An Editorial Note to Professor Malaurie's

SUCCESSIONS AND DONATIONS UNDER FRENCH CIVIL LAW

by Professor Cynthia Samuel

The translation of French legal commentary is well recognized as a valuable service to those who study or practice law. As one of its earliest projects the Louisiana State Law Institute embarked upon the translation into English of eminent French legal treatises. From the late 1950s to the mid 1970s many fine translations were published, among them, the eleventh edition of Planiol and Ripert, *Treatise on the Civil Law* and certain volumes of the sixth edition of Aubry and Rau, *French Civil Law*. The original purpose of the project was to provide commentary in English that would be helpful in interpreting the Louisiana Civil Code of 1870, which in form, and to notable degree in substance as well, resembled the Code Napoleon. These translations have proved useful in practice and are frequently cited by lawyers and judges.

In the last twenty years Louisiana has seen an increased development of its own body of commentary on the Louisiana Civil Code in the gradual appearance of parts of the Louisiana Civil Law Treatise series. Nevertheless, Louisiana civilists still have much to gain from the French. The scholarly product of the small civil law faculties of the Louisiana law schools can never approach the wealth of doctrine that exists in France. Louisiana still needs more commentary since, despite the pessimism of certain law givers that commentary would destroy a codification, the process of examination and reexamination of the law by many, rather than few, capable scholars will keep a codification alive and current, intelligible and susceptible of practical application. As long as Louisiana's civil code does not stray too far from its French older sister, the French doctrinal tradition is an advantage to be enjoyed by Louisiana like the resources of a wealthy and active family.

Moreover, as the European Economic Community expands and unifies and as the search for new markets leads the United States to

increased trade with the countries of the civil law tradition, the interest in the civil law will increase in the United States as well as in other common law countries. The demand for civil law doctrine written in English will rise. Translation of French doctrine thus will increasingly serve an audience broader than jurisdictions like Louisiana whose code of civil law is already related to the French.

For these reasons the Tulane Civil Law Forum is pleased to publish its English translation of the introduction to *Les Successions, Les Liberalités* by Philippe Malaurie. This volume, which appeared in 1989, is part of the multi-volume *Cours de Droit Civil* by Philippe Malaurie and Laurent Aynès published by Editions Cujas, Paris. Philippe Malaurie is Professor of Law, Economics, and Social Sciences at the University of Paris. The Forum is grateful to Professor Malaurie and to Editions Cujas for their permission to publish the translation.

In his introduction Professor Malaurie places the law of successions and donations not just in the context of civil law, but also in its social, philosophical and historical contexts. The American reader will be impressed by the amount of empirical knowledge the French have about themselves with regard to successions and donations. He will see similarity to his own system in certain social and legal developments (e.g., the growing importance of state and private death benefits from pensions and insurance) and dissimilarity in others (e.g., the frequent litigation concerning burials and heirlooms, and the special problems of inheriting rural and residential leases). The terminology should be understandable to anyone with at least a slight knowledge of the civil law. Such a reader will be acquainted with the "reserve" or forced share (share that descendants, and in certain circumstances parents and surviving spouse, are entitled to claim by reducing *inter vivos* donations and legacies) and with collation (the Louisiana term for "rapport," meaning the equal sharing by the heirs at partition unless the decedent has specified an inequality). Louisiana civilists will feel quite at home with the legal institutions Professor Malaurie describes, except perhaps for the donation-partition (a device by which a parent donates property during his lifetime to his children and divides it among them at the same time) and the preferential-

attribution (discretionary allocation by the court of a particular asset to an heir who had a special connection to that asset as his share in the partition of the decedent's estate).

Finally, the Forum hopes that this translation will be of special significance to those engaged in the revision of the Louisiana Civil Code articles on successions and donations. Professor Malaurie has characterized the proposed French revision, a projet drafted by Professors Carbonnier, Catala and Morin, which is currently under consideration by the French Parlement, as retaining the basic theory of the present law while accepting social changes that are an accomplished fact. An innovative or revolutionary revision was apparently not needed or desired. Louisiana must be careful to separate accomplished social change from what is merely the political rhetoric of the day, for it would be a mistake to jettison existing principles that have served well without evidence that new ones serve better.

SUCCESSIONS AND DONATIONS UNDER FRENCH CIVIL LAW

GENERAL PRESENTATION

By Philippe Malaurie*

Sicut nubes...quasi naves...velut umbra[1]

1. Le mort saisit le vif. -- The law of successions[2] concerns the supreme horror, death, the tragedy that dominates the human condition. All that is terrestrial is destined to die, to be totally destroyed and reduced to nothing. All things perish, human beings and things; even corporate bodies grow old and disappear. Nothing that is human can be eternal; all is ephemeral.

But the law of successions is also the law of life. A succession is a conveyance from generation to generation. *Le mort saisit le vif*, as the old legal adage says.[3]

Le mort saisit le vif is first a very living heritage, civilization accumulated through the efforts of past generations and transmitted through the centuries via education. It is the most precious of all patrimonies for it is the spiritual continuity of a society. We are all heirs. Civilization would not exist but for history and successions. Civilization, history, and successions are all the daughters of time and durability.

Le mort saisit le vif is also the link between life and death. Psychoanalysis has made *Thanatos* the companion of *Eros*. Death is

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1. Like clouds . . . like ships . . . like a shadow. Epigraph of the *Mémoires d'outre-tombe*. Chateaubriand was freely inspired by Job 9:26, 14:2, 30:15.

2. **Etymology:** from the Latin *succedere* = to take the place of, to be substituted for.

3. *Infra*, nn. 111, 161, 186.

joined to love,[4] to giving, and to partition. It is not a fortuitous coincidence that the law of donations intermeshes continuously with the law of successions.

Le mort saisit le vif is finally a mystical consolation.[5] It is not only the alleviation of an heir's suffering through receipt of the deceased's assets but also the source of a deeper and more mystical consolation. What follows are two examples.

First, the concept of **the continuation of the deceased's person.**[6] In the ancient past a man was thought to be reborn through his descendants. The modern concept, somewhat debased analogically, is that the deceased's patrimony passes to his descendants[7] and, even more concretely and technically, his successors are obligated to pay off his debts even if in excess of the assets they receive. The mysticism remains: the living pay for the dead. A

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4. Love of death, love and death are classic literary themes. Examples: J. ANOUILH, *Eurydice*: "Death is beautiful. Only she gives love its true climate." Or else, LA FONTAINE, *La mort et le bûcheron.*: "A miserable man called death everyday to come save him. Oh death, he would say, how you appear so beautiful to me!" *Philémon et Baucis*: "It is the evening of a beautiful day." Or RONSARD, *Hymne à la mort*: "How strong and admirable is your power, Oh Death!" Or even more romantic, GOETHE, *Wandres nachtlied:* "You that are the daughter of the sky, calming pain and suffering, full of comfort for someone full of distress, Ah! I am weary of this wondering! What is the value of these pains and joys? Soothing peace. Come. Oh! Come to lodge in my heart." Or even Seneca as Monteverdi has him sing in *Le couronnement de Poppée*, Act 1, Scene 3: "Death is the dawn of an eternal day." Not everyone shares this serenity, to wit the anguish of Macbeth upon the death of Lady Macbeth, Act IV: "Life . . . is a tale told by an idiot full of sound and fury signifying nothing." The theme of death is a recurring one in psychoanalysis. For example, E. TOUBIANA, *L'héritage et sa psychopatholgie*, P.U.F. 1988, p. 138: "Death is peaceful, even more than peaceful. Death is also at the origin and at the service of sexual activity. A rivalry takes place between the survivors and death. Death takes on the appearance of a seducer whose lover is eternity, oh, how much superior to living lovers."

5. Cf. J. CARBONNIER, *Cours de sociologie juridique* 1962-63, for law students at Faculty of Law at Paris.

6. P.J. CLAUX, *Le principe de la continuation de la personne du défunt*, th. Paris 1969. A French Romanist, Accarias, had linked the principle of *continuatio domini* to family co-proprietorship as was the practice in ancient Rome: the *paterfamilias* was the representative of the family group; once he died, the family was not dissolved, so there was therefore no successorial transfer because technically speaking there was no succession (Précis de droit romain, t. 1, 1869, no. 79). A contrary view is held by H. LÉVY-BRUHL, *Heres* in Et. F. de Visscher, rev. int. dr. antiq., t. II, 1949, p. 137 et seq.: "The *heres* is the spiritual head of his family group." Initially, the principle of continued existence of the deceased's person did not have a patrimonial significance but only a religious one.

7. *Infra*, no. 150.

solidarity and a continuity, therefore, exists between the living and the dead.

In a similar fashion, a man's **last will and testament** remains tied to an idea of immortality, a man's power to make decisions and dispose of property even after death. The living execute the wishes of the testator even though he is no longer there to make them respect his wishes. This is perhaps because the wishes of the deceased are viewed as sacred or because one fears the wrath of the dead if their wishes are disobeyed.

Further, in order to soften the unexpected and brutal nature of death, the successorial transfer is often accomplished in two stages, occurring before and after death. For example, in an agricultural setting, one child will work on the farm, slowly assuming a more important role, later receiving a lease or assignment of certain plots from his parents to be followed by a donation-partition with reservation of a usufruct. The amount owed to the other heirs because of their right to equal shares of their parents' estate is payable by installment after the parents' demise.[8]

2. Death and its conflicts. -- The law of successions and its two satellites, donations and partitions, have more than just an appeasement value. In fact, they can produce a totally opposite result. The death of a loved one can engender conflicts, conflicts nourished by greed, jealousy, hate, often intensified by suffering. The battles over successions are more visible, longer lasting, and more inexorable than family peace which draws no attention to itself.

Can one prevent conflict from occurring by proceeding with an anticipatory settlement of one's succession? For example, one could make a donation as an advance inheritance or a donation-partition. However, the cure is often worse than the disease for it gives rise to numerous conflicts not only between heirs but also with the ascendant-

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8. INAMOTO et al., *Enquête sur la transmission héréditaire des fonds agricoles dans l'exploitation familiale en France*, Annals of the Institute of Social Science, Tokyo, 1982 20-110, sq. 47.

donor. Loysel's old saying reveals a time-tested and universal truth: "He who gives before death shall soon suffer much."[9]

A succession gives rise not only to disputes among heirs but also between the heirs and the deceased. The conflict between generations is an enduring one: from Catilina's conspiracy[10] to the African folktale of the coconut tree[11] (both evoked by Carbonnier[12]) one is brought to the young rebels in France who have attained legendary status because of the events of 1968. It is part of human nature (sometimes? often? always?) to accept one's heritage while at the same time rejecting it. For many of my contemporaries, our cultural heritage transmitted via education acts as a constraint, so they reject it (or at least pretend to) in order to find themselves.

The law of successions embodies the human condition and its contradictions: life and death, the mortal and immortal, pain and love, war and peace, death and life, filiation and its denial.

This introduction will examine the following topics: the character and evolution of the law of successions and donations (Section I), the nature and foundation of the law of successions (Section II) and its content (Section III).

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9. LOYSEL, *Institutes coutumières*, no. 668.

10. SALLUSTE, *La conjuration de Catilina*: "It is especially the young whose intimacy he sought out; their soul was still sensitive and malleable and therefore they could easily be entrapped." And Catilina says to them in XX, 10: "The truth be known, I swear before the Gods and men, victory is ours, we have the youth and the courage; whereas they have spent themselves in years and riches." Salluste also indicates that these youths were hoodlums and not good for much.

11. The elders are perched on top of a coconut tree that the young are shaking; the oldest and the weakest fall.

12. *Cours*, *supra*, note 5.

SECTION I

CHARACTER AND EVOLUTION

§ 1. - PURPOSE, SOURCES AND FACTORS

A. -- Purpose

3. Juridical and Sociological Definitions. -- The word succession has a legal meaning that differs somewhat from its sociological meaning. In law, succession is the transmission of the deceased's patrimony to one or several living persons.[13] From an historical and sociological point of view, the word has a broader meaning: it designates all the consequences that death entails for the later generations. It is not only the receipt of property but also the transmission of all benefits and advantages an heir can receive from the *de cujus*.[14] In the past, one's trade, be it farmer, musician, industrialist, etc., was transmitted from father to son. Little by little,

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13. One author has proposed another definition of succession on death: J. HÉRON, *Le morcellement des successions internationales*, th. Caen, Economica, 1986 préf. P. Mayer, no. 39: "Succession does not consist of the transfer of a patrimony but the insertion within another patrimony of all assets rendered vacant by the death of the patrimony's titleholder." This definition cannot be employed in French law because the succession is legally instantly transferred upon an individual's death without there being any period where it is in abeyance. The author denies this interpretation because he believes all succession, even under French law, is a succession to the assets (*op. cit.* p. 8, no. 16).

The classical authors gave the word succession a more general meaning: the act of taking someone's place. For example, the buyer "succeeds" the seller. *Cf.* AUBRY et RAU, t. II, 7 éd. par P. Esmein, no. 67: " A person succeeds another when he receives or acquires because of the law or a man's wishes, all or part of the other's rights with the ability to exercise these rights hereafter in his own name." When it pertains to particular successors this meaning is an anachronism. See, for example, the title of §176 of Aubry and Rau. "Of the position of particular successors from the point of view of rights that are valuable to them in that quality." This is Chinese.

14. The *de cujus* is the decedent whose succession is under examination (*is de cujus successione agitur*). The expression is ancient: even the law utilizes it (Article 767, al. 4, red. L. 9 mars 1891), which is the only example since the Ordinance of Villers-Cotteret (1539) where a French statute employs a Latin expression. M. Peyrefitte, then Minister of Justice, had requested that one speak of "the deceased" instead of the *de cujus* (circulaire du 15 sept. 1977, Def. 77. 549). This was a linguistic trick. It is startling to speak of acts the deceased has taken while alive. In addition, it is ambiguous to speak of the deceased when there may exist more than one (for example, grandfather, father, mother).

this particular conception of heredity is diminishing. However, certain similar cultural benefits remain. Education, for example, is of growing importance; social success depends on university degrees.[15] A university education was itself for a long time influenced by the family environment. Today this is no longer as true: for example, often the children of university professors have the poorest vocabulary and grammar. There is likewise a succession of power, be it economic power (the management of a company), cultural power (there are still some family dynasties where sons follow their father's footsteps as professors, lawyers, doctors), political power, etc. In addition, there exists an extra-patrimonial succession: family name, nationality, the moral right of an author.[16]

The truest succession is, of course, one's children and the love one has given them and which they have given in return, rather than the money one leaves them.

Succession is a transfer of the patrimony by a universal title, which signifies two things. On the one hand, it is the exclusive method of transfer of the patrimony which by its very nature is inalienable. On the other hand, the law is governed by the principle of unity of succession, be it in its devolution or transfer. This rule is set forth in Article 732 ("the law does not consider either the nature or origin of the property in order to regulate the succession"[17]). Although originally etched in stone, this rule is now slowly being altered by contemporary law.

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15. LA FONTAINE, *Le laboureur et ses enfants*: "Restrain yourselves, he said, from selling that which we have inherited from our parents. A treasure is hidden within...but not money. But the Father was wise enough to show them before his death that work is a treasure."

16. J. CARBONNIER, *Cours, supra* , note 5; TERRÉ et LEQUETTE, no. 3.

17. The most notable exception to the unity of succession can be found in private international law, where the succession of immovables is governed by the law of the place where they are found, and movable property by the law of the deceased's last domicile. J. HÉRON *op. cit. supra*, note 13.

B. -- Sources

4. Patrimonial Law of the Family. -- The law of successions and donations constitutes, along with the law of matrimonial regimes, the patrimonial law of the family. It has the same sources as the rest of private law: legislation (particularly the Civil Code), case law, practice (notably notarial in nature), and now even international sources. Thus, the European Convention on Human Rights can block the application of legislation that infringes on these rights, legislation such as successorial discrimination and incapacities affecting illegitimate children.[18]

The law of successions utilizes the legal techniques of patrimonial law to promote family goals. It embodies property law concepts: the methods of transferring property, seizin and possession, the patrimony with its correlation of assets and liabilities, and real subrogation. The law of juridical acts is also represented: the law of contracts (donations and marriage contracts) and the law of unilateral acts (wills and certain renunciations of succession).

All these legal institutions are affected by an element particular to family law: long duration. These acts are spread out over a long period of time, for often they anticipate the effects of death or their effect takes place after death. This time factor makes inflation a special problem. Contemporary legislation has tried since the early sixties to remedy the grossest injustices that resulted from inflation; due to an inherent fact of life, the suppression of one monetary evil has often given birth to another. The law of matrimonial regimes alters the general principles, especially the general theory of obligations.[19]

5. Complexity; the notary; coherence. -- Combining numerous rules of civil law and tax law, the law of successions and, to a lesser degree, the law of donations has always been very **complex.**

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18. Concerning Belgian law: European Human Rights Court, June 13, 1979, R. 83.434, Com. Vieujean.

19. *Droit des régimes matrimoniaux*, nos. 2-5.

Each time that an attempt is made to simplify it, it only becomes more complicated; it is the fate of infectious diseases.[20]

The **notary** exercises a primary role in the application of succession law. He has a creative function because by adapting legal formulas he often creates new ones. He is a peacemaker except when he or one of his clerks acts negligently. The notary, as one used to say, is the family counsellor because he prevents litigation; he is, as we say today, the intermediary who overcomes the conflicts and obstructions that the anticipation of death and death itself provoke.

The proposed draft reform legislation would grant him an even more active role in family affairs: the court could order a notary to take urgent and conservatory measures with the succession property (Articles 812 and 814-3).[21]

The law of succession, while complex, is perhaps the branch of law with the most **coherent** character. It is an interrelated system of rules; one cannot modify one without another being affected. Therefore, in the law of successions, minor reforms do not exist.[22]

6. Genealogists. -- Other professionals besides the notary are involved in successions, most notably, the genealogist.[23] The profession, which first appeared around 1830, is dedicated to finding possible heirs when a succession appears to be vacant. Genealogy[24] is the investigation of ancestors, that is to say the biological basis of the inheritance.[25] The genealogist under a contract of **disclosure of**

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20. Ch. NICOLLE, *Naissance, vie et mort des maladies infectieuses*, Alcan, 1930. *Cf.* the conclusion, p. 218. "The infectious disease is like other biological phenomena. It has the characteristic of life which seeks to perpetuate itself and which tends toward equilibrium."

21. *Infra*, no. 19.

22. BEUDANT-LE BALLE, no. 7.

23. **Biblio.**: F. MALÉZIEUX, *Les généalogistes devant la loi*, th. Lille, 1910; J. Ch. LAURENT, *Le contrat de révélation de succession*, rev. crit., 1931, 397.

24. **Etymology**: ancient Greek for "family" and "study of."

25. According to M. Yan Thomas, *Le traité des computs du jurisconsulte Paul*, in P. LEGENDRE, *Le dossier occidental de la parenté*, Fayard, 1988, p. 30, that comments on the *liber de Gradibus* (treatise on degrees) of the Roman jurisconsult Paul (3rd century A.D.), genealogy was the heart of Roman civil law. "That is to say the institutional armor of the Roman people . . .. At the heart of the civil law was the law of successions; the transfer of patrimony from the dead to the living and the relative roles of each individual in this continuous renewal of parental stakes, projected onto the

succession promises to make known to his client a succession of which he is unaware.[26] The remuneration is a percentage of the net amount received by the heir.[27]

The contract will only be upheld if the succession would not have come to the heir's attention without the genealogist's intervention. Due to the aleatory nature of the contract,[28] a genealogist's fees cannot be reduced by the court even if they appear excessive.[29] A genealogist is therefore not subject to rules concerning agents or even those governing the liberal professions, though he is considered to be a professional.[30] The courts have declared the contract *sui generis*.[31] A

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patrimonial register, represents the central function of the civil law, the axis on which all its operations are situated."

26. For example: 1) B obligates himself to reveal to the undersigned persons the existence of a hereditary right open in their favor but unknown to them. 2) B obligates himself to provide the required proof necessary for the undersigneds' claim to be recognized as heirs. 3) In the case of failure for whatever cause, including the intervention of heirs with closer affiliation, a will which disinherits the heirs, or the estate's debts being greater than its assets, B shall bear the cost of any expenses he incurred.

27. For example, if the heir is a nephew or a niece of the *de cujus*, the fee received by the genealogist is based on the following schedule: 50% (up to 20,000 FF), 45% (between 20,000 and 50,000 FF), 40% (between 50,000 and 100,000 FF), 35% (between 100,000 and 500,000 FF), 30% (for amounts over 500,000 FF). The system of remuneration is almost the equivalent of that of taxes imposed on certain transfers, except that the genealogist's honorarium is regressive, whereas taxes are progressive.

28. If a genealogist cannot prove his client's rights or if a will exists disinheriting his client, then any expenses incurred by the genealogist must be borne by him; he therefore runs the risk of loss or a chance of profit, which is what characterizes the aleatory contract.

29. At the head of an extensive body of case law is Civ., 7 mai 1866, D.P., 66.I.247; S., 66.I.273: "This fee of 100,000 FF takes into consideration the possibility that Nevoit (the genealogist) was assuming risks and perils that could have entailed a considerable loss of money if the case had been lost." *See also* Civ. 1, 17 avr. 1956, B.I., no. 169; D., 56.427; J.C.P., 56.II.9314: "Because of the contingent nature of the agreement under which the genealogist agrees to reveal a succession to an heir who is unaware of it for a percentage of the inheritance a judge is not allowed to reduce the contractually stipulated remuneration." *See also* Civ. 1, 3 nov. 1960, B. I, no. 471; J.C.P., 60.II.11884. This case law has received the approval of A. Rouast, *La réduction judiciaire de la rémunération des généalogistes*, J.C.P., 1954.I.1179, who believed that the profession "constitutes almost a public service." (Should we then make their honoraria subject to a set fee schedule?)

The Court of Cassation in an earlier case had come to a directly opposite conclusion: Req., 7 fév. 1855, D.P., 55.I.205, 2d espèce; S., 58.I.530: "Nevoit (the genealogist) was hired by the widow Grésillon in his capacity as businessman; he acted from that point forward as an agent; and the payment awarded for his services was subject to the sovereign determination of the courts who were not strictly bound by the terms of the contract between the genealogist and his client."

30. *Droits des contrats spéciaux*, 2d éd., nos. 548-549.

31. *Ibid.*, nos. 3, 532.

client cannot even invoke the law of December 22, 1972 governing sales made in the home because once the revelation is made to the client, the genealogist has performed under the terms of the contract and the client can no longer retract his acceptance.[32]

On the other hand, if the heir and his address were known by the deceased's entourage and notary, then there is no secret; the contract is therefore void for lack of cause.[33] However, even if the heir knew of the succession, the contract would be upheld if performance under the agreement was not contingent upon the discovery of a succession but rather depended only on the research and establishment of a genealogy.[34]

7. Judge's role and power as mediator. -- Besides the judge's traditional duty of resolving submitted cases by interpreting and applying the law, the judge has, as in the area of family law[35] and matrimonial regimes,[36] been accorded an independent power under contemporary law. The judge's power to act as mediator between the parties is slowly evolving, a power similar to the one granted judges in the past. This power is in marked contrast to the Napoleonic Code's mandate that a judge must strictly adhere to the law.[37]

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32. Civ. 1, 19 mai 1981, B. I, no. 171; D., 82.161, n. J.F. Barbiéri; J.C.P., 82.II.19914, n. M. Coutot: "It is by a literal interpretation of Article 8-1-C, which excludes Articles 1 to 5 of the Law of December 22, 1972 from applying to services performed immediately and personally by the individual, that the Court of Appeal held that the genealogist Maillard had already performed the essential part of the service to be rendered at the time of Mme Davoise's acceptance of his offer, and therefore found the litigated contract valid."

33. Civ. 1, 18 avr. 1953, D., 53.403; J.C.P., 53.II.7761; G.P. 53.II.I: "Beaubernard (the genealogist) had not rendered any service to the heiress nor had he assumed any risk; the heiress would have become aware of the succession without the genealogist's intervention; from these facts the Court of Appeal was able to deduce that there was no revelation of the unknown and therefore the agreement of November 26, 1944 could not be upheld."

34. Civ. 1, 26 nov. 1968, B. I, No. 299. In this case, Monnehaye knew he was an heir at the time he contracted with the genealogist: "He asked the genealogist to procure the proof necessary for his rights to be recognized." The contract was found to be valid and that the judge could not adjust the fee to be received, which is debatable since the work done by the genealogist Coutot is not in this case very different from that done by other professionals.

35. *Droit de la famille*, no. 17.

36. *Droit des régimes matrimoniaux*, no. 18.

37. J. PATARIN, *Le pouvoir des juges de statuer en fonction des intérêts en présence dans les règlements de succession*, Et. P. Voirin, L.G.D.J., 1967, p. 618 et s.