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SUCCESSIONS AND DONATIONS

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SUCCESSIONS

Retour Successoral

Articles 908-910, which are the concluding articles in Book III, Title I, Section 4, of the Louisiana Civil Code pertaining to successions falling to ascendants, establish a right in the ascendant to the return of the things he has given to his descendant who has died without posterity, but only when these things are found in the succession of the donee. This right is a legal right of return,[1] referred to as *retour successoral*, which gives the ascendant donor the right to inherit the things given by him to the *de cujus* who has died without having made any other disposition of them.[2] In *Succession of Christensen*,[3] the precise question presented was whether property given by a grandmother to her grandchild was subject to the *retour successoral* where the donee had died without posterity, but after having bequeathed the property to her father. The court of appeal, which adopted the decision of the trial court, had no difficulty in concluding that since the property passed to the legatee under the provisions of the will immediately upon the death of the testatrix,[4] the property was no longer in the succession of the donee at the time of her death, and that therefore, article 908 of the Louisiana Civil Code was inapplicable.[5]

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1. This is distinguished from a conventional right of return authorized by LA. CIV. CODE arts. 1534 and 1535 whereby the donor may stipulate for the return of the things given if he survives the donee, or if he survives the donee and his descendants.

2. This concept comes to Louisiana via art. 747 of the Code Napoléon and the doctrine and jurisprudence thereunder. *See* 3 LOUISIANA LEGAL ARCHIVES, part I, Art. 908 (1940); 9 AUBREY ET RAU, DROIT CIVIL FRANÇAIS nº 608 (6th ed. 1953), in LAZARUS, 4 CIVIL LAW TRANSLATIONS § 608 (1971). This right of return is also known as the "anomalous succession" because the property is inherited by the donor and not necessarily by the heirs called by law to the succession of the donee. *See* 3 RIPERT ET BOULANGER, TRAITÉ ELÉMENTAIRE DE DROIT CIVIL DE PLANIOL nº 1762 (4th ed. 1951).

3. 248 So.2d 45 (La. App. 1st Cir. 1971).

4. LA. CIV. CODE art. 1626.

5. This result is in accord with French doctrine and with the French jurisprudence interpreting the corresponding provision of art. 747 of the Code Napoléon. The reason given by the French in reaching the conclusion that the property donated *mortis causa* is not found in the succession of the donor is precisely the same as that given by the court in the present case: In a testate succession, the legatee acquires the thing bequeathed at the time of the death of the testator. *See* LA. CIV. CODE art. 1626; 9 AUBRY ET

TESTAMENTARY DISPOSITIONS

Form—Olographic and Statutory Wills

In *Succession of Barnett*,[6] the question at issue was the validity of a testament in olographic form entirely written and signed by the testatrix on the front side of a single sheet of paper, but the date of execution was written by the testatrix on the reverse side. Citing prior jurisprudence to the effect that the date of an olographic will may be at the head, at the foot, in the body of the instrument, and even after the signature of the testator,[7] the Court of Appeal for the Second Circuit held the will valid, noting that the testatrix had been "forced to crowd her signature at the bottom of the page" and that it was natural for her to turn the page over in order to write the date.

Succession of Peterson[8] involved a statutory will in which, following the dispositive provisions thereof, there was a declaration signed by the testator to the effect that he had executed the same in the presence of the notary and the witnesses. This declaration was followed by another clause, signed by the notary and by the witnesses but not by the testator, which was substantially in the language suggested by the statute for an attestation clause. Proceeding from the proposition that an attestation clause is only a certification or recital of the acts done in the confection of an instrument, the Court of Appeal for the Second Circuit rejected the appellant's contention that the will was invalid on the ground that the attestation clause was not signed by the testator, and held that both clauses, when taken together, satisfied the requirements of the statute.

In *Succession of Morgan*,[9] the court of appeal had declared a statutory will invalid on the ground that the attestation clause was insufficient in that it failed to "evidence" that the instrument was the testatrix' last will and testament.[10] The supreme court reversed, holding that the attestation clause not only intended to, but that it actually did, reflect that the testatrix had

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RAU, DROIT CIVIL FRANÇAIS nº 608 (6th ed. 1953); 3 RIPERT ET BOULANGER, TRAITÉ ELÉMENTAIRE DE DROIT CIVIL DE PLANIOL nº 1762 (4th ed. 1951).

6. 245 So.2d 418 (La. App. 2d Cir. 1971).

7. Succession of Marshal, 126 So.2d 698 (La. App. 4th Cir. 1961).

8. 240 So.2d 39 (La. App. 2d Cir. 1970), *cert. denied*, 257 La. 175, 241 So.2d 532.

9. 230 So.2d 323 (La. App. 4th Cir. 1970).

10. *See The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Successions and Donations*, 31 LA. L. REV. 223, 229 (1970).

stated, declared, affirmed, or in some definite manner, signified that the instrument was her will.[11]

Woodfork v. Sanders[12] was an action for damages instituted by the universal legatee under a testament in a statutory form against the testator's attorney who had allegedly prepared the will. The will had been declared invalid by the probate court on the ground that one of the two attesting witnesses was the plaintiff-legatee himself. The action being one for damages suffered by the plaintiff because of the invalidity of the will, the court found it necessary to re-examine the question as to its validity *vel non*, even though the judgment declaring the same invalid had already become final as to the heirs and the testamentary legatees.[13] The question at issue was whether or not the provisions of article 1592 of the Civil Code, which disqualifies as a witness any person who is a legatee under the testament,[14] were applicable to attesting witnesses to a statutory will. As the writer appreciates it, the Fourth Circuit Court of Appeal took the position that because R.S. 9:2442-2443 provide a method for making a will in addition to those methods provided for in the Civil Code, the only qualifications required of witnesses to a statutory will were those contained in R.S. 9:2443, namely the ability to sign one's name and the ability to read.[15] The court was also of the opinion that article 1595 of the Civil Code[16] did not apply to the statutory will because the language of the

11. Succession of Morgan, 257 La. 380, 242 So.2d 551 (1971). Actually, the attestation clause used was substantially in the same language as that suggested by the statute, except that the words "and declared" obviously had been unintentionally omitted.

12. 248 So.2d 419 (La. App. 4th Cir. 1971); *See* Note, 32 LA. L. REV. 153 (1971).

13. "Insofar as concerns testator's succession and the heirs in whose favor this will was adjudged invalid, that judgment has apparently become final for lack of a timely appeal . . . But that judgment does not bind defendant, who was in no way a party to that proceeding . . . . Therefore, we examine the question of the will's formal validity just as if we were ruling on the will itself." 248 So.2d 419, 421 (La. App. 4th Cir. 1971).

14. LA. CIV. CODE art. 1592: "Neither can testaments be witnessed by those who are constituted heirs or named legatees, under whatsoever title it may be."

15. LA. R.S. 9:2443 (Supp. 1952) *as amended*, La. Acts 1964, No. 123, § 1: "Except as provided in R.S. 9:2442 with respect to a testator who is physically unable to sign his name, those who know not how or are not able to sign their names, and those who know not how or are not able to read, cannot *make dispositions* in the form of the will provided for in R.S. 9:2442, *nor be attesting witnesses thereto.*" (Emphasis added.)

16. LA. CIV. CODE art. 1595: "The *formalities* to which testaments are subject by the provisions of the present section, must be observed; otherwise the testaments are null and void." (Emphasis added.)

statute creating the additional method of making wills precluded its application thereto.[17]

The writer is unable to agree with these propositions: It is true that R.S. 9:2443 requires that the witnesses know how and be able to read and sign their names, but this does not necessarily preclude the application of other provisions of law *in pari materia*.[18] The fact that R.S. 9:2442 provides for an additional method of making a will in accordance with the *formalities therein set forth*, does not necessarily mean that the statute is a self-contained instrument. If R.S. 9:2443 contains the *only* qualifications for witnesses, *a fortiori* it would have to be concluded, from the very language of its provisions, that it contains the only qualifications for testators, namely, their ability to read and sign their names.[19] Surely, it cannot be suggested that a person who does not meet the qualifications of article 1475 of the Civil Code[20] is capable of making a statutory will because he happens to know how and is able to read and sign his name. As to the applicability of article 1595, it may very well be that the language of R.S. 9:2442 *implies* that a statutory will not confected in the form therein provided is not valid. But if so, it is simply restating the basic principle of article 1595. Besides, the observance of the *formalities* required in making a testament is totally different from the *capacity* of the parties to the testament. Both article 1595 of the Civil Code and R.S. 9:2442 would then speak of the invalidity of wills for the non-observance of the formalities required by law in the confection thereof. They do not purport to declare the nullity of the instrument for the

17. "But the language of R.S. 9:2442 could hardly more clearly imply that C.C. art. 1595 cannot invalidate a statutory will: *'In addition* to the methods provided in the Louisiana Civil Code, *a will shall be valid if'* the statute's requirements are met.

"As a minimum, it appears that C.C. art. 1595 cannot apply to statutory wills. Accordingly, even if art. 1592 were held applicable, the possibility of limiting its effect to invalidating only the legacy to the witness, and not the entire will, seems very strong." Woodfork v. Sanders, 248 So.2d 419, 423 (La. App. 4th Cir 1971) It is submitted that this last suggestion does violence to the very language of article 1592 and that a will otherwise valid in form and attested by a sufficient number of *competent* witnesses, will be valid; the fact that it is also attested by a witness who is a legatee would invalidate neither the will nor his legacy.

18. LA. CIV. CODE art. 17.

19. LA. R.S. 9:2443 (Supp. 1952) *as amended*, La. Acts 1964, No. 123, § 1. *See* note 15 *supra*.

20. LA. CIV. CODE art. 1475: "To make a donation either *inter vivos* or *mortis causa*, one must be of sound mind." *See also* LA. CIV. CODE art. 1476 which prohibits minors under sixteen years of age from disposing *mortis causa*.

lack of capacity of the parties thereto. As the court itself states: "[t]he basic prohibition of art. 1592 (taken by itself) is against one being both witness and legatee (the purpose being presumably to avoid undue influence, imposition or fraud)."[21] If this is true with regard to the nuncupative testaments of the Civil Code, why should it not be true also of the statutory will? What is there about the statutory will that immunizes it from the possibility of undue influence, imposition, or fraud?

Usufruct of the Surviving Spouse

In *Succession of McCrary*,[22] the Court of Appeal for the Second Circuit reversed the lower court and held that a legacy of all the property of the testator to his wife "so long as she does live" constituted a legacy of the usufruct of such property, and not a legacy in full ownership; consequently, the naked ownership thereof devolved *ab intestato* by operation of law on the heirs of the testatrix.[23]

In all cases where a predeceased spouse leaves issue of the marriage without having disposed of his share in the community property, the survivor is entitled to the usufruct of such property as is inherited by the issue of the marriage. This usufruct terminates, however, if the survivor contracts a second marriage.[24] In *Succession of Chauvin*,[25] the testator, whose patrimony consisted solely of his share in the community of acquêts, made the following disposition:

> "I leave all I die possessed of to my son Bernard Chauvin Jr., subject to *the usufruct* thereon which I leave to my loving wife, Bernice." (Emphasis added.)[26]

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21. Woodfork v. Sanders, 248 So.2d 419, 422 (La. App. 4th Cir. 1971).

22. 246 So.2d 899 (La. App. 2d Cir. 1971), *cert. denied*, 258 La. 770, 247 So.2d 866, 869 (1971).

23. The court based its conclusion on Succession of Weller, 107 La. 466, 31 So. 883 (1902) *and* Succession of Verneuille, 120 La. 605, 45 So. 520 (1908), in which the legacies were, respectively: "to my husband 'to be his so long as he lives'" and "to my wife for her lifetime." Succession of Johnson, 223 La. 1058, 67 So.2d 591 (1953) *and* Succession of Heft, 163 La. 467, 112 So. 301 (1927) are distinguished.

24. LA. CIV. CODE art. 916.

25. 242 So.2d 340 (La. App. 4th Cir. 1970).

26. *Id.* at 341. It is quite apparent from the reference to *the usufruct* that the testator had in mind the provisions of Civil Code article 916; it is also clear that the dispositions he made of his share in the community would have been the same that the law would have made had he died intestate.

Since the surviving widow remarried soon after the death of the testator, the question presented was whether or not her subsequent marriage had the effect of terminating the usufruct over the deceased's share in the community. Relying on the cases of *Smith v. Nelson*[27] and *Succession of Carbajal*,[28] the Court of Appeal for the Fourth Circuit rejected the appellant's contention that the testament had simply confirmed the legal usufruct given to the surviving spouse by article 916 and held that the usufruct given by that article had been converted into a testamentary usufruct which, for that very reason, did not terminate upon the remarriage of the usufructuary, except as to that portion of the patrimony of the deceased that constituted the légitime of the son.[29]

With all due respect, the writer is compelled to disagree. Although the court finds that *Smith v. Nelson* and *Succession* of *Carbajal* stand for the proposition that a 916 usufruct becomes a testamentary usufruct when conferred by will,[30] these cases *do not so hold.* A careful reading of *Smith v. Nelson* will reveal that, but for the testamentary disposition in his favor, the surviving spouse in that case would not have been entitled to the usufruct over the community property involved, simply because the property of that community was inherited, not by the issue of the marriage, but by the children of the deceased spouse by a prior marriage.[31] In other words, there was no transformation

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27. 121 La. 170, 46 So. 200 (1908).

28. 154 La. 1060, 98 So. 666 (1924).

29. "In the instant case the son inherited the naked ownership of his father's estate and his legitime has been burdened with a usufruct in favor of his mother. It is true that Article 916 confers on the surviving spouse in community the usufruct of the decedent's interest in the community, leaving issue of the marriage with the naked ownership. But, construing both codal articles in *pari materiae* [*sic*] [LA. CIV. CODE arts. 916, 1493] we conclude Article 916 is a statutory exception to the general rule enunciated in Article 1493, an exception which a testator cannot exceed and which restricts him to all of the provisions of Article 916, including, insofar as the legitime is concerned, termination of the usufruct upon a second marriage." Succession of Chauvin, 242 So.2d 340, 342 (La. App. 4th Cir. 1970).

30. "Thus our *jurisprudence holds* that a donation mortis causa of the usufruct of community property to the surviving spouse confers a lifetime usufruct which is not terminated by a subsequent marriage. This is true even if the testament grants the *same usufruct* the survivor would have acquired by operation of law under L.S.A.-C.C. Art. 916 in an intestate succession." (Emphasis added.) *Id.*

31. *See* the analysis made by the court on the factual situation in Smith v. Nelson: "In *Smith* . . . the testatrix's *second* husband was sent into possession of the usufruct of all her property acquired during the *second community* while three children, issue of a *prior marriage*, inherited in full

of a 916 usufruct into a testamentary usufruct. Indeed, in all cases in which a usufruct is granted to a person who is not entitled to it by law, the usufruct is conventional rather than legal,[32] and the usufructuary will be treated accordingly.[33] But where the usufruct given by testament is one to which the usufructuary is otherwise entitled by law, the granting of such usufruct should be regarded only as a confirmation of such usufruct, and it has been so held by the supreme court.[34] The error into which the Court of Appeal for the 4th Circuit seems to have fallen is in accepting the *Nelson* and *Carbajal* cases as establishing a non-existing jurisprudential rule[35] that the donation *mortis causa* of a 916 usufruct confers a lifetime usufruct.[36]

It should also be noted that the usufruct established by article 916 of the Civil Code is on the entire share of the deceased in the community, or on so much thereof as is inherited by the issue of the marriage, so that if the patrimony of the deceased consists solely of his share in the community, the usufruct will attach not only to the disposable portion thereof, but also to the portion reserved by law for the heirs, the reason why a

ownership all the assets of the first community and the *naked ownership of the second.*" (Emphasis added.) *Id.*

It is evident that the surviving spouse could not have had the legal usufruct of the second community under article 916, for the heirs inheriting the same were not the issue of the marriage. It is also evident that the usufruct thus granted to the surviving spouse could only have affected the disposable portion of that community. LA. CIV. CODE art. 1710.

32. LA. CIV. CODE art. 540: "Usufruct may be established by all sorts of titles; by deed of sale, by marriage contract, by donation, compromise, exchange, last will and even by operation of law.

"Thus the usufruct to which a father is entitled on the estate of his children during the marriage, is a legal usufruct."

33. *See* Succession of Carlisi, 217 La. 675, 47 So.2d 42 (1950), where the testator, leaving *no descendants* nor ascendants, bequeathed to his surviving spouse the usufruct of all his property, which consisted solely of his share in the community, and the naked ownership thereof to a charitable institution. It is clear, and the court so holds, that this was not a legal usufruct which would exempt the usufructuary from giving security because articles 915 and 916 are inapplicable under these circumstances.

34. Winsberg v. Winsberg, 233 La. 67, 96 So.2d 44 (1957); Succession of Moore, 40 La. Ann. 531, 4 So. 460 (1888).

35. Succession of Carbajal, 154 La. 1060, 98 So. 666 (1924), the only other case cited by the court, dealt solely with the question of whether or not a testament fell by the subsequent birth of a posthumous child where provision for the unborn child had been made in the testament. It is only in a four-line per curiam opinion that reference is made to Smith v. Nelson, and then it is unclear upon which property the usufruct was given, nor is it shown whether the property, if community, was inherited by the issue of the marriage or by someone else.

36. If such were the rule, the usufructuary would be required to give security because, not being a legal usufructuary, the provisions of article 560 of the Civil Code would be inapplicable.

bequest of such a usufruct does not violate the provisions of article 1710 of the Civil Code[37] is that such a usufruct is legal rather than testamentary.[38]

It logically follows that a usufruct of the kind conferred by will in *Chauvin* must be considered *in its entirety* as a legal usufruct, and that such a usufruct must stand or fall in its entirety. It cannot be a testamentary usufruct as to a portion of the property on which it bears, and a legal usufruct as to another. Actually, the decision in *Chauvin* means that when the usufruct given by testament is over that portion of the community property that constitutes the légitime of the issue of the marriage, the usufruct is a legal usufruct which terminates upon the remarriage of the usufructuary; but when the usufruct thus given affects only the disposable portion, the usufruct is transformed into a testamentary usufruct for life. However, there seems to be no basis for this either in the legislation or in the jurisprudence.

Prohibited Substitutions

A testament is a declaration of last will clothed with certain formalities whereby a person disposes of the totality or a portion of his patrimony, or a particularly designated thing in favor of one or more persons.[39] Implicit in this definition are the concepts that a testament may contain as many distinct dispositions or bequests as there are legatees to whom they are made, and that each such bequest is essentially independent of the others, so that the invalidity, caducity, or revocation of one or more of the dispositions in the testament does not affect the validity of the others.[40] These concepts are so elementary that they do not

37. LA. CIV. CODE art. 1710: "[P]rovided, however, that no charges or conditions can be imposed by the testator on the legitimate portion of forced heirs. . . ."

38. "It is true that Moore could not incumber the portion for which his children are forced heirs, that is, their legitime; but the fact is that he has not done so, for the incumbrance is placed upon it by law, independent of his participation. All Moore did was to confirm it. It would have existed without the confirmation *which is practically a superfluity.*" (Emphasis added.) Succession of Moore, 40 La. Ann. 531, 537, 4 So. 460, 463 (1888).

39. LA. CIV. CODE arts. 1469, 1570, 1571.

40. "The various dispositions made in a testament do not form an essentially indivisible whole. Thus, when a testament contains several legacies, the validity of each legacy is independent from the validity of the others, unless the testator has manifested a contrary intent." 10 AUBRY ET RAU, DROIT CIVIL FRANÇAIS, nº 647 (6th ed. 1954) in LAZARUS, 3 CIVIL LAW TRANSLATIONS § 647, at 24 (1969).

appear to have ever been questioned in the past. On the contrary, in those cases in which the validity of a particular testamentary disposition has been at issue, the other valid dispositions of the testament have been upheld,[41] and the only question that was presented was whether or not such legacies as had become caducous or declared invalid for any reason were payable to the heirs *ab intestato* or to the universal legatee.[42] Nevertheless, in *Succession of Walters*,[43] the appellants contended that the presence of a bequest creating a prohibited substitution had the effect of rendering null all the other testamentary dispositions, and strongly urged the court to declare the entire will of the testator invalid. The appellants relied solely upon the following statement made for the first time in *Succession of Johnson*:[44]

> "Whilst that article [Civil Code Article 1520] at first blush would seem to indicate that substitutions and fidei commissa are one and the same thing and affect the validity of the will in the same manner, it is undoubtedly settled by the jurisprudence of this State that there are differences between them and that it is very important to note the differences because in cases of prohibited substitutions the *whole will* is stricken with nullity whereas in cases of fidei commissa, it is only the dispositions which are tainted with that designation that are invalid."[45] (Emphasis added.)

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41. *See* Succession of Hunter, 159 La. 492, 105 So. 596 (1925) (the prohibited substitution and the legacy containing an impossible condition did not affect the validity of other special legacies which were left intact); Succession of Ledbetter, 147 La. 771, 85 So. 908 (1920) (prohibited substitution only was annulled); Succession of Herber, 117 La. 239, 41 So. 559 (1906) (prohibited substitution in a testament did not invalidate other legacies, particularly the residuary universal legacy).

In Succession of Smart, 214 La. 63, 36 So.2d 639 (1948), involving a testament containing thirteen particular legacies and a residuary universal legacy, two of the particular legacies being prohibited substitutions, the court said: "The fact that there are bequests of particular legacies in the will that contain prohibited provisions or substitutions such would destroy *only the legacies* and would not effect the will as a whole. It is well settled that the invalidity of a portion of a will does not destroy the will in its entirety." (Emphasis added.) *Id.* at 67, 36 So.2d at 640-41.

42. *See* LA. CIV. CODE art. 1702. Succession of Burnside, 35 La. Ann. 708 (1883); Compton v. Prescot, 12 Rob. 56 (La. 1845); Prevost v. Martell, 10 Rob. 512 (La. 1845).

43. 243 So.2d 324 (La. App. 4th Cir. 1971), *cert. granted*, 258 La. 249, 245 So.2d 717 (1971).

44. 223 La. 1058, 67 So.2d 591 (1953).

45. Succession of Johnson, 223 La. 1058, 1067, 67 So.2d 591, 594 (1953). It will be noted that no authority is cited in support of this statement. *But see* Dufour v. Deresheid, 110 La. 344, 347, 34 So. 469, 470 (1903).

It should be noted that in *Succession of Johnson*, the court was inquiring into the validity of the *only* disposition contained in a testament whereby the testator bequeathed to the second named legatee what was left after the death of the first named legatee. This was practically the identical proposition that had previously been presented to the court in *Dufour v. Deresheid*,[46] from which the court in *Johnson* quoted at length and on which it relied[47] in concluding that the legacy of the residuum was not prohibited by article 1520 of the Civil Code. But it will also be noted that in the *Deresheid* case, the statement made by the court concerning the distinction between a substitution and a *fidei commissum* is materially different:

> "It is only in cases of *substitution* that the entire disposition of a will is null. In cases of *fidei commissa*, pure and simple, that clause alone creating the *fidei commissum* is null as in violation of law, leaving unaffected the validity of the disposing clause or main donation."[48]

There is every reason to assume, therefore, that all the court in *Johnson* intended to say was that in cases of a prohibited substitution the *entire disposition*, that is the institution as well as the substitution, is null, and that the reference to the "entire will" was totally inadvertent. It is the opinion of the writer that, in rejecting the appellant's contention and in refusing to declare the testament invalid in its entirety, the court in *Succession of Walters* reached the correct result, and one which is supported by French doctrine and jurisprudence.[49]

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46. 110 La. 344, 34 So. 469 (1903).

47. "That [the quotation from the *Deresheid* opinion] is a statement of the law as it may well be applied in the present case." Succession of Johnson, 223 La. 1058, 1072, 67 So.2d 591, 596 (1953).

48. Dufour v. Deresheid, 110 La. 344, 347, 34 So. 469, 470 (1903).

49. "When in the same act there are several dispositions one of which is tainted with substitution, the nullity of this disposition does not in any manner affect the fate of the others. Particularly, the nullity of a universal legacy containing a substitution has no effect on the validity of particular legacies contained in the same testament, on legacies which will have to be paid by the heirs ab-intestato, or on the validity of the clause revoking a prior testament, though such testament had been made in favor of the same legatee. It will be otherwise if the substitution which apparently affects only one of the dispositions, can be considered as in effect affecting the other dispositions as well." 11 AUBRY ET RAU, DROIT CIVIL FRANÇAIS no 694 (6th ed. 1956) in LAZARUS, 3 CIVIL LAW TRANSLATIONS § 694, at 328 (1969).

"The nullity of the substitution thus carries with it the nullity of the entire disposition which contains it. But if several distinct dispositions independent from one another are contained in the same testament, the nullity of the disposition tainted with a substitution, will not affect the others. Thus: a testament contains a legacy of an immovable with a charge on the

Excessive Donations—Reduction by Creditors

As is clearly indicated by articles 1493 and following of the Louisiana Civil Code, the légitime of a forced heir is that portion of the patrimony of the disposer which, because it cannot be alienated by the latter to the prejudice of the former, must remain essentially inalienable to descend upon the heir by operation of law.[50] The right to the légitime is, therefore, a right of succession arising *ab intestato*[51] which is protected by law by the action of reduction, which is but an action to revendicate the property from the donee or his transferee, as the case may be, in order to have the same returned to the mass of the succession of the disposer,[52] so that the forced heir may receive the same *ab intestato.*

The forced heir, however, need not enforce his right to the légitime. Indeed, he need not claim any portion of the succession of the *de cujus*, and may even renounce it in toto;[53] but having become seized of it upon the death of the *de cujus*, and having become the owner thereof immediately upon the death of the latter,[54] his action in refusing to assert his rights thereto or in formally renouncing it, constitutes an alienation of the property in fraud of the rights of his creditors, and thus, the latter are given the right to accept it in his place and stead to the extent that they have been prejudiced by the renunciation or the refusal.[55]

However, in *Succession of Henican*,[56] the Court of Appeal for the Fourth Circuit denied the creditor of the heir the right to avail himself of the provisions of articles 1021 and 1990 of the Civil Code, seemingly on the grounds that a creditor is

legatee to preserve and render the same to a third person at the time of his death; the same testament also contains a legacy of another immovable made purely and simply to another legatee; it is manifest that the nullity of the first legacy could not result in the nullity of the second." 6 HUC, COMMENTAIRE THÉORIQUE ET PRATIQUE DU CODE CIVIL no. 27, at 43 (1894). To the same effect, *see also* 27 DEMOLOMBE, COURS DE CODE NAPOLÉON no. 178 (1876); 12 LAURENT, PRINCIPLES DE DROIT CIVIL FRANÇAIS no. 511 (1876); 3 RIPERT ET BOULANGER, TRAITÉ ELÉMENTAIRE DE DROIT CIVIL DE PLANIOL nos 3884-86 (4th ed. 1951).

50. *See particularly* LA. CIV. CODE arts. 1493-1496, 1498, 1502, 1710.

51. Succession of Turnell, 32 La. Ann. 1218 (1880); 11 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 679 (6th ed. 1956) in LAZARUS, 3 CIVIL LAW TRANSLATIONS § 679, at 191 (1969).

52. LA. CIV. CODE arts. 1516-1518.

53. LA. CIV. CODE art. 977.

54. LA. CIV. CODE arts. 940 *et seq.*, 1292.

55. LA. CIV. CODE arts. 1021, 1990.

56. 248 So.2d 385 (La. App. 4th Cir. 1971).

neither a forced heir nor an heir or assign of forced heirs, and therefore, has no right under the provisions of article 1504 to institute the action of reduction.[57] The decision leaves one with the impression that the word "assigns" as used in article 1504 of the Louisiana Civil Code is more limited in scope than the term "*ayant cause*" which is used in the text of the corresponding article 921 of the Code Napoléon under which, the court asserts, creditors are entitled to bring the action of reduction.[58] Actually, however, the term "*ayant cause*" in French law means "assigns" and is no more extensive than the word "assigns." It has reference only to persons who derive their rights from another, including his heirs, legatees and donees, but *it excludes creditors.*[59] A comparison of the text of the Code Napoléon article with the original French text of article 29, page 215, of the Digest of 1808, and with the French text of article 1491 of the Code of 1825, will reveal that the language used in all three is identical.[60] It will also be noted that the term "*ayant cause*"

57. The decision is based on Tompkins v. Prentice, 12 La. Ann. 465 (1857). There, as in this case, the forced heir of the deceased who had been excluded from the testator's will and had been virtually disinherited, failed to assert his claim to the portion reserved to him by law, whereupon the creditor of the heir sought the authority to accept the succession in the name of the heir and to be sent into possession of the légitime to the extent of the heir's indebtedness to him. In a 3-2 decision (the personnel of the supreme court then numbered five), the supreme court held that the creditor had no right of action because the action to reduce a donation could be brought only by the forced heirs of the disposer, or by his heirs or *assigns*, the term assigns not including the creditors of the heir.

58. This statement is apparently based on language found in the dissenting opinion by Spofford, J., in the *Prentice* case where it is said: "It will be observed that the word "assigns" is "*ayants-cause*" in the French text, and that, in this particular, the article is literally taken from Article 921 of the Code Napoleon. It will also be observed that the word *ayants-cause* in article 921 of the latter Code, is held by the French authorities, with entire unanimity, to embrace personal creditors of the heir." Tompkins v. Prentice, 12 La. Ann. 465, 470 (1857). *But see* note 59 *infra.*

59. In DALLOZ, PETIT DICCIONAIRE DE DROIT 157 (Paris 1951), the term is defined as follows:

"AYANT CAUSE. L'ayant cause est celui qui *tient son droit d'une autre personne* que l'on dénomme *auteur.* On distingue les ayants cause *à titre universel* et les ayants cause *à titre particulier.* Les premiers sont ceux qui recueillent *tout ou partie* du patrimoine de leur auteur décédé. Ce sont les héritiers ab intestat, les légataires universels ou à titre universel et les donataires de biens à venir. *On ne peut assimiler les creanciers chirographaires à des ayants cause à titre universel.* Les ayants cause a titre particulier sont ceux qui acquierent soit par un act entre vifs, soit par un legs particulier un droit sur un objet determiné." *See also* the French authorities cited in note 61 *infra.*

60. In the French Code the action is given to "leurs héritiers ou *ayant-cause.*" In article 28, page 215 of the Digest, and in the French text of art. 1491 of the Code of 1825, the phrase used is "leurs héritiers ou *ayans-cause.*" The difference in spelling is inconsequential.

was translated as "assigns" in both the Digest and the Code of 1825. In light of the meaning of the term in French law this is as accurate a translation as it is possible to make. The court of appeal is correct, however, in stating that in France, the creditors of the heir are permitted to bring the action of reduction. The reason for this is not that article 921 of the French Code is broader than the provisions of our article 1504, but rather the fact that creditors may always accept a succession which their debtor has renounced or refused to accept, and the only way in which effect can be given to this right is by permitting the creditor to institute the action of reduction which their debtor could have instituted[61] and which, when exercised by a creditor, is in the nature of a revocatory action.[62]

The further holding of the Court of Appeal seems likewise unwarranted; it held that article 1991, which enumerates the rights of a debtor which a creditor may not exercise, is illustrative and that when read *in pari materia* with article 1504, precluded the creditor from bringing the action of reduction. Article 1991 lists only purely personal actions and does not expressly *deny* creditors the right to sue for reduction, and to so construe it is tantamount to holding that the rights granted to crediors by articles 1021 and 1990 to accept the successions falling to their debtors are only illusory.[63]

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61. "The law thus gives to the forced heirs in general . . . as well as to their *ayants-cause*, the right to demand the reduction or revendication of liberalities which impinge upon the reserved portion . . . .

"This right can, in the first place, be exercised by the forced heirs themselves . . . .

"This right, being part of the patrimony of the person invested with it, is transmissible to the heirs of the latter as well as to his legatees; it is assignable either by itself or as part of the mass of the succession rights of the heir, *and it may be exercised by the creditors of the latter by virtue of article* 1166." 6 HUC, COMMENTAIRE THÉORIQUE ET PRATIQUE DU CODE CIVIL no. 163 (1894); *cf.* LA. CIV. CODE art. 1969. As Marcadé has observed, even if art. 921 of the French Code (LA. CIV. CODE art. 1504) had said that the reduction could be sued for *only by forced heirs*, and had omitted the phrase "and their heirs or ayants cause," still, the right of the creditors of the forced heir to take his place and to sue for the reduction would have resulted from other provisions of the Code. 3 MARCADÉ, EXPLICATION DU CODE CIVIL 921, no. II (7th ed. 1873). To the effect that the creditors of the heir may bring the action of reduction as a right which the heir himself could have brought by virtue of articles 1166 and 1167 of the Code Napoléon, *see* 11 AUBRY ET RAU, DROIT CIVIL FRANÇAIS nº 685 (6th ed. 1956) in LAZARUS, 3 CIVIL LAW TRANSLATIONS § 685, at 237 (1969); 3 RIPERT ET BOULANGER, TRAITÉ ELÉMENTAIRE DE DROIT CIVIL DE PLANIOL nº 2727 (4th ed. 1951).

62. *See* LA. CIV. CODE arts. 1968, 1969, 3182, 3183. 3 MARCADÉ, EXPLICATION DU CODE CIVIL, on art. 921, no. II (7th ed. 1873).

63. It is true that creditors cannot accept a donation *inter vivos* made to their debtor, nor can they sue for collation. But the reason for this is