported some stylistic refinements it made another report in which it revised the text so as to make it clear that the trust, in case of a minor, would run during minority and for ten years after majority. It also revised the last proviso excepting donations for educational, charitable, and religious purposes from the “prohibition as to trust estates,” by making that phrase read “prohibition as to trust estates, as *fideicommissa*,” an interpolation, if one can judge from the record, that was made for stylistic reasons only. For if it was intended to do otherwise, the Committee on Coordination would surely have reported its

reasons to the convention, as it did in making the change in language to make it clear that the trust would run during minority and for ten years after majority.

It is fair to say from this record that the constitutional convention wanted provision for trust estates, but for a limited time—a period which has been lengthened by amendment voted by the people.

It is apparent, too, that without this liberalizing amendment, the original ordinance proposing an absolute prohibition against substitutions, fideicommissa, and trusts affecting immovable property might not have been adopted by the convention.

In interpreting this strange constitutional provision, "trust estates," must be considered something apart from "substitutions and fideicommissa," which must be given the meaning set forth in the Civil Code.

We get back to the study made of those terms in the first part of this study, and for the very same reasons, they cannot be given any other interpretation here.

By the very language of the Code itself the prohibited substitution defined there is the disposition by which a "donee, heir or legatee is charged to preserve and deliver the thing given or bequeathed to a third person." Such a disposition is a fideicommissum. And the Code, by reference to the Trebellianic portion, in the very next paragraph, definitively ties those provisions to the only institution to which they could apply, the fideicommissum of the Roman law of Justinian, the substitution fideicommissaire of French law, and the fideicomisarias of Spanish law.

Both the French and Spanish refer to the fideicommissum as a substitution. There were other substitutions, of which our Code only preserves the vulgar substitution. If the word "substitution" is given any effect beyond the definition given in the second paragraph of article 1520, would it not be justifiable to say that the vulgar substitution was also proscribed by the constitutional prohibition against substitutions?

It was demonstrated in discussing the codal prohibition that "substitutions and fideicommissa" could have been used only as synonyms. The same considerations apply with equal force in considering the import of this constitutional prohibition against substitutions, fideicommissa, and trust estates.

Before turning from this constitutional prohibition, it may be noted that the language of the Constitution prohibiting the legislature from passing a law abolishing forced heirship does not mean that it cannot pass a law changing, regulating or restricting the rights of forced heirs, as for example, authorizing the placing of the legitime in trust. The records of the constitutional convention show that the proposal to freeze "the legitime of forced heirs as now fixed by law" was defeated in the convention.

The question, moreover, has been squarely decided by the Supreme Court, in a case involving the placing of the legitime in trust. In *Succession of Earhart*,⁵⁹ the Court said:

"The words 'no law, shall be passed abolishing forced heirship' mean exactly what they say; in other words that forced heirship cannot be done away with wholly, wiped out or destroyed. This provision does not prohibit the legislature from regulating or restricting the rights of forced heirs. In fact, under the provisions of Article 1493 and 1494 R.C.C., the legitime is now restricted by permitting the testator to dispose of a portion of his estate as he sees fit. Insofar as the codal articles relating to forced heirship are concerned, they must bow to the recent statute. Act 81 of 1938; *Wilbert v. Wilbert*, 155 La. 197; 99 So. 36."

Conclusion

The constitutional prohibition against substitutions fideicommissa and trust estates, except for trust estates for a limited period, although of doubtful constitutional propriety, nevertheless has not been without value in considering this whole subject. Consider these conclusions:

1. By discussing "trust estates" in the same context with substitutions and fideicommissa and allowing "trust estates" for a limited period, the Constitution sets them apart as something different from "substitutions and fideicommissa."
2. The "substitutions and fideicommissa" referred to in the Constitution can only be the "substitutions and fideicommissa" prohibited by article 1520 of the Civil Code.
3. As defined in that article "substitutions and fideicom-

59. 220 La. 817, 57 So. 2d 695 (1952).

missa" are used as synonyms, for a disposition in which there are two liberalities, in which the first beneficiary ("donee, heir or legatee") is charged to preserve the object of the liberality, and deliver it to the second beneficiary.

4. If any wider latitude is given to "substitutions and fideicommissa" under the Constitution, the vulgar substitution would be unconstitutional.

5. The term "trust estates" as used in the constitution undoubtedly refers to the "trust" or "trust estates" of the common law as they exist in our sister states, and the Constitution has left to the legislature the task of determining the manner in which this alien institution shall operate in this field of the civil law, and of fixing the limits beyond which it shall not go.

As for the prohibition against abolishing forced heirship, it is certain that it does not prevent the legislature from placing the legitime in trust.

A SUGGESTED RATIONALE FOR INTERPRETATION

The commentaries of the French jurists who have discussed the interpretation of article 896 of the Code of Napoleon are entitled to great weight in Louisiana, because the substitutions prohibited by article 1520 of the Revised Civil Code of 1870 are identical with those proscribed by article 896 of the French Civil Code. They have a common ancestry. French doctrine must supply the deficiency in Louisiana doctrine, regrettably lacking for so many years.

It is generally considered in France that the prohibition in article 896 is directed at substitutions fideicommissaires, the fideicommissa of the Roman law of Justinian, and not to the dispositions called substitutions in that law. (The vulgar, pupillary, and exemplary substitutions.)

The quotation from Marcade, given above,⁶⁰ expresses French opinion on this matter. There is no opinion to the contrary.

Previously discussed evidence in this study is cumulative proof of the correctness of that observation.⁶¹

It has likewise been established that the substitution prohibited by the corresponding article of the Louisiana Code, as

60. See pp. 467-470 *supra*.

61. See discussion of the development of the law relating to substitutions and fideicommissa in France at pp. 10-19 *supra*.

that substitution is defined and delimited by that article, is exactly the same thing as that prohibited by article 896 of the Code Napoleon. The second and third paragraphs of article 1520 of the Code of 1870 can only refer to a *fidei commissum*, or the identical fideicommiss, or substitution of the French law.⁶²

It well may be that the redactors of the Louisiana Code considered that the prohibition applied also to the vulgar, pupillary, exemplary, and derivative substitutions authorized along with fideicommissarias by Law XIV, Title V of *Partida VI* of the Spanish law. But it is just as plausible to assume that they intended the article to apply only to the dispositions described in the second paragraph. For they authorized vulgar substitutions (article 41, page 218, Code of 1808; article 1508, Code of 1825; article 1521, Code of 1870); and limited the effect of a donation mortis causa to the property of the testator (article 3, page 208, Code of 1808; article 1455, Code of 1825; article 1469, Code of 1870), as does article 895, of the French Civil Code cited by Marcade, above.

But that speculation is beside the point here, for there can be no doubt about the import of the second and third paragraphs of article 1520 and the corresponding articles in our earlier Codes, defining and limiting the prohibition of the first paragraph against fideicommissa to the same disposition prohibited by the French Code against substitutions.

We can, therefore, look with much interest and profit to the commentaries of the French jurists who have done so much to develop the juridical interpretation of the French Civil Law, and the law of the countries which benefitted from a French legal inheritance.

Definitions

At the outset it may be well to consider some definitions, as they are used in French doctrine, for they will be of considerable value in developing a rationale of interpretation of this part of our law which has caused so much difficulty in the past.

Let us turn to one of the commentators who is greatly respected in Louisiana.

Baudry-Lacantiniere says:

⁶². See discussion relating to Louisiana at p. 462 *et seq.* and conclusions at p. 471. *supra*.

"3048. Before examining the rule itself posed by Article 896, it is important to give some definitions. They will not be without value in explaining the development which this difficult matter requires.

"Fideicommiss, fiducie, substitution — such are particularly three terms, the meanings of which must be clearly fixed, before undertaking the study of the prohibition contained in Article 996 [*sic.* — means 896]. We will thus commence by defining them, preoccupying ourselves moreover, with the scientific exactitude of the definitions.

"We will next hope to see, with respect to Article 896, if these definitions are in perfect accord with the terminology that it was deemed advisable to adopt in the Civil Code.

"3049. Let us first speak of fideicommiss. The fideicommiss is a disposition by which one charges a person, favored in the first order, to render the thing given or bequeathed, to another person favored in the second order. It is, for example, a disposition conceived in the following terms: 'I bequeath such an immovable to Paul, and I charge him to render this immovable to Pierre at the end of five years.'

"3050. With the *fideicommiss* thus defined, there may not be any question of confounding it with *fiducie*. In the simple *fiducie* as in the *fideicommiss*, one likewise charges a person to render to another the object of the donation or legacy, but, and it is the essential difference which distinguishes the *fiducie* from the *fideicommiss*, the fiduciary is not benefited, he is only a simple intermediary charged to render.

"Thus a testator has said: 'I bequeath my properties to Paul, with the charge of administering them, of capitalizing the revenues, and of remitting the whole to Pierre, when he has attained his majority.' Here Pierre is the only legatee; Paul is only an intermediary, a *nudus minister*, a testamentary executor invested with a particular mission.

"In the actual state of our practices, the *fiducie* is seldom used except to evade the law decreeing incapacities. Thus, frequent recourse is had to it to benefit unauthorized religious congregations.

"In sum, that which distinguishes the *fiducie* from the *fideicommiss*, is that in the *fideicommiss* there are two succes-

sive beneficiaries; while in the *fiducie*, there is only one, i.e. he to the profit of whom the rendition ought to be made.

"Let us note, however, that the doctrine and particularly the jurisprudence does not always conform to this terminology. The simple *fiducie* is often designated under the name of *fideicommissis*. But it is not unimportant to note that they are two distinct institutions, to which the same rules cannot fit.

"3051. With regard to *substitution*, in general, it is uniquely, if its etymological origin is adhered to, *sub instituo*, an institution in sub-order; that is a disposition by which a person is called to receive a liberality, in default of another person, or after him. There is, for example, a substitution when the disposition is conceived in the following terms: 'I bequeath all my properties to Pierre, and if he die before me, I bequeath them to Paul.'"⁶³

This, of course, is the vulgar substitution of the Louisiana and French Civil Codes, of the *Siete Partidas*, and of Justinian's Institutes.

These definitions — *fideicommissis* (it is precisely the same term used in the French text of the Louisiana Code) (article 1507, Code of 1825; article 40, page 216, Code of 1808), *fiducie*⁶⁴ and substitution — must be understood, therefore, as determining the constituent characteristics and developing a rationale of interpretation of article 1520 of the Revised Civil Code and its precursor, article 896 of the Code Napoleon.

*Constituent Characteristics of the Substitution Prohibited by
Article 896 of the Code Napoleon and Article 1520
of the Revised Civil Code*

A disposition may be considered as a substitution or *fideicommissum*, prohibited by the first paragraph of article 1520 only when it combines the elements or characteristics, expressly or impliedly demanded by the second paragraph of that article. Analysis shows that the characteristics of the prohibited substitution deducible from article 1520, (and its counterpart, 896) are: (a) There must be a double disposition of the same prop-

63. 11 BAUDRY-LACANTINERIE & COLIN, *op. cit. supra* note 30, *Des Donations Et Des Testaments*, ch. VII, "Of Substitutions," p. 490.

64. "*Fiducie*" is discussed hereafter at p. 483 *et seq.*

erty in full ownership; (b) wherein the first beneficiary is charged to preserve the thing bequeathed and render it to the second beneficiary; (c) who takes it successively, after the first beneficiary — *i.e.*, the double disposition must be made in successive order.⁶⁵

(a) *Double Disposition in Full Ownership*

The second paragraph of article 1520 (and of French article 896) strikes with nullity "Every disposition by which the donee, the heir or legatee is charged to preserve for and render a thing to a third person . . ." This necessarily imports two donations of the same thing in full ownership, to two different persons in succession. It means that the ownership of the property will rest successively in the two beneficiaries one after the other, by will of the testator. As a result of the obligation of the first beneficiary to preserve the thing bequeathed and render it to the second beneficiary, it follows that the second beneficiary, on accrual of his right to receive the thing bequeathed, takes only indirectly from the testator, but immediately from the obligated first beneficiary.

Aubry and Rau, one of the most highly respected commentators in France, says that it follows from this that there is no prohibited substitution, within the intendment of article 896:⁶⁶

"When several persons have been called conjointly or one in default of the others;

"When the usufruct has been given to one and the naked ownership to the other, Art. 899 C.N.;

65. 11 AUBRY & RAU, *op. cit. supra* note 22, § 694 *et seq.*, at 161 *et seq.* In the discussion which follows, concerning the constituent characteristic of the prohibited substitution, no detailed citations are given to French doctrine or jurisprudence, because there is little controversy, if any, about the basic principles discussed. The following general references indicate some of the principal commentaries consulted on the subject of the distinctive characteristics of substitutions:

1 GRENIER, *op. cit. supra* note 37, at 114, 116; 5 TOULLIER, LE DROIT CIVIL FRANCAIS nos. 21 to 24 (5th ed. 1830); PROUDHON, TRAITE DES DROITS D'USUFRUIT, D'USAGE PERSONNEL ET D'HABITATION no. 440 *et seq.* (2d ed. 1836); 8 DURANTON, COURS DE DROIT FRANCAIS SUIVANT LE CODE CIVIL nos. 66, 72 and 86 (4th ed. 1844); COIN-DELISLE, *op. cit. supra* note 8, art. 896 C.N., no. 7; MARCADE, *op. cit. supra* note 33, art. 896 C.N., no. 455 *et seq.*; TROPLONG, DROIT CIVIL EXPLIQUE no. 104 *et seq.* (1855); 6 HUC, COMMENTAIRE THEORIQUE A ET PRACTIQUE DE CODE CIVIL no. 13 (1894); 5 PLANIOL & RIPERT, *op. cit. supra* note 23, no. 285 *et seq.*; 3 COLIN & CAPITANT, *op. cit. supra* note 13, no. 1976 *et seq.*; 7 BEUDANT, COURS DE DROIT CIVIL FRANCAIS no. 403 *et seq.* (2d ed. 1934).

66. 11 AUBRY & RAU, *op. cit. supra* note 22, § 694, at 162.

“When a donation or legacy, made to several persons called to enjoy it, one after the other, has for its object, not the ownership but only the usufruct of all or part of the property of the disposer;”

(French doctrine and jurisprudence are unanimous that the donation of successive usufructs is not a prohibited substitution, because all rights of the usufructuary cease at its termination, and he has nothing to render to his successor; consequently the succeeding usufructuary takes directly from the donor, and not from the antecedent usufructuary.)⁶⁷

“When the usufruct of certain property has been bequeathed to Primus, and the naked ownership to his children, born and to be born, and in the case of the death of Primus without children, to Secundus.”

(This is explained in a note, which says that in such a case Secundus will receive the property directly from the disposer, and not through the intervention of Primus, on the head of whom ownership never would have rested; citing authorities and cases. Note 6, p. 163)

Double Conditional Legacies — French jurisprudence has held that there is no prohibited substitution when a legacy, apparently in full ownership has been subordinated to a suspensive condition, with a provision that if this condition fail, a third person would take the thing bequeathed. An illustration of this is the legacy made for the benefit of Primus, on condition that he marry, or that he marry before a certain date, or that he live to be a certain age, but with the proviso that if the condition be not fulfilled, Secundus will take the property bequeathed.

In declaring such a legacy valid, and not a prohibited substitution, French jurisprudence is based on these considerations:

(1) It constitutes two legacies under a suspensive condition, the first legacy under the condition described in the illustration, the second legacy under the condition of the failure of the condition of the first legacy.

(2) As a result of the retroactivity of the condition, the second legatee (Secundus) is considered as receiving the prop-

67. *Ibid.*; 11 BAUDRY-LACANTINERIE, *op. cit. supra* note 30, no. 3166; 5 PLANIOL & RIPERT, *op. cit. supra* note 23, no. 294; 34 CARPENTIER-DU SAINT, *op. cit. supra* note 19, *Verbo Substitutions*, no. 427 *et seq.*

erty not after the first legatee (Primus), but in default of him, and there is no successive order.

(3) There is no real charge to preserve and render resting on the first legatee.

(4) In such a case, the testator will be considered to have bequeathed the usufruct to Primus for the period intervening between his receipt of the legacy and the failure of the condition, even if he has not so specified.

(5) In some instances, the courts have annulled a conditional legacy (*e.g.* "I bequeath my property to X if he attain 21 years; if he die before that this legacy will fail and be as not written."), as containing a resolatory condition. However, the jurisprudence generally has validated double conditional legacies of the type given in the illustration, where the testator intends to maintain the first legacy, only if the legatee attains a certain age, or accomplishes a fact before a certain age, without being concerned with whether the condition is resolatory or suspensive.

(6) Some earlier decisions have annulled double conditional dispositions as substitutions prohibited by article 896 of the French Code, where the legacy is made to the first legatee with the stipulation that, if he die without children, the property bequeathed will be attributed to another.

But subsequent jurisprudence has validated this type of double conditional legacy, on the basis that the happening of the condition (the death of legatee without children) operated retroactively, and the substituted legatee received the property directly from the testator, and not through the first legatee as intermediary.

This later jurisprudence has received vigorous support as not at all contrary to the spirit of the Civil Code underlying the prohibition against substitutions.

"It does not suffice," say Aubry and Rau, "to justify it, to invoke the retroactivity of the condition, because it remains true that, in the mind of the testator (disposer) there are two successive legatees, if the condition is realized, which should put an end to the first legacy. In a certain sense there is a charge to preserve and render. But there is a great dif-

ference between that one who pretends to regulate imperatively the transmission of his property to the heirs of his heirs, and particularly to their descendants, and him who, foreseeing the case where his legatee would have no children, prescribes a new destination for the thing bequeathed. It is the will of the individual to regulate the transmission of his property for several generations in the way of which it was desired to put obstacles by means of Article 896. This will does not exist when the testator first foresees, and hopes that the legatee would have descendants, and leaves him, in this case, full freedom to dispose of the property bequeathed to him. Moreover, contrary to what takes place in the true substitution, no person not yet conceived at the death of the testator may benefit from the second conditional legacy. Finally, the double conditional legacy does not bring to the free transmission of property more of an obstacle than any other conditional legacy and the law does not prohibit conditional legacies."⁶⁸

It must not be thought from all of this that the character of a prohibited substitution cannot be attributed to any double legacy, for French courts still occasionally annul double dispositions, *e.g.*, (a) universal legacy to X in order that after his death the entire inheritance would return to the testator's nephews; (b) legacy to a nephew and his wife, expressly with a substitution for the benefit of their children, and if they die without children, to another nephew; (c) legacy or property with provision that it be preserved and transmitted to descendants.

This phase of French juridical opinion is interesting and of importance here in Louisiana for it shows that there is no blind prejudice against double dispositions. On the other hand, the prohibition of article 896 has been confined in its application to dispositions which would generate the evils which the redactors of the Code Napoleon, animated by the spirit of the Revolution, wanted to suppress — that is to say, dispositions whereby the first legatee, given the ownership of a thing, is required to preserve it and deliver it to the second legatee, who takes in succession from the first legatee.

Distinction Between Fiducie and Fideicommiss (Prohibited Substitution) — Fiducie. It has been indicated before, in this

68. 11 AUBREY & RAU, *op. cit. supra* note 22, § 694, n. 7-7, at 165.

study, that in France there is a distinction between a *fiducie* and a fideicommiss — a *fiducie* being perfectly lawful while a fideicommiss is prohibited.

A *fiducie* is a disposition by which a person is instituted legatee for form only and has been charged with holding the things bequeathed and administering them up to the designated time of delivery, not for himself, but for the benefit of the real legatee; this charge of rendering to the second, or real legatee, imposed on the apparent legatee is called *fiducie*.⁶⁹

The determination of the question of whether a particular disposition is a simple *fiducie*, or a prohibited fideicommiss (sub-

69. This is the definition given by the jurists, among whom are: 1 TROPLONG, *op. cit. supra* note 62, nos. 109, 110; 18 DEMOLOMBE, COURS DE CODE NAPOLEON, nos. 104-106 (1876); 14 LAURENT, PRINCIPES DE DROIT CIVIL FRANCAIS nos. 402, 403 (1878); 6 HUC, *op. cit. supra* note 62, no. 15; 11 AUBRY & RAU, *op. cit. supra* note 22, § 694, at 167-68; 11 BAUDRY-LACANTINERIE, *op. cit. supra* note 30, nos. 3088-90; ROLLAND DE VILLARGUES, DES SUBSTITUTIONS PROHIBEES, nos. 153, 154 (3d ed. 1833); THEVENOT D'ESSAULT DE SAVIGNY, TRAITE DES SUBSTITUTIONS FIDEICOMMISSAIRE, no 541 (1778); 6 MERLIN, *op. cit. supra* note 22, *Verbo Fiducaire (Heretier)* discusses this institution and cites as its origins in Roman law: Law 33 D. De Usuris; Law 46, D. Ad Senatus-Consultum Trebellianum (D36.1.46); Law 78 of same Sen. Con. (36.1.78.¶12); Law 43.¶3 D. De Legatis 2°; Law 21.¶2 D. de Annis Legatis.

In the first volume of the French Reports of Jurisprudence (Journal Du Palais 1, p. 134) in Vignier V.N., (Decided 18 Frimaire an V) it was said that "The fiducie is a testamentary disposition by means of which, in instituting a person as heir, but for form only, the testator charges that person to administer the succession and preserve it up to the moment when he ought to deliver it to the real heir and that is ordinarily his majority. It is a sort of tutorship or mandate. This kind of disposition which was authorized by the Romans, was sometimes practiced in our former jurisprudence. It is not contrary to principle; thus M. Merlin and Rolland De Villargues . . . that it was always authorized under the empire of the Civil Code."

34 CARPENTIER-DU SAINT, *op. cit. supra* note 19, *Verbo Substitutions*: "75. It results that there is no substitution . . . 3 in case of a simple *fiducie*, when a person, instituted only for form, and in no way benefitted in reality, holds the things in his hands for the account and in the interest of the real beneficiary to whom he must render them (see *infra* no. 3313) 4 a fortiori when the disposer confides to a person whom he does not desire to benefit, the execution of his wishes by charging him to deliver, but only at the end of a certain delay. In such a case the pretended obligated beneficiary is only an agent (mandataire). These ought to be considered, for example, not as legatees burdened with a substitution, but as testamentary executors, individuals, to whom a testator has bequeathed all his property with the charge to sell them and give the price to a third person. Paris 28 June 1869 (Bull. D'Arr De La Cour De Paris 1869, p. 247) and Article 896 in speaking of a legatee or donee, it is certain that the testamentary executor, although obligated to render, is not a burdened beneficiary in the sense of this article, since he is not the owner of the things he is obligated to deliver. . . ."

For a comparison of the characteristics by which a *fiducie* is distinguished from a substitution: MERLIN, *op. cit. supra* note 22, *Verbo Fiducaire*, no. 3; 1 TROPLONG, *op. cit. supra* note 62, nos. 109, 110; 18 DEMOLOMBE, *op. cit. supra* note 66, no. 105; 14 LAURENT, *op. cit. supra* note 66, no. 403; 11 BAUDRY-LACANTINERIE, *op. cit. supra* note 30, no. 3088; 6 HUC, *op. cit. supra* note 62, no. 15; 5 PLANIOL & RIPERT, *op. cit. supra* note 23, no. 290; Civ. 18 Frimaire An V: Sir. 1.1.99; Req. 8 August 1808: Sir. 8-1-505; Nimes 17 August 1808: Sir. 10-2.554; Toulouse 18 May 1824: D.25.1-23; Nimes 16 December 1833; Sir. 35.2.333.

stitution) is left to the evaluation of the judge. To decide this question he should look to the terms of the testament and all the circumstances of fact to determine if the intention of the testator was to institute the first legatee more in the interest of the second legatee than himself. The criterion here is the effect of the bequest on the first legatee, burdened with the obligation to administer and to deliver to the second legatee. If his interest, in his own behalf, is considerable, as, for example, the right to retain all of the fruits produced by the property bequeathed, then there is a veritable fideicommiss, or prohibited substitution. But the right to retain only a part of the fruits, or one or several of the things bequeathed, seems indicative of a simple *fiducie*. It seems to the writer that where the part of the fruits, or the things retained, might be equated with reasonable compensation for the services required in administering the bequest for the second, or real legatee, a *fiducie* would be clearly indicated.

In France there is general accord in considering that a *fiducie* is indicated by these circumstances: the ultimate or second beneficiary is a minor child of the testator. The first legatee is his nearest relative in his confidence, and delivery to the second legatee is to take place after he attains majority. But the concurrence of all of these circumstances is not necessary to characterize a disposition as a simple *fiducie*.

Although this device, *fiducie*, is perfectly legal in France, it is not used very much. All of this is very well explained by a distinguished French jurist in discussing Civil Law Substitutes for Trust,⁷⁰ in the course of which he said:

“If one uses such an approach, one will find, as will be shown later, that there is one right in rem that is remarkably similar to that created by a great many trusts — this is *fiducia*. This technique, much closer to trusts than the fideicommissum, with which it is generally compared, is no longer in use, but it still is in existence and can be utilized.” (p. 1127)

“The scheme that has just been outlined ‘(deposit)’ need not be used, since the civil law affords a technique which achieves the same practical results in a more direct and easy way. We refer to the *fiducia*, which has been con-

70. Lepaule, *Civil Law Substitutes For Trusts*, 36 YALE L.J. 1126-47 (1933).

sidered so much like the trust that it has been used as its French translation in the Province of Quebec. Curiously enough, the civil law has not understood all the advantages that can be derived from the use of the *fiducia*. While it is now nearly forgotten by text writers and practitioners, it is not dead, and has recently been recognized by courts as perfectly legal. We hope that new life can be infused into this old juristic institution, dormant for centuries, so that substantial social service may be rendered by it. *Fiducia* is the real substitute for a trust; it is its twin institution, since not only are the same functions fulfilled by it, but the same methods are used to achieve them. In both there is a transfer of property to one who has the legal title but derives no personal advantage from it, and who must manage the property for the benefit of someone else, while his own creditors cannot attach it. While, however, the trust is now a thoroughly developed device, and the rights and duties of each party to it are well settled, the *fiducia* has never (p. 1138) been of great importance in civil law countries — except in the province of Quebec — and rights and liabilities arising under it are far from being precisely determined. Hence we conclude that in the *fiducia* the civil law has a legal technique which can easily be developed along the same lines as the trust, if text-writers and practitioners are far-sighted enough to perceive what can be done with it.” (p. 1139)

In conclusion he says :

“If one takes an analytical point of view in the study of comparative law, one is in many instances liable to take a road that leads nowhere. Such would be the case in dealing with the subject of the present article. But if one takes a decidedly functional viewpoint, things immediately appear in a new light. From such a viewpoint we conclude that in several cases, the civil law has no substitute for trusts, because it would be contrary to its policy to sanction their results, but that in all other cases the same results may be reached quite adequately, although often through widely different means.

“The civil law has a real substitute for the trust, the *fiducia*, but it has failed to understand the use that can be made of it. Civilians have therefore used many different

techniques to cope with situations usually dealt with by trusts in England and America. The complications, the diversity, the precision and often the narrowness of these techniques are without a doubt a weakness. It is a great asset in a legal system to have an adaptable device at the crossroads of all legal institutions, and one which fulfills many social functions at the same time. It is the writer's hope that Anglo-Saxon jurists will assist their civilian brethren in reviving and developing the long forgotten *fiducia*." (p. 1147)

Here it is important to consider that from a functional viewpoint, much of the common law trust can be achieved in the civil law through the almost dormant technique of the *fiducie*, centuries old but still valid and upheld by the courts. And that, important in itself, should dissipate the mistaken, nebulous belief that the trust is abhorrent to the Civil Law. As Lepaulle says: "The significant thing is that in a trust qua trust there is nothing shocking to the mind of civil law jurists, as far as rights in personam are concerned."

(b) *Charge to Preserve and Render*

According to article 1520 of the Revised Civil Code and 896 of the Code Napoleon, the second essential element of a prohibited substitution is the charge imposed on the instituted heir, donee, or legatee by the disposer (testator) to preserve the thing bequeathed and deliver it to a third party, *i.e.*, the second beneficiary.

French doctrine and jurisprudence have established some rules interpreting this requirement. They are:

(1) Simple advice or recommendation to preserve and deliver the things bequeathed is not equivalent to a charge to preserve and deliver, within the intendment of article 896, and hence there is no prohibited substitution. There is no substitution if the testator makes a simple request of the first beneficiary, who complies with it, and expressly so declares, nor would there be a prohibited substitution where the testator expresses a simple wish that the property be transmitted to a third person, even when his instructions for its preservation are obligatory.

(2) The charge to preserve and deliver need not be couched

in the terms of article 896, if it results necessarily from the tenor of the disposition.⁷¹ Thus, the charge to preserve and render it necessarily implied in the following dispositions:

“I institute Pierre and after he has received (the property) I substitute his children for him”;

“I institute Pierre and I wish that after him my property will be returnable to Paul.”

(3) A prohibited substitution likewise results from the prohibition imposed by the testator on the donee or legatee, against alienation of the things bequeathed to the prejudice of his children (or other heirs, or of those of the testator, when this prohibition must be in force during the life of the first beneficiary.)

It may also result from the method of employment of things bequeathed imposed on the legatee for the same purpose. This rule has its counterpart in the situation where it results from the ensemble of the dispositions in the testament that the first legatee is placed in the necessity of alienating all or part of the things bequeathed in order to execute them: there is then, an element of fact, exclusively by itself of all prohibited substitutions.

(4) The charge to preserve and deliver does not necessarily result from the following:

The prohibition against making a will or even of alienating out of the family;

The obligation imposed on the legatee to institute such a person as his heir;

The obligation to place the sums bequeathed in non-transferable securities;

When the disposition says: “I bequeath to such a one, and substitute such a one to him,” such terms being not in general considered as importing the charge to preserve and render.

71. 11 AUBRY & RAU, *op. cit. supra* note 22, at 170, note 18, is to the effect that the terms “charge de conserver et de rendre” are not sacramental.

“The terms ‘charged to preserve and render’ are not sacramental; and on that account alone that the second paragraph of Art. 896 does not require, in order that there be a substitution, that the donee be literally charged to preserve and render, it suffices that this charge results as a necessary consequence, from the terms, or the general import of the disposition.”

(5) The legacy *de residuo*, that is to say, the disposition by which the legatee is charged to transmit at his death the residue of the things bequeathed, does not constitute a prohibited substitution, because it does not import the essential charge to preserve and render.

To the same effect is the disposition which permits the legatee, charged to preserve and render, to sell or encumber the property bequeathed in case of need.

But this authorization to alienate in case of need is not exclusive of the charge to preserve.

The freedom given the first beneficiary to make with the second beneficiary such arrangements as are mutually agreeable so long as the will of the testator is faithfully executed, does not exclude the charge to preserve.

(6) At one time it was held that fungible things might be made the object of a substitution only if the testator prescribed the manner of their use, but more recently it has been held that a double disposition may constitute a prohibited substitution, even when it relates to fungible things, as for example on the third of a succession in movable securities and properties.

(7) In the case a rent is bequeathed to its debtor (constituting a legacy of liberation) but it is bequeathed to a third person, if the debtor die without children, it has been held that there is no substitution, because, the two legacies, not having the same object, there is no obligation to preserve and render.

These rules should be considered if similar questions should arise in Louisiana for the charge to "preserve and deliver" is an essential ingredient of prohibited substitution under Art. 1520.

(a) *Successive Order*—According to Aubry and Rau, in order to consider that a double disposition contains a prohibited substitution, it is necessary that the legatee first gratified be obligated to preserve the thing bequeathed, during his lifetime, in order to render it, at his death, to the legatee in the second order. This is the characteristic modality which, having in view the result of taking away the things substituted from the estate of the obligated beneficiary, and of putting them in the patrimony of the second beneficiary, constitutes that which is called "successive order" in the matter of substitutions.

As a consequence there is no substitution where the legatee has been obligated to transmit the things given immediately, or after the expiration of a fixed delay, not even where the charge imposed upon him is susceptible of realization during his lifetime.

This charge to preserve during the first legatee's lifetime does not need to be literally expressed, but it does not result from the indeterminate charge to deliver (render) without other addition or explanation. The charge "to preserve for a third person" extends to the entire life of the obligated beneficiary, if it has been imposed on him without any time limitation.

It has been held that a prohibited substitution results:

Where the charge to transmit was subordinated to a negative act by the burdened legatee or to a condition not susceptible of proof until his death;

Where the donee is charged to bequeath the donated immovable to a third person;

Where the disposer stipulates for a right of return either to disposer's heirs or a third person, without at the same time stipulating the return for himself, in case the donee or legatee die without posterity;

Where the disposition provides "I bequeath my property to Paul; but, if he die without children I intend that this legacy be without effect."

This brief comment on the successive order as an essential characteristic of the prohibited substitution, taken from the French, should be of interest also in Louisiana because of the identity of the texts.

Conclusion

The characteristics of the substitution prohibited by article 1520 of the Revised Civil Code are the same as those of the substitution prohibited by article 896 of the Code Napoleon because the texts are the same and relate to the same institution.

In order that a disposition fall within the prohibition, these things must concur:

(A) A double disposition of the same thing in full ownership;

(B) Wherein the first beneficiary is charged to preserve the thing bequeathed and transmit it to the second beneficiary;

(C) Who takes it successively, *i.e.*, in successive order.

There is nothing in the texts which would justify any different interpretation in Louisiana.

Principles of Interpretation

The faculty of disposition is a natural and essential function of the ownership of property. That is the philosophy underlying article 1713 of the Code of 1870 which reads:

“A disposition must be understood in the sense in which it can have effect, rather than that in which it can have none.”

This article is an editorial derivative from article 201, p. 252, Code of 1808, which literally reproduces article 137 of Title IX, Book III, *Projet du Gouvernement* (1800) for the French Civil Code. The proposed article was not adopted, but French doctrine is in accord.⁷²

In the matter of substitutions, favored in Roman law, a latitudinerian approach by which the existence of a substitution could be found by interpretation would be in extension of this faculty of disposition, while in France, and also in Louisiana, the prohibition against substitutions is in derogation of that faculty, and should be strictly construed, and limited to those cases clearly falling within the terms of the second paragraph of the prohibitory article.

French law so holds, and follows the rule that the testator in writing his last will is considered to have written nothing that was useless, and his expressions ought to be construed in a manner most favorable to procuring the effects authorized by law. But in the case of substitutions, generally prohibited by present French law, in determining whether a disposition does or does not contain a prohibited substitution, application

72. The following citations are authority for the principle in the interpretation of testaments generally: 5 PLANIOL & RIPERT, *op. cit. supra* note 23, no. 18, at 24; COIN-DELISLE, *op. cit. supra* note 8, at 447, no. 10; the following are authority for the same principle but relate to substitutions, etc., specifically: 1 TROPLONG, *op. cit. supra* note 62, no. 117, at 177; 2 BAUDRY-LACANTINERIE & COLIN, *op. cit.*

should be made of the rule that when in doubt, a testator is not to be considered as having wished to do that which the law prohibited, and still less that which would bring about the destruction of the principal disposition.⁷³

This leads to this rule of interpretation: When a disposition, attacked as containing a substitution, is susceptible of two interpretations, one that it contains the essential characteristics of the substitution prohibited by the Code, and the other that it does not contain them, and the real intention of the testator cannot be ascertained from the terms used (article 1712) and all of the circumstances (article 1715)⁷⁴ it is preferable to adopt that interpretation which conduces to the maintenance and not the caducity of the disposition.⁷⁵

The application of this rule, in French juridical opinion, leads, among others to the following consequences:

(a) A disposition in terms applying equally to a case where the first beneficiary die *before* the testator (in that case a valid *vulgar* substitution), and where he die *after* the testator (in that case a prohibited fideicommissary substitution), will be considered as providing for a vulgar substitution. Thus, "I institute Pierre, and in case of decease (or after his death) I put Paul in his place," would be construed as a vulgar substitution.

supra note 30, no. 3176, at 553-4; 18 DEMOLOMBE, *op. cit. supra* note 66, no. 157, at 169; 3 COLIN & CAPITANT, *op. cit. supra* note 13, no. 1981; 34 CARPENTIER-DU SAINT, *op. cit. supra* note 19, *Verbo Substitutions*, nos. 582-611; 5 TOULLIER, *op. cit. supra* note 62, nos. 44, 50.

73. 11 AUBRY & RAU, *op. cit. supra* note 22, § 694, note 45, at 181: "Art. 1157. The application of this rule of interpretation to acts attacked as containing a substitution is incontestable, since a violation of the prohibition against substitutions imports not only the nullity of the charge to preserve and render, but even that of the principal disposition, and it is not to be presumed that the donor or testator had wished to do that which the law prohibited, under penalty of the nullity of the entire disposition." Citing 16 MERLIN, *op. cit. supra* note 22, *Verbo Substitution Fideicommissaire*, § 8, no. 7; 5 TOULLIER, *op. cit. supra* note 62, nos. 44, 50; 1 TROPLONG, *op. cit. supra* note 62, no. 117 and a number of cases.

74. Thus 11 AUBRY & RAU, *op. cit. supra* note 22, at 181, n. 44 says that: "The rule of interpretation posed by Art. 1157 is only subsidiary; the ambiguity of a clause, in that which concerns the existence of any one of the constituent elements of a substitution, authorizes the judge to apply this rule only to the extent that the doubt resulting from this ambiguity cannot be dispelled by an examination and reconciliation of all of the clauses of the act." The rule to which reference is made is similar to the rule of Louisiana Civil Code article 1951: "When a clause is susceptible of two interpretations, it must be understood in that in which it may have some effect rather than in a sense which would render it nugatory." For an application of such a rule of interpretation in Louisiana see *Succession of Feitel*, 176 La. 543, 146 So. 145 (1933), and the very early case of *Farrar v. McCutcheon*, 4 Mart.(N.S.) 45 (La. 1825).

75. 11 AUBRY & RAU, *op. cit. supra* note 22, § 694, at 181, n. 45.

Again: "I institute Pierre, and if he die without children, I substitute Paul for him" has been sometimes considered as a vulgar substitution, and sometimes as a fideicommissary substitution, according to the circumstances of the particular case.

(b) When the principal legacy is subordinated to a condition, accompanied by a subsidiary legacy in case the condition be not accomplished, and the condition may be construed as susceptible of realization either at the death of the testator, or that of the principal legatee, the disposition should be regarded more as a conditional legacy with a vulgar substitution than as a fideicommissary substitution. Thus: "I leave such to Primus, and if he does not marry I substitute Secundus in his place."⁷⁶

(c) When the terms of a disposition, attacked as containing a prohibited substitution, may be construed as only expressing a right of accretion between co-legatees, they ought to be interpreted preferably in this sense, although in this case the accretion would operate by virtue of law and independently of stipulation. So with legacies made conjointly to several persons with the proviso that in case of predecease of one or more of them, the survivors would receive the totality of the legacy, provided, however, the terms of the will are not opposed to the assumption that the testator had in view the hypothesis where one or more of the legatees would die during his lifetime. Generally, it would be likewise even though the testator had established the right of accretion only in the case where one or several of the legatees would die without children.

(d) When the terms of a disposition, to several persons successively, one after the other, leave doubt as to whether the testator intended to bequeath the ownership or the usufruct to the first legatee, interpretation that usufruct was intended should be adopted.

(e) If a disposition attacked as a prohibited substitution may be construed as a disposition *de eo quod superit*, it should

76. These cases are cited by 11 AUBRY & RAU, *op. cit. supra* note 22, § 694, at 182, n. 48, in which it is said that: "It has been held that the clause: 'I institute Pierre and, at his death, his children born and to be born, with the charge for him to transmit intact the said heritage to his children,' if null insofar as it concerns Pierre, as the principal disposition burdened with a substitution, may be, in effect, considered to be valid, in so far as it concerns children born, the disposer being reputed in effect, to have foreseen the particular causes which would prevent the disposition in the first order taking effect. Req. 7 mai 1900: Sir. 1901. 1. 189."

be construed as the latter. Thus there is no substitution where a legacy is made to several persons to use, enjoy, and dispose of in the most absolute manner, although it is accompanied by a clause that if one of the legatees die without posterity after the testator, his portion would devolve by accretion to the other co-legatees.

(f) Finally, as it has been discussed heretofore,⁷⁷ jurisprudence has placed many double conditional legacies beyond the reach of the nullity pronounced by article 896 of the Code Napoleon.

These examples illustrate the restrictive philosophy of French doctrine and jurisprudence in the interpretation of article 896 and there is nothing in Louisiana law to make them inapplicable here.

The fact is that in one of the very first cases concerned with substitutions under the Louisiana Civil Code that came before the Supreme Court of Louisiana the court adopted this basic philosophy of interpretation from the French commentators.⁷⁸ It said:

"The question, which now occurs to us for the first time,

77. See p. 481 *supra*.

78. *Farrar v. McCutcheon*, 4 Mart. (N.S.) 45 (La. 1825). The French authorities cited with authority were: 5 TOULLIER, *op. cit. supra* note 65, at 58, 69; 4 PANDECTES FRANCAISES, *op. cit. supra* note 52, at 21; MERLIN, QUESTION DE DROIT; 5 TOULLIER, *op. cit. supra* note 65, no. 44, at 58, in translation says:

"44. The general spirit of the law, that of the jurisprudence of the Royal Courts and of the Court of Cassation, is to annul a disposition made since the Code, only when it *necessarily* presents a substitution, and may not be sustained or interpreted in any other manner." (Emphasis added.)

¹This is a principle posed by the Court of Besancon, in a decision of 28 March 1811, reported in the *Recueil De Jurisprudence De Droit Civil*. T. XVI, p. 217.

5 TOULLIER, *op. cit. supra* note 65, no. 50, at 69, in translation, reads:

"50. It is impossible to foresee all the questions which may give rise to an infinity of particular cases; but all of the difficulties they may present, can be resolved by applying with discretion these two fundamental principles:

"One, that, if the clause is susceptible of two interpretations, it is always necessary to interpret it in the sense which does not present a substitution, and which tends to validate the disposition, because the testator is never considered to have desired to do that which the law prohibits, still less that which would bring about the destruction of his desires;

"The other, that every time the act is conceived in such a manner that it *necessarily* included the charge to preserve and transmit, even though not literally expressed, without it being possible to attribute a different meaning to it, proper to maintain the will of the testator, in the eyes of the law the disposition is null as containing a substitution; it is null with respect to the substitution, because it is contrary to the law which the testator has wish to elude; it is null with respect to the institution or principal legacy, because it is certain that the testator has desired to give only with the charge to transmit, and it is uncertain if he has wanted to give without this charge." (Emphasis added.)

has, however, been considerably agitated in various tribunals of the kingdom of France, and we are aided by many decisions in cases depending on the 896th Article of the Code Napoleon which is similar to our code, on the subject of substitutions and fideicommissa. It is true, that from a hasty view they seem to be somewhat contradictory in themselves, but on a closer inspection and more minute investigation they are capable of being pretty well reconciled. From them and commentaries on the French Code, several axioms or general principles are deducible which we believe to be correct.

“1st. The dispositions of testaments ought not to be annulled, until they necessarily present a substitution.

“2nd. If the claim be susceptible of two interpretations, it ought to be interpreted in that way, which avoids a substitution and gives effect to the will.

“3rd. Whenever the disposition is made in such terms as necessarily to comprehend a charge to keep for and transmit to a third person, it contains a substitution although not literally expressed. 5 Toullier 58 & 69.

“It may also be safely admitted as true, that in every substitution or fideicommissum, the agency of three persons is required, viz., the donor or testator, the person who receives the donation to hold and enjoy for a certain time, and one to whom he is bound to transmit it. See Pandects Francaises Vol. 4 p. 21. A quotation from Merlin Quest. De Droit.”

* * * *

We shall see in Part II hereof, in what manner these adopted principles have been followed in Louisiana jurisprudence.

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ANNEX 2. PREAMBLE TO ORDINANCE OF AUGUST 1747
ON SUBSTITUTIONS

Isambert, DeCrusy & Taillandier,
Recueil General Des Anciennes Lois Francaises.
Depuis L'an 420 Jusqúa La Revolution De 1789. (1830)
"D'Aguesseau, Chancellor — August 1747.

(Volume XXII)
(pp. 193-195)

No. 629. Ordinance Concerning Servitudes

At the camp of the Commandery of Vieux-Jonc, August 1747. Reg. P.P 27
March 1748 (Archiv)"

"Louis, etc. in the spirit of the resolution which we made to put an end to the uncertainty and the diversity of decision rendered by the various courts of our kingdom, although based on the same laws, the matter of donations inter-vivos and that of testaments appeared to us, because of their importance, to require that they be the first objects of our attention, and were made the subject of our ordinances of February 1731 and August 1735. We now propose to establish the uniformity of jurisprudence with respect to substitutions fideicommissaires, which may be made by either kind of disposition; but the matter of fideicommissis very simple in its origin, has become much more complex, since substitutions have begun to be extended, not only to several persons called one after the other, but to several degrees, or to a long succession of generations. By that means a new sort of succession has been created, where the will of man, taking the place of the law, has caused the establishment of a new order of jurisprudence, which has been accepted all the more favorably, since it was regarded as tending to the conservation of patrimony, or families, and of giving to the most illustrious houses the means to maintain their position; but the great number of difficulties which resulted, either on account of the interpretation of the wishes, often equivocal, of the donor or testator, or of the composition of his patrimony, or of the different distractions of which the fideicommissa are susceptible, or of the subsidiary recourse of the wife against the things burdened with the fideicommissum, has given rise to an infinity of lawsuits, which have been seen to revive several times at each opening of the fideicommissum; so that because of an event contrary to the views of the author of the substitution, it happens that that which he had ordered for the advantage of his family, sometimes has brought about its ruin. On the other hand, the necessity of assuring and favoring freedom of commerce, having required of the wisdom of the law, that it establish the formalities necessary to make substitutions public, the negligence of those who were required to comply with these formalities, has become a new source of litigation, where the decisions of the judges have been suspended between the favor of a creditor, or an acquirer in good faith, and that of a substitute who ought not to be deprived of the things substituted, through the fault of him who was charged to deliver them to him. It is on account of all of these considerations, that, after obtaining the opinions of the principal magistrates of our Parliaments, and of the superior councils of our kingdom, which have made us an exact account of the jurisprudence of their different jurisdictions, we have believed that the two principal objects in the matter of fideicommissa required that we divide this law into two different titles. The first will comprehend all that which concerns substitutions-fideicommissaire, considered in themselves, and the right which may be exercised over the things substituted. The second will be concerned with the obligations imposed on those burdened with a substitution, either to direct the kind of publicity they must give, or to assure the constitution and usage of the effects involved, or for the expedition and determination of disputes arising in such an important matter; if the multitude and the subtlety of the abstract question with which it is filled, the opposition which reigns in this respect, not only between the opinions of the most celebrated juriconsults, but between the decisions of the most enlightened courts, and the necessity of resolving doubts where the weight of the opposing opinions is almost equal, makes the choice between conflicting opinions so difficult, have retarded longer than we desired, the publication of this ordinance. We hope that our people will be compensated for it by the great attention which we have given to placing it in the state of perfection of which it is susceptible. Far from giving the least restraint to the freedom to make substitutions, we propose only to make them more useful for families, and our application to prevent all arbitrary inter-

pretations by means fixed and uniform rules, will serve only to cause greater respect for the wishes of donors and testators, by requiring them only to explain themselves in the most express manner. It is thus that we will give to our subjects a new proof of the care which we take to maintain good order within our kingdom, through the authority of our laws, at the same time that we are most occupied in defending it otherwise than by force of arms, whose principal object is to procure the great benefit of peace for a people so worthy of our affection through its attachment for our person, and by the zeal which it shines forth more and more every day for our service. For these reasons, etc. we wish and we are pleased with this which follows:”

ANNEX 3. COMENTARIOS AL CÓDIGO CIVIL ESPAÑOL (1951)
MANRESA

TITLE III, CHAPTER II, § 3, OF SUBSTITUTIONS, P. 139 ET SEQ.
ENGLISH TRANSLATION — INTRODUCTORY COMMENT (P. 6-7)
ARTICLES 774, 775, 776, 777, 781

TEXT IN SPANISH AND ENGLISH. COMMENT IN ENGLISH P. 7-11

The testator may designate not only the heirs whom he desires should enjoy the inheritance at his death, but is also permitted by law to make a second or ulterior call for the case in which the instituted heir or legatee first named by him be unwilling or unable to accept the inheritance or legacy, or dies without being able to dispose of his estate; and not only is he authorized to do this, but he can also leave the inheritance to one person charged with delivering it to another either in whole or in part.

This new call which the testator has the faculty of making is what has always been known as *substitution*.

In its broadest and most precise sense, the substitution is, as stated by Roguin, “the disposition whereby a third party is called to take a hereditary asset (total or partial inheritance or legacy) in default of a person first designated, or after such person.” From the last phrase in this definition it is clear that there are two principal species of substitutions: (1) when the substitute receives the thing in default of the person first instituted and who does not want to, or cannot accept it (direct substitution); (2) when the substitute receives the thing after the person first instituted has enjoyed the gift during a stated time (indirect, oblique, or gradual substitution). There are vast differences between the two. (a) In the direct substitution there are several donations, one of which is immediate and the other or others eventual, but only one of which is executed (for in the end it is only the substitute or the substituted who inherits), while in the indirect substitution there are two or more donations which are effectively executed one after the other. (b) In the direct substitution the testator organizes the transmission of his estate in favor of one or several heirs who may dispose of it and who are not obligated to make restitution, while in the indirect substitution the first beneficiary has the obligation of preserving the property for the benefit of one or several subsequent beneficiaries, and, thus, his freedom of disposition is impeded or, at least, restrained. (c) The importance of the direct substitution is the elimination of the successors *ab intestato*; the indirect substitution, on the other hand, has a considerable social impact because it interferes with the free alienation of property, for which reason it has been prohibited or limited by certain laws.

The preceding observations comprise, within their terms, the most complete definition of the substitution that can be given. Ordinarily, it is defined by some authors with reference only to the case where the instituted heir refuses to, or cannot accept the inheritance, in which case there is truly a personal transmission from the testator to the substitute; but besides this *direct* substitution, the law has recognized another *indirect* substitution in cases where the instituted heir dies while yet a minor or in a state of insanity, permitting the testator to make any disposition he might deem convenient with respect to the succession of the property, and it even authorizes the substitution to take effect after the instituted heir has received the inheritance on condition of returning it to another either in whole or in part. . . .

In truth and in fact, the substitution is nothing more than the subsidiary institution of a second or ulterior heir or legatee, subordinated to another principal institution which depends upon an event more or less certain to happen, that is to say, a conditional institution.

In Roman law, the substitution was necessarily important because of the implied accretion of inheritances under that law. The Partidas devoted to it the fourteen laws of Article 5, Partida 6, and the jurisprudence has constantly respected and confirmed the doctrine established by those laws. Prior to the Code, the law recognized six kinds of substitutions, namely: the vulgar, pupillary, exemplary, fideicommissary, *breviloqua* and reciprocal. The first (vulgar) was the substitution which any testator could make of the heir instituted in case the latter did not become such; the second (pupillary) was that which a parent made by naming a substitute for his minor son in case the latter, having become heir, should die before reaching the age of puberty, and to acquire, therefore, the right to testate in his place; the third (exemplary) was that made by ascendants by naming substitutes for those heirs who would have the right to inherit from them, but who might, because of insanity, be unable to make a testament, in case they should die before having recovered their sanity and without having made a testament previous to the insanity or during a lucid interval; the fourth (fideicommissary), also referred to by the writers as *indirect*, took place when the testator instituted a person as his heir charging this person to return the inheritance to another either in whole or in part; the fifth, also called *compendiosa*, was the consolidation into one document of several of the substitutions above mentioned; and the last took place when several instituted heirs were substituted *inter sesse*.

As can be seen from the above, the six kinds of substitutions recognized by the former legislation can be reduced to the four first cited, since the last two are only modifications of the others. These four original forms of substitutions are the subject of the section of the Code we will presently examine. . . .

ARTICULO 774

Puede el testador sustituir una o mas personas al heredero o herederos instituidos para el caso en que mueran antes que él, o no quieran, o no puedan aceptar la herencia.

La sustitución simple, y sin expresion de casos, comprende los tres expresados en el párrafo anterior, a menos que el testador haya dispuesto lo contrario.

(The testator may substitute one or more persons in place of the instituted heir or heirs in case the latter die before him, or in case they be unwilling or unable to accept the inheritance.

(The simple substitution, without more, includes the three cases stated in the preceding paragraph, unless the testator has otherwise provided.)

The above article refers to the vulgar substitution which was the first substitution known to the Roman law and from which it originates, it having been established for the case where the heir instituted in first place never became such. . . .

The legal reason for this kind of substitution, as well as for the others, was the requirement imposed by Roman law that there should always be a true heir who would accept the inheritance so that the intention of the testator could be carried out in its entirety, otherwise, the succession would pass to the heirs *ad-intestato*, with the result that the other independent dispositions of the institution would remain unexecuted. For this reason, and in order to facilitate the acceptance of the succession, the testator was permitted to substitute, to the end that if the instituted heir did not come into the inheritance, it could then pass to the one called in his place. . . .

ARTICULO 775

Los padres y demás ascendientes podrán nombrar sustitutos a sus descendientes menores de catorce años, de ambos sexos, para el caso de que mueran antes de dicha edad.

(Parents and other ascendants may name substitutes for their descendants

of both sexes under fourteen years of age, in case the latter should die before reaching that age.)

The precepts of this article have reference to the pupillary substitution whereby it can be said that the father makes his own, as well as his minor child's testament, since he actually names an heir for him. This kind of substitution was established by Roman law after the vulgar substitution, to take care of the situation where the instituted heir who became such should die intestate, not having yet reached the age of puberty. . . .

ARTICULO 776

El ascendiente podrá nombrar sustitutos al descendiente mayor de catorce años, que, conforme a derecho, haya sido declarado incapaz por enajenación mental.

La sustitución de que habla de párrafo anterior quedará sin efecto por el testamento de incapacitado hecho durante un intervalo lucido o despues de haber recobrado la razón.

(An ascendant may name substitutes for the descendant over fourteen years of age, who in accordance with law, has been declared mentally incapable.

(The substitution spoken of in the preceding paragraph will be rendered ineffective if the incapable makes a testament during a lucid interval or after having regained his reason.)

In addition to the vulgar and pupillary substitutions, the Code has equally recognized the so-called exemplary substitution, also known by the name of *quasi-pupillary* because of its resemblance with the former, and this article of the Code regulates this form of substitution.

This substitution was established by Justinian, in imitation of the pupillary substitution to take care of the case where the instituted heir died in a state of incapacity which prevented him from making his own testament. *Si haeres erit in furore decesserit*. As in the case of the pupillary substitution, the substitute here takes the estate of the testator and that of the incapable, if the latter dies without having made a testament. . . .

ARTICULO 777

Las sustituciones de que hablan los dos artículos anteriores cuando el sustituido tenga herederos forzados solo serán válidas en cuanto no perjudiquen los derechos legitimarios de éstos.

(When the person substituted has forced heirs, the substitutions spoken of in the two preceding articles will be valid only insofar as they do not prejudice the légitime rights of such heirs.)

Since the substitution was established in its various forms for the purpose of avoiding intestacy, it should be understood that they could not be admitted to the prejudice of any third person having légitime rights to the inheritance, and the above article so provides, by recognizing the légitime rights which have always deserved the consideration of the lawmaker, and which cannot be diminished nor affected in the least, not subjected to any condition. . . .

ARTICULO 781

Las sustituciones fideicomisarias en cuya virtud se encarge al heredero que conserve y transmita a un tercero el todo o parte de la herencia, serán válidas y surtirán efecto siempre que no pasen del segundo grado, o que se hagan a favor de personas que vivian al tiempo del fallecimiento del testador.

(Fideicommissary substitutions by virtue of which the heir is charged to preserve and transmit to a third party the whole or a part of the inheritance shall be valid and shall have effect provided they do not extend beyond the second degree, or provided they are made in favor of persons living at the time of the death of the testator.)

This article and the five that follow have reference to the substitution *fideicommissaria*, which has been the subject of the principal reforms introduced by the Code on the matter of substitutions.

The substitution is called *fideicommissary* or *indirect* when the testator institutes a person as his heir charging him to return to another the whole or part of the inheritance. The heir instituted under such a condition is called the fiduciary heir, and he who is to receive from him the property of the testator is known as the *fideicommissary*.

The given definition permits us to distinguish the differences existing between the ancient fideicommissa and those recognized by modern laws, for the former were considered as universal modes of acquiring the inheritance, and the latter are only kinds or special forms of substitutions.

Roman in origin, the fideicommissa became obligatory during the time of Augustus, and although it was accepted by custom before then, it was not given legal recognition until that time; its advent was due to the difficulties encountered in the confection of testaments due to the solemn formalities required, and the inability of the greater number of citizens to comply with these requirements. By virtue of the fideicommissa, the fiduciary heir became obligated to deliver the inheritance to the fideicommissary, thus discharging the will of the testator (*fideicommitente*), in order to do which he had to make an inventory of all the property received.

Law 14 of Title 5 of Partida 6 recognized this institution, and by Law 8 of Title 11 of the same Partida, effect was given to the *Senadoconsulto Trebeliánico* whereby, in order to stimulate the acceptance of the inheritance in the fideicommissary substitution, the fiduciary heir was given the right to retain for himself the fourth part of the property comprised in the inheritance before transmitting it to the fideicommissary. . . .