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H. Alston Johnson

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# Testamentary Dispositions

*H. Alston Johnson\**

As readers of this symposium will already know from other articles contained in it, the Louisiana State Law Institute proposed comprehensive revisions to portions of Book II of the Civil Code relative to successions and donations in Senate Bill 1379 introduced in the 1995 Regular Session of the Louisiana Legislature. The bill did not pass, and it is envisioned that it will be re-introduced in much the same form during the 1997 Regular Session of the Louisiana Legislature. Hence these commentaries, designed to praise this work where praise is deserved and to criticize constructively where such criticism would be useful. All of this is done, of course, with the aim of improving the final legislative product.

This particular portion of the symposium discusses the proposed changes in the nature and content of testamentary dispositions.<sup>1</sup> The division of testamentary dispositions into various categories is not simply an idle academic exercise. Some very important issues may be resolved by the decision as to the nature of a given legacy, such as priority of payment of the legacies in a testament, responsibility for the debts of the deceased, and the proper allocation of lapsed legacies. Before we begin that enterprise, however, some historical discussion is necessary; would a commentary on proposals to amend the Civil Code be complete without it?

## I. SOME HISTORY

It is well known that the present Civil Code divides legacies into those which are deemed universal, those which are under universal title, and those which are called particular legacies.<sup>2</sup> The proposed revision would roughly approximate those three categories with legacies which are to be called residuary, general, and particular,<sup>3</sup> though with a few quite significant changes. The present Civil Code categories of legacies follow very closely the categories found in the Code Napoleon when our drafters approached the task of writing the Digest of 1808 and the Civil Code of 1825. However, there are a few differences of note between the Code Napoleon categories and our own.

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\* Adjunct Professor of Law, Louisiana State University; Co-Reporter, Louisiana State Law Institute project to revise Civil Code Book II relative to successions and donations, 1980-1984.

1. These changes were primarily contained in proposed Articles 1584 through 1604 of Senate Bill 1379 of the 1995 Regular Session [hereinafter proposed La. Civ. Code arts.]. The bill is reproduced in the Appendix to this Symposium at 57 La. L. Rev. 201.

2. La. Civ. Code art. 1605 outlines these three types of legacies. In turn, La. Civ. Code art. 1606 defines a universal legacy; La. Civ. Code art. 1612 defines a legacy by universal title; and La. Civ. Code art. 1625 "defines" a particular legacy, mostly by default, by stating that a particular legacy is any legacy which is neither a universal legacy nor a legacy by universal title.

3. Proposed Article 1584 lists the three types of legacies; proposed Articles 1585, 1586 and 1587 define residuary, general, and particular legacies respectively.

The general article introducing the categories of legacies in the Code Napoleon was simple and straightforward, providing only that testamentary dispositions were either universal, under universal title, or particular.<sup>4</sup> The Digest of 1808 essentially followed this formula, but divided testamentary dispositions into an institution of heir on the one hand or legacies (in one of the three categories) on the other.<sup>5</sup> There were no substantive changes in the Codes of 1825<sup>6</sup> and 1870.<sup>7</sup>

The definition of universal legacy found in Article 1003 of the Code Napoleon is functionally identical to that of the various articles of our Civil Code in its development, and to the wording of Article 1606 in the present Civil Code. The definition of a legacy by universal title in Article 1010 of the Code Napoleon is virtually identical to that found in Article 1612 of today's Civil Code, and to that which was found in Article 1604 of the Code of 1825. The redactors of the Digest of 1808 had tried a slightly different formulation,<sup>8</sup> which they apparently abandoned in returning to the Code Napoleon language in the Civil Code of 1825. Finally, with respect to particular legacies, the drafters of the Code Napoleon had more or less the same "default" provision that we find in Article 1625 today, *i.e.*, that any legacy which is neither a universal legacy nor one under universal title is a particular legacy.<sup>9</sup> This is substantively identical to the provision that we now have in Article 1625 of the Civil Code and which we had in Article 1618 of the Code of 1825; but once again the drafters of the Digest of 1808 had hit upon a slightly different idea which was jettisoned in 1825.<sup>10</sup>

All of the foregoing reveals that, with only minor deviations from time to time, we have stayed very close to the categories originally outlined in the Code Napoleon. This raises the rather obvious question of whether the changes now proposed are simply change for change's sake, or whether there were serious functional problems in the categories that could not be addressed without a change in their definition. To this inquiry we now turn.

4. Code Napoleon art. 1002 provided: "Les dispositions, testamentaires sont ou universelles, ou à titre universel, ou à titre particulier."

5. La. Digest of 1808 arts. 110, 113.

6. La. Civ. Code art. 1598 (1825).

7. La. Civ. Code art. 1605 (1870).

8. The French and English text versions of Article 115 of the Digest of 1808 contain different fractional examples, but more importantly, state specifically that a legacy by universal title may be given to one or more persons. While there is no doubt that a legacy by universal title may be given to one or more persons under the present law, the concept is not specifically stated.

9. Code Napoleon art. 1010(2) provided: "Tout autre legs ne forme qu'une disposition à titre particulier."

10. Article 116 of the Digest of 1808 at least attempted to define a particular legacy in a way different from simply stating that it was neither a universal legacy nor a legacy by universal title. That article stated, in pertinent part, that a particular legacy was one "by which the testator gives to one or several persons certain substances, as such a house, such a horse, his library, his ward robe; or indeterminate things as a horse, a silver bason [sic] weighing so much; or a certain sum of money, as a sum of ten thousand dollars; or a certain quantity, as ten puncheons of rum or a hundred barrels of flour."

## II. DEFINITIONS AND FUNCTIONS OF PROPOSED LEGACY CATEGORIES

The rough equivalent of a universal legacy is the "residuary" legacy, which is defined in proposed Article 1585 as follows:

A residuary legacy is a disposition of all or a fraction of the entire estate, or all or a fraction of the balance of the estate that remains after deducting all general and particular legacies.

A residuary legacy may be made for the benefit of more than one legatee without changing its nature, even though the testator has assigned portions to the legatees.

This is a laudable attempt to address two different concepts, but it may not have been completely successful. The first concept is that of the former universal legacy: how shall we define a disposition that the testator intends shall give the legatee "an eventual calling to the totality of the estate" as the cases describe it? The important issue here is not so much what the testator has actually given to the legatee, but what the testator intends for the legatee to take in the event that certain other legacies lapse for whatever reason<sup>11</sup> or are null.<sup>12</sup> The testator's intent, of course, is paramount;<sup>13</sup> but if he has been unclear about whether a particular disposition should be considered universal, the law may have to reach a conclusion about what he might have intended.

The present definition of a universal legacy in Louisiana Civil Code article 1606 is not wholly satisfactory on this point. It provides that a universal legacy is a disposition "by which the testator gives to one or several persons the whole of the property which he leaves at his decease." If one understands "the whole of the property" which he leaves at death to mean "all property not otherwise disposed of for whatever reason" and then focuses on an intent to vest one or more individuals with the possibility of taking all such property, then the article probably accomplishes its purpose. But if one understands this to be more narrow, and to require that the testator state precisely that he wishes to bequeath "all of his property" to an individual or individuals, then the category of universal legacy is a good deal smaller.<sup>14</sup>

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11. The most common reason for a lapsed legacy would certainly be predecease of another legatee, but renunciation might be another. See proposed Article 1589.

12. As in the case of a prohibited substitution. See La. Civ. Code art. 1520.

13. La. Civil Code art. 1712: "In the interpretation of acts of last will, the intention of the testator must principally be endeavored to be ascertained, without departing, however, from the proper signification of the terms of the testament."

14. Indeed, as the Supreme Court of Louisiana noted in *Succession of Burnside*, 35 La. Ann. 708, 716 (1883): "The words of the code are not sacramental. It is not needful that a testamentary bequest shall be couched in the identical language of the Code, and if it is essential to constitute a universal legatee that all shall be given him without diminution, the only will by which such legatee could be named would be one which contained that disposition and no other."

For the most part, the cases have given this article the broader and more useful meaning over the years. They have looked to the potential result of a given legacy, and have inferred from that potential result (though perhaps not actually achieved) an intent on the testator's part to favor that legatee with the potential calling to the entirety of the estate.<sup>15</sup> If the disposition is of the disposable portion of the estate, that would be considered a universal legacy even though there were forced heirs at the time it was written, since the forced heirs might predecease the testator without issue.<sup>16</sup> If the disposition said simply "X is my heir," the disposition would be considered universal even though it did not actually dispose of property in the formal sense, since this should be considered the rough approximation of the institution of an heir.<sup>17</sup>

Thus, even in the absence of a specific foothold in present Article 1606, the cases have respected the view of the French doctrinal writers and have established that either the actual or potential calling to the entirety of the estate is the essential element in determining whether a disposition is a universal legacy. Unfortunately, the proposed article converting a universal legacy into a "residual" legacy does not address this issue, and there does not appear to be any reason why it should not do so. If the concept of a disposition of "a fraction of the entire estate" is intended to express this notion, it could perhaps be clarified.

The second concept which is at work here is that of a legacy of the residuum. Whether a legacy of the "rest" or "residuum" of the testator's estate, following other legacies, constitutes a universal legacy has proved to be a troublesome issue for our courts. It seems clear at this point that a legacy of the residuum following a particular legacy is a universal legacy.<sup>18</sup> This conclusion is reached largely by negative reasoning, *i.e.*, since the testator did not assign a specified part or fraction (such as in a legacy by universal title) elsewhere in the testament, then he did not intend to limit the legatee of the residuum to any given part or fraction. Thus, he must have intended that the legatee of the residuum could receive the entirety of the estate under certain circumstances. It is less clear that the legacy of the residuum following a legacy by universal title might constitute a universal legacy. By definition, the assignment of one fraction (by universal title) leaves only another fraction to the legatee of the residuum, thus limiting rather than potentially expanding the rights of that legatee

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15. This was the standard enunciated by the court in *Compton v. Prescott*, 12 Rob. 56 (La. 1845). Applying that standard, the court concluded that a legacy which was effectively of three-fourths of the property of the decedent could not be considered a universal legacy. In K. A. Cross, *A Treatise on Successions* § 140, at 204 (1891), the author includes within his own definition of a universal legacy the concept that the disposition is of the whole of the property left at death "either actually, or in eventual right."

16. 5 Marcel Planiol et George Ripert, *Traité pratique de Droit Civil Français* No. 614 (1933).

17. *Id.* The Code Napoleon did not recognize the concept of institution of heir known to Roman law, but our redactors chose to carry the concept forward even though it came to have no particular legal significance in our statutory scheme.

18. *Succession of Burnside*, 35 La. Ann. 708 (1883).

of the residuum and permitting the inference that the testator did not intend to vest the residuary legatee with a potential calling to the entirety of the estate. This has led to conclusions in the cases that the legacy of the residuum following a legacy by universal title is not a universal legacy.<sup>19</sup>

The commingling of the concepts of residuary legacies and universal legacies in the cases decided under present Article 1606 has puzzled lawyers and judges alike.<sup>20</sup> Properly understood, neither concept determines the other. A residuary legacy is not necessarily universal, or by universal title, or by particular title. The term "residuary legacy" refers to its content, not its nature; it is largely a shorthand way for the testator to deal with large portions of his property without specifically identifying them. By the same token, a universal legacy need not be of the residuum and probably need not actually dispose of any property in itself. In fact, a testator could create a universal legacy simply by saying: "X is my universal legatee, to receive whatever legacies lapse for whatever reason."

To its credit, the proposed article attempts to resolve this lack of clarity by providing specifically that a "residuary" legacy may be one that is of all or a fraction of the balance of the estate that remains after deducting all "general and particular legacies." But here again, the essential nature of the legacy is its *universality*, not its residuary character; the change of terminology may foster confusion rather than the clarity which it seeks.

The second paragraph of the proposed article tackles another problem, and that is whether a legacy now to be called "residuary" (*i.e.*, universal) ceases to be so when it is made to more than one person and the testator "has assigned portions to the legatees." This introduces the debate over the controversial decision in *Succession of Lambert*,<sup>21</sup> ironically celebrating its fiftieth birthday as this symposium is written. The comments to the proposed article state that the second paragraph is intended to "revise" the jurisprudential rule of *Lambert*, but this is not entirely accurate. In the first place, *Lambert* did not present an issue of whether a given legacy was universal; rather, it addressed the issue of whether a given legacy should be considered conjoint and thus whether testamentary accretion should occur in favor of the surviving co-legatee when the other legatee had predeceased the testator.<sup>22</sup> Thereafter, the cases appeared to follow *Lambert* when the issue was actually one of lack of conjointness *vel non*

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19. The opinions in *Succession of Dougart*, 30 La. Ann. 268 (1878) and *Compton v. Prescott*, 12 Rob. 56 (La. 1845) probably stand for this proposition.

20. See generally *Hopson v. Ratliff*, 426 So. 2d 1377 (La. App. 3d Cir. 1983).

21. 210 La. 636, 28 So. 2d 1 (1946).

22. As all students of Louisiana succession law are aware, the testator in *Lambert* made a disposition of the residuum of his estate to "my brothers Robert and Albert share and share alike." Albert had in fact predeceased the testator, and the issue was whether Robert was entitled to take the entire legacy of the residuum due to testamentary accretion. A disfavored brother (William) and Albert's son (Albert, Jr.) successfully argued that the legacy was not conjoint; no accretion could occur; and half of the legacy should descend intestate, partially to them and partially to the favored, surviving brother.

and testamentary accretion,<sup>23</sup> but may not have followed it when the issue was universality of a disposition and none of the legatees to whom a portion was assigned had predeceased the testator.<sup>24</sup> The net effect of the second paragraph of the proposed article is probably to confirm and codify the case law that holds that assignment of parts within a legacy otherwise universal in nature does not destroy its universality, but the actual holding in *Lambert* as to conjointness and testamentary accretion is unaffected by the paragraph. About this more later, but *Lambert*<sup>25</sup> probably should have also been repudiated as to conjointness and testamentary accretion, as well as with respect to the universality of legacies.

The second category of legacies is proposed to be known as "general," the rough equivalent of legacies by universal title in the present Civil Code. Here, unlike the substitution of the word "residuary" for "universal" in the present scheme discussed above, there is a substantive change in the law. Proposed Article 1586 provides: "A general legacy is a disposition of all, a fraction, or the balance of property expressly described by the testator as one of the following categories: separate or community property, movable or immovable property, or corporeal or incorporeal property. This list of categories is exclusive."<sup>26</sup>

There is probably more change in the law here than meets the eye. The first is that the categories are "exclusive," presumably meaning that only those dispositions specifically listed can be considered "general" and thus potentially narrowing the scope of this category. Present Article 1612 is probably broader, including within legacies by universal title any legacy which is expressed as a "proportion" of one's disposable property and then giving examples ("as a half, a third, or all his immovables, or all his movables, or a fixed proportion of all his immovables or of all his movables"). The present article does not appear to place property into categories, but rather expresses the general proposition that it is the assigning of a fraction or a proportion among all disposable property that makes a legacy one under universal title, regardless of the nature of the property.

The comments to the proposed article also express the view that the law will be changed by its enactment because it provides that a legacy of all or a portion of the testator's separate or community property is a general legacy and "such dispositions were not legacies under universal title under prior law."<sup>27</sup> No authority is cited for the latter statement, and there does not appear to be any jurisprudential authority for it. Whether it is a viable extrapolation from the present article is of course open to debate, but since the present article is illustrative rather than exclusive, it is difficult to see how the statement can be correct. If a testator gives "the proportion of my immovable property which is my separate property"

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23. Succession of McCarron, 247 La. 419, 172 So. 2d 63 (1965).

24. Gregory v. Hardwick, 218 La. 346, 49 So. 2d 423 (1950).

25. *Lambert* was not universally popular (pun intended) when it was first decided. Chief Justice O'Niell wrote not one or two, but three dissents in the case—the only instance known to the writer in which one justice wrote three dissents in the same case.

26. Proposed La. Civ. Code art. 1586.

27. See proposed La. Civ. Code art. 1586 cmt. a.

to a legatee, it seems that would fit the definition of a legacy by universal title under the present article; it gives a "certain proportion" of the testator's immovable property to the legatee.

Another comment expresses the view that a legacy of "one-fourth of my property" would not be a general legacy under the proposed article because such a legacy is not within the exclusive listing.<sup>28</sup> But a legacy of one-fourth of a subset of the entire property, such as "one fourth of all my immovables," would be a "general" legacy under the same comment. It will probably take some time to educate Louisiana lawyers to the notion that the assignment of a fraction of a smaller subset of the patrimony is "general" but giving a fraction of the larger set (and without any specificity as to the items of property) is not "general" but rather is "particular."

The exclusivity of the article may prove difficult to administer. In order to fit within the article, the legacy must be "expressly described" by the testator "as one of the following categories." Most persons who write wills without legal assistance (and indeed some of those who do) will not be totally familiar with all of these terms. What if the testatrix says "I leave all of my unimproved real estate to X"? This is arguably a "fraction" of her "immovable property," but she has not "expressly described" the category as "immovable property."

The third category of legacies seems substantively unchanged, though it laudably adopts the more common name of such legacies as "particular legacies" rather than the more cumbersome "legacies by particular title" used in present Article 1625. The proposed article continues the practice, however, of "defining" particular legacies by default: "A legacy that is neither general nor residuary is a particular legacy."<sup>29</sup>

Comment (b) to the proposed article correctly observes that the assignment of parts in a particular legacy does not affect its classification as a particular legacy. But one wonders why this statement was confined to the comments under proposed Article 1587, but was thought worthy of a paragraph in the main text of Article 1585, expressing the same concept as to a residuary legacy. The treatment probably needs to be harmonized: comments both places, or main text both places.

The fact that the proposed categories provoke so much thought and discussion (albeit not necessarily as erudite as the work of the redactors) should give us some pause. Is it worth the certain confusion among lawyers and judges when the terminology and content change? That there are some problems with the interpretations of the present categories cannot be gainsaid, but this is really not the central issue in this effort. The central issue is whether the problems can only be solved by changing the names and definitions of the categories of legacies.

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28. See proposed La. Civ. Code art. 1586 cmt. b.

29. Comment (a) to proposed Article 1587, as Senate Bill 1379 was introduced, stated that the article did not define a particular legacy in the negative by providing that it is not either one of the other two types of legacies but rather "provides a positive definition." This comment must have been written for a earlier version of the proposed article, because it does not fit the version in the introduced bill. This needs correction.



## III. JOINT OR SEPARATE LEGACIES: HEREIN OF LAPSE AND ACCRETION

The revision addresses the nettlesome issue of the joint or separate nature of a legacy in several places, beginning with proposed Article 1588: "A legacy to more than one person is either joint or separate. It is separate when the testator assigns shares and joint when he does not. Nevertheless, the testator may make a legacy joint or separate by expressly designating it as such."<sup>30</sup>

This is plain enough: if the testator calls a legacy to more than one person "joint," then it is joint regardless of whatever else he may do. If he says "I leave Greenacre jointly to A and B, one-half to each," then presumably the legacy will be considered joint, not separate, under this article. This probably restores our law to what it was prior to the controversial decision in *Succession of Lambert*,<sup>31</sup> discussed earlier. The additional language after the dispositive portion of the legacy is regarded as surplusage, doing only what the law would accomplish anyway and thus having no other legal consequence. The difference is that by the insertion of the word "jointly" in the hypothetical legacy, the testator presumably may protect himself against a decision such as *Lambert*, which treated a legacy without that word as not joint because of the additional language at the end.

But what if the testator should write "I leave Greenacre to A and B, one-half to each"? The spectre of *Lambert* is still present. The article would permit the conclusion on the continuing authority of *Lambert* that this is a separate rather than joint legacy.<sup>32</sup> With the continuation of the principle that upon the predecease of one of these two legatees, the share that would have been the predeceased's does not belong to the other if the legacy was separate,<sup>33</sup> the result will be that Greenacre does not belong entirely to the surviving legatee. While one can never know with certainty, this may not have been the testator's intent. The timidity with which the drafters approach *Lambert* is puzzling. It was itself the reversal of about a century of jurisprudence; why should it be entitled to such deference? Would it not be preferable to provide that if a legacy is given to more than one person, it is presumed to be joint? Testators who write without legal assistance will no doubt add "sharing" language, but it could be disregarded as it was pre-*Lambert*.

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30. The proposal jettisons the word "conjoint" used in the present articles with the comment that the change is intended to "highlight the fact that new rules have been adopted" and to avoid the possibility that use of the old term with the new concept would "lead lawyers or judges into error." There is, of course, no magic to the word "conjoint." The word "conjoint" itself was simply an effort to translate the French word "conjointement" which had been used in the version of the article in the Code Napoleon, the Digest of 1808 and the Civil Code of 1825.

31. 210 La. 636, 28 So. 2d 1 (1946).

32. Indeed, it might be argued that the revision enhances the authority of *Lambert* in this instance rather than diminishes it. By offering the testator the possibility of "overruling" *Lambert* or at least avoiding it by the use of the word "joint," could it be said that a disposition which fails to use "joint" is clearly governed by *Lambert*?

33. See proposed La. Civ. Code art. 1592: "When a legacy to a joint legatee lapses, accretion takes place ratably in favor of the other joint legatees, except as provided in the following Article." The following article is an anti-lapse provision applicable within certain familial relationships.

Testators who write with legal assistance and wish to have such a legacy considered separate could simply write a vulgar substitution: "I leave Greenacre to A and B. Should B predecease me, I leave his portion to C." The person providing legal assistance would know that with respect to any legacy to more than one person, the testator should be asked the simple question of what he wants to happen if one of those persons should predecease him. He could be told, in addition, that given that he is leaving property to multiple persons, the law will presume that he wants them to share it in the event of predecease of one among them; and that if he wants a different result, he is free to provide for it.

This would indubitably eliminate considerable jurisprudential debate about the extent to which *Lambert* survives this revision. The proposal appears to trim its wings significantly, but declines the opportunity to repudiate it completely. The cleaner approach would be to write provisions to overrule it,<sup>34</sup> restoring the presumption of jointness in a legacy to multiple persons and permitting a testator to overcome the presumption with clear and unequivocal language.<sup>35</sup>

One other situation of a conjoint legacy under the present law appears to go without treatment in the revision, however, and this omission should probably be addressed in some way. After the declaration in present Article 1707 that a legacy to multiple legatees is conjoint unless parts are assigned, present Article 1708 also provides that a legacy is conjoint "when a thing, not susceptible of being divided without deterioration, has been given by the same act to several persons, even separately." The writer has always believed that this referred to a situation in which, on the first page of a testament, the testatrix gives "the house on July Street" to A and then on the second page, unwittingly, gives "the house on July Street to B." While it could be argued that the later disposition simply prevails over the former and the house belongs to B,<sup>36</sup> such a conclusion would effectively read Article 1708 out of the Civil Code.

But this is not really the point of the present observation. If it is intended that the concept expressed in present Article 1708 is to be superseded by the

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34. Overruling *Lambert* would seem to place our law much closer to the presumed intent of a testator, which is where it is supposed to be in a case of ambiguity. If a testator has taken the trouble to link A and B with a given asset and has simply added "share and share alike" to the disposition, is it not more likely that he would want the survivor of A or B to have it rather than a universal legatee or an intestate heir?

35. There is also a reference in comment (b) to proposed Article 1588 that probably needs correcting. The comment notes that much of the harshness of the *Lambert* rule is alleviated by the substance of proposed Article 1588 and by the "coordinating provisions of Article 1587." But proposed Article 1587 is the "definition" of a particular legacy and seems to have nothing to do with *Lambert*.

36. Present Article 1723 would appear to indicate this result: "When a person had ordered two things, which are contradictory, that which is last written is presumed to be the will of the testator, in which he has persevered, and a derogation to what has before been written to the contrary." There do not appear to be any decisions squarely on point. The substance of present Article 1723 is continued in proposed Article 1615: "When a testament contains contradictory provisions, the one written last prevails. . . ." The concept of "written last" has much more meaning in the context of an olographic testament than it does in a statutory testament, however.

interpretive rule contained in present Article 1723 (and proposed Article 1615), then some note should be taken of that intent in a comment.

#### IV. LAPSE OF LEGACIES

Proposed Article 1589 commendably gathers together various instances of the lapse of legacies which are scattered through multiple articles in the present Civil Code.<sup>37</sup> They are for the most part unremarkable, except for one observation with respect to terminology. As the proposed article uses the term, "lapse" apparently describes the situation in which a legacy that the testator intended to be paid to a given person may not now legally be paid. The reasons for which it may not now be paid may vary. The most common situation is also the clearest: the legatee has predeceased the testator. That legacy, at least insofar as the testator's intent is concerned, must be considered to have "lapsed," and the law must oversee its disposition in some other way. But the legacy may also "lapse" because it is renounced, and under other proposed articles it would belong to certain designated heirs of the renouncing legatee.<sup>38</sup>

In this latter instance, it could be argued that the legacy does not so much "lapse" as it is redirected by the law; but this is probably more precision than is required. The common understanding among lawyers of the concept of "lapse" is that the legacy is, for whatever reason, not going to be paid to the intended legatee. This common understanding appears to be carried out in the use of the term "lapse" in the proposed article.

The more important change in the proposed articles, however, occurs in the subsequent discussion of what is to become of lapsed legacies. Some of the principles contained in this portion of the proposed articles are to be re-enacted from the present Civil Code without change. As in present Article 1704 of the Civil Code, proposed Article 1591 provides that if a particular or general (by universal title) legacy is made but another particular legacy is "carved out of" the first legacy but then lapses, the particular or general legacy benefits from the lapse of that legacy. The proposed article might possibly go a step beyond that, however, by addressing the lapse of a general legacy as well.<sup>39</sup> And as in

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37. Paraphrasing, proposed Article 1589 announces that legacies lapse when the legatee predeceases the testator or is "incapable of receiving" at the death of the testator; when the legacy is subject to a suspensive condition and the condition can no longer be fulfilled or the legatee has died before it is fulfilled; when the legatee is "judicially divested" of his rights in the estate, presumably by being declared unworthy; when the legacy is renounced; and when the legacy is declared invalid or null.

38. See *supra* note 32 and the accompanying text.

39. The proposed article may not necessarily solve all problems. If the testator leaves his movable property to A and the rest of his property to B, the former bequest is a general legacy under the proposed articles. The precise classification of the legacy to B is not entirely clear. If it is considered to be a legacy of all of the testator's immovable property (which is logical, since all of his movable property was given to A and the "rest" is given to B), then presumably it, too, is a general legacy. But it could also be considered a residuary legacy under proposed Article 1585. But

present Article 1707, proposed Article 1592 provides that when a legacy to a joint legatee lapses, it is paid proportionately to the other joint legatees.<sup>40</sup>

But apart from these well-established rules, there are certain changes. Generations of lawyers have learned that "representation does not apply to legacies," meaning that despite what the lay person might expect, a legacy which lapses does not automatically belong to the representatives of the legatee. If a person wants that result upon the lapse of a legacy under the present Civil Code articles, she must provide specifically for it. The proposed articles establish an "anti-lapse" concept such as that known to our common law brethren, although limited to certain members of the legatee's family. Specifically, proposed Article 1593 provides:

If a legatee, joint or otherwise, is a child or sibling of the testator, or a descendant of a child or sibling of the testator, then to the extent that the legatee's interest in the legacy lapses, accretion takes place in favor of his descendants by roots in existence at the time of the decedent's death. The provisions of this Article shall not apply to a legacy that is declared invalid or is declared null for fraud, duress, or undue influence.

This proposal establishes, as its comments suggest at one point, an implied vulgar substitution in favor of certain preferred successors. This provision has a good deal to recommend it, but it is not free of controversy. It is not limited to a particular type of legacy, so one has to assume that it applies to all types of legacies. This gives it a broad application which might possibly be more than the ordinary practitioner or ordinary citizen might expect. There is no question that it favors certain classes of successors (children and siblings of the legatee, and their descendants) over others (residuary legatees). On balance, this is probably what most testators would prefer, if asked; but there is really no practical way to know that. It is commendable that the provision stays with the current rules of representation, *i.e.*, permits this limited form of representation for legacies to the same classes of heirs (children and siblings of the legatee, or their descendants) who are presently permitted the privilege of representation in intestacy.<sup>41</sup> Presumably, the same rules of representation that are applicable in intestacy to these classes will also apply in this instance;<sup>42</sup> a comment to this effect might be helpful.

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if A predeceases the testator and the general legacy to A thus lapses, to whom does it belong? Apparently it would belong to B, since he was given the "rest" of the property, and is presumably the "successor who would have received the thing if the lapsed legacy had not been made" under proposed Article 1591. This is an anomalous result if the testator really intended the legacy to B to be one of all of his immovable property, since he seemed to intend to deny movable property to B, who then ends up with it under the tenets of proposed Article 1591.

40. The same principle is expressed in almost identical terms in proposed Article 1594. Presumably this will be corrected when the bill is reintroduced.

41. See La. Civ. Code arts. 882 and 884.

42. Being in the direct line of descendants, children clearly exclude collaterals in intestacy, and

Several comments under the article clarify specific issues. If the joint legacy is residuary in nature, the rights to which these preferred successors succeed upon the death of one of the legatees include not only ownership of the thing bequeathed, but also the rights of the deceased residuary joint legatee to take legacies that lapse for whatever reason.<sup>43</sup> If the legacy in question is deemed "invalid" for substantive reasons (for example, if it is a prohibited substitution), then the exception does not apply and the legacy will descend to a residuary legatee or in intestacy; but a comment declares that if the legatee is "judicially divested of his rights" through a declaration of unworthiness, then the exception does apply.<sup>44</sup> This is an interesting observation; it highlights a curious dichotomy in the proposed article. If the interest of one of the joint legatees "lapses" because of fraud, duress, or undue influence (that is, arguably for "bad" conduct on the part of the legatee), then the preferred successors do not succeed. The legacy presumably goes to the residuary legatee or in intestacy. But if the legatee's behavior, while still "bad," becomes the basis for judicial divesting on the basis of unworthiness, the exception does apply and the legatee's representatives succeed. The reason for the distinction is unclear.

Other comments are not as clarifying, however. The first two comments announce that the article changes the law by modifying the rule announced in *Succession of Lambert*. This could be misleading to the casual reader. The "rule" announced in *Lambert* is not that there is no representation as to legacies; this had been the "rule" prior to *Lambert* and remained the "rule" after *Lambert*. Rather, the "rule" announced in *Lambert* is that the phrase "share and share alike" added to a legacy destroys the conjointness of a legacy to two or more persons, resulting in a conclusion that the legacy lapses rather than accretes to the putative conjoint legatee or legatees. In fact, this "rule" is not changed by proposed Article 1593. All that proposed Article 1593 does, which is significant enough, is to declare that upon the "lapse" of certain legacies (whether because "share and share alike" is used or for some other reason), a limited privilege of representation is to be allowed. The comment should probably be reworded to delete the reference to *Lambert* as unnecessary, and to some extent misleading.

This brings to the fore another issue. A significant amount of education of the practicing bar will have to take place with respect to proposed Article 1593. Not only is this a change of longstanding principles (although probably for the better), but it is on an issue that will require affirmative action in testaments to negate its effects. If, for example, a given testator may prefer the old rule and does not wish a lapsed legacy to go to certain preferred successors, he will have to provide for that eventuality in the testament. Drafters of testaments will have to be thoroughly informed of the tenets of proposed Article 1593 so that they can

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their representatives would do likewise. Though representation of siblings of the deceased is permitted in intestacy, those representatives would inherit only when there are no children living or represented who would exclude them.

43. See proposed La. Civ. Code art. 1593 cmt. c.

44. See proposed La. Civ. Code art. 1593 cmt. f.

take the necessary steps to assure that a testator's wishes are accurately reflected in the testament.

Subsequent provisions in this same section are superficially appealing, but may have some unexpected problems. Proposed Article 1596 expresses the long-established proposition that if any portion of the estate is not disposed of by legacy, or by accretion in the event of the lapse of this legacy, it descends intestate. Currently, one would state the rule as "if there is a universal legatee, then no part of the estate will descend intestate." Because of the change in the characterization of legacies, and the replacement of "universal legacies" with "residuary legacies" in the proposal, the comment to proposed Article 1596 states the proposition as: "If there is a surviving residuary legatee, no portion of the estate will devolve under this Article." Aside from the general observation that perhaps the replacement of the concept of "universal legacy" with "residuary legacy" is questionable, there is nothing remarkable about the essential proposition expressed in proposed Article 1596.

But the provisions of proposed Article 1595 may be another matter. Proposed Article 1595 provides: "All legacies that lapse, and are not disposed of under Article 965 or the preceding Articles, accrete ratably to the residuary legatees."<sup>45</sup>

It is here that the difference between the present category of "universal legacy" and the proposed category of "residuary legacy" is most prominent. In theory, at least, a universal legacy is taken as expressive of the testator's intent to favor the universal legatee with an eventual calling to the entire of the estate, and it is not difficult then to infer that a universal legatee should benefit from the lapse of any other legacy. But a residuary legacy does not necessarily carry the same import. The "residuary" legacy, even with the new definition, has much more to do with the convenience of describing its substance than with the revelation of an intent by the testator to favor this legatee with all lapsed legacies.

Under the new definition, a legacy of "three-fourths of my estate to A and one-fourth to B" is a "residuary" legacy.<sup>46</sup> Assume that A has predeceased the testator. Under the present law, this legacy would be considered one under universal title, and the lapsed legacy of three-fourths of the estate would descend intestate and would not accrete to B. Making the legacy "residuary" under the new definition, and then providing in proposed Article 1595 that the residuary legatee takes this lapsed legacy, will yield the opposite result: B will be entitled to the entirety of the estate. Since the testator has carefully assigned one-fourth to B, it is difficult to draw this inference from the bequest itself, but that is what the law will do under proposed Article 1595. This particular problem would disappear if the old categories of legacies are retained; this disposition would not

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45. Proposed La. Civ. Code art. 1595.

46. Proposed Article 1585 provides that a "residuary legacy is a disposition of all or a fraction of the entire estate . . . ."

be considered "universal," and thus the lapsed portion of the legacy would descend intestate unless there is a universal legacy elsewhere in the testament.

#### V. MISCELLANEOUS TOPICS: LOSS; FRUITS; PRIORITY OF PAYMENT; DISCHARGE

The remaining articles in the revision address a variety of miscellaneous issues, some more important than others. Proposed Article 1597 expresses predictably the consequences of destruction of property that is bequeathed, but the wording could be improved. As presently proposed, the article provides:

The legacy is extinguished if the object of the legacy is lost, extinguished or destroyed. However, the legatee is entitled to any part of the property that remains and to any uncollected insurance proceeds attributable to the loss, extinction, or destruction, and to the testator's right of action against any person liable for the loss, extinction, or destruction.<sup>47</sup>

In context, this clearly applies only to a particular legacy of a certain object; it would not make sense for it to apply to a residuary legacy or a general legacy. Moreover, it clearly envisions loss, extinction or destruction prior to the death of the testator, so that at the time the will becomes effective, the legacy cannot be carried out. Some clarification in the text on these points is indicated.<sup>48</sup>

There is likely to be some confusion about the proposed article's granting to the intended legatee of the testator's "right of action" against any person who might be liable for the destruction of the object in question. This is a part of the so-called "survival action" governed by Louisiana Civil Code article 2315.1, which provides that such an action "survives" the death of the owner of the property, but in favor of specifically designated beneficiaries (spouse and children first, and in their absence parents, and in their absence siblings) or the succession representative if those beneficiaries do not survive the deceased. Article 2315.1 does not indicate whether this right is one that the testator may give to someone other than the designated beneficiaries.

The matter of succeeding to the rights of a deceased with respect to property damage has an interesting history. Prior to 1961, the case law had established that the right to recover damage to the property of the victim survived only in favor of the beneficiaries designated by Louisiana Civil Code article 2315 as it then read.<sup>49</sup> But in 1961, as a part of the comprehensive amendments introducing the new Code of Civil Procedure, the legislature amended the article to carve

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47. Proposed La. Civ. Code art. 1597.

48. Comment (d) to proposed Article 1597 confirms that this is the intended application of the article, but some expression to that effect in the text would probably be preferable.

49. *Guidry v. Crowther*, 96 So. 2d 71 (La. App. 1st Cir. 1957); *Young v. McCullium*, 74 So. 2d 339 (La. App. 1st Cir. 1954); *Covey v. Marquette Cas. Co.*, 84 So. 2d 217 (La. App. Orl. 1956).

out "damages to property" into a separate paragraph and provided that the right to recover such damages belonged not to the statutorily-designated beneficiaries, but rather was "inherited by [the decedent's] legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse." It seems difficult to avoid the inference from the 1961 amendments that the right to recover damages to the property of the victim, unlike the right to recover damages for personal injury, had become a matter of general succession law rather than tort law. The claim was to be made by the "successors" not the "statutory beneficiaries." Even though the word "legatee" was not included in the list of persons to receive the cause of action, such a testate successor would at least fit comfortably within the group of listed individuals (intestate heirs).

But still later, in 1986, the "survival" provisions of Louisiana Civil Code article 2315 were carved out of that article and, with amendments, were enacted as present Louisiana Civil Code article 2315.1. Once again, claims for damage to property were separated from claims for personal injury damages. The latter "survived," as they always had, to designated beneficiaries.<sup>50</sup> The former also "survived" to the same beneficiaries, but unlike the claim for personal injury damages, "survived" to the succession representative even in the absence of the designated beneficiaries.<sup>51</sup> Thus, as Article 2315.1 presently stands, the right to bring an action against a person allegedly liable for the destruction of a particular object owned by the deceased belongs first to the beneficiaries designated in exclusive order by the statute, or in their absence by the succession representative. This seems to express a legislative determination that the "tort" rights of these beneficiaries are to be preferred to the "succession" rights of the succession representative.<sup>52</sup> If that is true, the granting of these rights to the intended legatee is inconsistent with that philosophy. If it is thought that this right should more properly rest with the intended legatee (which is not at all an undesirable result), then an amendment to Louisiana Civil Code article 2315(B) should be made to insert an intended legatee of the object into the mix of possible plaintiffs before the statutory beneficiaries and the succession representative. This is cumbersome, however, and perhaps the better rule is simply to excise this concept from proposed Article 1597 altogether, and leave the law as it is.

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50. See La. Civ. Code art. 2315.1(A).

51. See La. Civ. Code art. 2315.1(B). Presumably the differing treatment may be explained by the fact that the legislature was unwilling to recognize that the damage to familial relationships beyond those of spouse, children, parents and siblings was significant enough to permit legal action, but was willing to permit recovery even in their absence for a piece of property with easily ascertainable value. This left the law in the curious posture of denying any right to recover for personal injuries to a victim prior to his death to, say, a close cousin who was the succession representative but the only surviving relative, but permitting recovery for the damage to the automobile in which the victim was injured.

52. See generally H. Alston Johnson, III, *Death on the Callais Coach: The Mystery of Louisiana Wrongful Death and Survival Actions*, 37 La. L. Rev. 1, 23 (1976).



Proposed Article 1598 addresses the truly troublesome issue of the right of legatees to "fruits and products" attributable to the legacy from the date of death. It begins with the sensible proposition that these "fruits and products" belong to the legatee but are subject to administration of the succession, if any (as are the legacies themselves, of course). This is not, however, simply a restatement of existing law, and the comments do not make that entirely clear. There is a rule in the present Civil Code which specifies that these fruits belong to a universal legatee from the day of death, but only if a demand is made for them within a year.<sup>53</sup> There is apparently no rule at all for legatees under universal title, though a comment to the proposed article suggests that the French writers recognize a right similar to that of the universal legatee.<sup>54</sup> And the rule for a particular legatee in the present Civil Code is precisely the opposite: there is no right to the fruits of the legacies until a demand for their delivery is made.<sup>55</sup> The proposed rule changes this concept, but the comments do not make that clear.

The proposed article then has a very lengthy second paragraph governing the issue of "fruits" (*i.e.*, interest) of a monetary legacy. It provides first that such a legacy is an exception to the general rule of a right to fruits from the day of death, by specifying that there is a one-year "grace period" from death during which such interest is not due. That period may be extended by court order for "good cause shown," or the amount of interest to be paid may be established by court order. Comment (c) suggests that this is to relieve the succession representative of being an investment advisor, and perhaps this is a good idea. However, one might inquire why the same treatment should not be accorded to other legacies, such as rental property, as to which some "management" of the bequeathed asset might entail negotiation of rental terms that could possibly include "free rent" (*i.e.*, no fruits during a given period).

Proposed Articles 1600 and 1601 deal with priority of payment among legacies, and are essentially unremarkable. They continue the present rules found in Louisiana Civil Code articles 1635 and 1634 respectively, *i.e.*, particular legacies are to be discharged in preference to all others and among particular legacies those of a specific item are to be paid in preference to those of money.<sup>56</sup>

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53. La. Civ. Code art. 1608. If no such demand is made, then the right to the fruits begins only with the "day of the judicial demand, or from the day on which the delivery has been agreed upon." Cf. A.N. Yiannopoulos, *Rights of the Usufructuary: Louisiana and Comparative Law*, 27 La. L. Rev. 668, 676 (1967).

54. See proposed La. Civ. Code art. 1598 cmt. h.

55. See La. Civ. Code art. 1626.

56. Proposed Article 1601 closes with the statement that when a legacy of money is "expressly declared to be remunerative, it shall be paid in preference to all other legacies of money." Probably this is meant to convey the idea that if a legacy of money seems to be in compensation for a debt forgiven or for services rendered, it should be paid before others. The choice of the adjective "remunerative" is probably not wise, however, since this is a term of art defined elsewhere in the Civil Code. If only a general "compensatory" nature to the legacy of money is intended, another

The final articles in this section deal with the discharge of legacies. Proposed Article 1602 provides that "intestate successors and general and residuary legatees are personally bound to discharge an unpaid particular legacy, each in proportion to the part of the estate that he receives." Comment (e) states that "it should be obvious" that the article applies only where successors have been put into possession and there are unpaid cash legacies, followed by a lengthy explanation about why this should be "obvious." The comment is about ten times longer than the text of the article, so perhaps it is not so "obvious" after all. But this is not the primary problem with the proposed article.

If proposed Article 1416 (in another portion of the revision) remains as it is presently proposed, the rule of present Article 1425 that the accepting heirs are not solidarily bound for the debts of the deceased will be reversed, and solidary liability of these heirs of the debts will become the rule. If that is true, then proposed Article 1602 establishes a different concept for the payment of an unpaid particular legacy, since it specifies that each successor should pay the legacy "in proportion to the part of the estate that he receives." This inconsistency should be harmonized. The proposed Article 1602 is essentially the same as present Article 1633; but the change from no solidarity to solidarity in proposed Article 1416 has created the inconsistency.

With regard to general legacies (formerly legacies by universal title), proposed Article 1603 provides that "intestate successors and residuary legatees are obligated to discharge a general legacy, each in proportion to the part of the estate that he receives." Here again, there is inconsistency with the proposed concept of solidary liability. But there is a greater difficulty. Under the proposed classification scheme, a residuary legacy might be one that says simply "all the rest of my property to Jane" following another disposition that says "all of my immovable property to Tom."<sup>57</sup> Under the literal reading of proposed Article 1603 the residuary legatee (Jane) is "obligated to discharge" the legacy to Tom of immovable property, but she has actually only received movable property herself. As a practical matter, this will not create a problem in an estate which is under administration, but could cause confusion in one which is not under administration, or is not proposed to be.

Similarly, the provisions of proposed Article 1604 relative to "limitation of liability" in the discharge of legacies seem only to be relevant to estates which are not under administration. An administered estate will have accomplished the payment of all legacies before the final judgment of possession and discharge of the succession representative, so the problem of personal responsibility of a successor for discharge of a legacy will not be presented. But in the case of a

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adjective would be better. Actually, on balance, the closing phrases of present Louisiana Civil Code article 1635, upon which the proposed article is based, are probably preferable.

57. Proposed Article 1585 provides: "A residuary legacy is a disposition of all or a fraction of the entire estate, or all or a fraction of the balance of the estate that remains after deducting all general and particular legacies." A disposition of all immovables is a general legacy, and the disposition of the "rest" of the estate after that to Jane is a residuary legacy.

succession which is not under administration, when the rules of discharge of legacies discussed in the preceding paragraphs will govern, one has to consider issues of limitation of liability. Proposed Article 1604 introduces a sort of "in rem" concept, in which the obligation of a successor to discharge a legacy only extends to the "value of the property of the estate that he receives, valued as of the time of the receipt." Stated differently, his own patrimony is not exposed to the claim of a legatee or apparently the claims of other successors who might have paid the legacy and are now seeking contribution which would exceed the value of the property received by this successor.<sup>58</sup>

The concept envisioned by the proposed article seems sound; it would be unfair for the legatee charged with discharge of this legacy to diminish his own patrimony to do so. But the concept rests uneasily with some other parts of the revision and with the present Civil Code principles, and should be re-examined.

## VI. CONCLUSION

There is much to commend the work of the Law Institute to the Louisiana Legislature, as there has been in many of the proposals that it has made over the years. But putting aside the minor drafting problems in the text and comments that can be corrected, this review leaves two important impressions. One concerns something the Institute proposes; the other concerns something it does not propose.

What it proposes, of course, is to change the categories of universal legacies, legacies by universal title and legacies by particular title into residuary legacies, general legacies and particular legacies. The case for departing from the traditional categories is not clearly made; the changes made in the scope of these legacies could probably be made without changing their names and without radically changing their content.

What the Law Institute does not propose is the outright overruling of *Succession of Lambert*, preferring apparently to nibble around the edges of its holding. This leaves *Lambert* to cause mischief and is a missed opportunity to eradicate it as contrary to many decades of Louisiana judicial opinion.

The writer left the work of revising Book II of the Civil Code to wiser heads upon departure from full-time teaching in 1984. These comments are offered as

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58. It is unclear how this concept fits with the provisions of La. R.S. 9:5011-5016 (1991) relative to the separation of the patrimonies of the deceased and the successor. Those statutes establish a species of "grace period" of "three months" during which the patrimonies do not merge, in effect, and the rights of the creditors of the deceased prime those of the creditors of the successor as to the assets of the deceased, and vice versa. Following the expiration of this three-month period, it would appear from these provisions that the liability of the successor is no longer "in rem" but extends to his entire patrimony. But see also the puzzling provisions of La. R.S. 9:1421 (1991), to the general effect that all accepting heirs accept under benefit of inventory and do not expose their patrimonies to the debts of the deceased. On this latter point, see generally Katherine S. Spaht, *Developments in the Law—Successions*, 47 La. L. Rev. 471, 479-84 (1986).

an outside observer, to be sure; but as one who still shares with the drafters a common interest in clarity of impression and ease of application with respect to the Civil Code. In this spirit, these observations are advanced.

