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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* Professor of Law, Economics, and Social Sciences, University of Paris. Translated by Jacqueline Constance Hea, J.D. Tulane University, 1989. The first edition of this text was published in the French language by Editions Cujas of Paris under the title: *Droit Civil: Les Successions, Les Libéralités* by Philippe Malaurie. The authorization to translate and to publish has graciously been given by the author and the publisher.

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.

For example it is the judge, who when faced with ownership in indivision, must balance the different interests in order to justify measures derogating from the general law in favor of one of the co-owners: maintenance of the indivision (Article 815, al. 3), preferential attribution (Article 832, al. 8 and 832-1, al. 1). The judge may also have to decide what is the "common interest" which justifies relaxing the rules of management (Article 815-5) or taking urgent measures (Article 815-6). In the area of donations, it is the judge who authorizes a revision of the charges or conditions (Article 900-2). The draft reforms[38] further accentuate this tendency, for example, in defining the grounds for unworthiness (Article 727), in setting the date for the beginning of divided ownership on the basis of the date used to appraise the property to be divided (Article 861, al. 3, which codifies contemporary case law), in moderating the *ultra vires* liability of an heir for the decedent's debts (Article 787, al. 2) and in rectifying the partition of an inheritance if it is afflicted with a vice of consent (Article 887, al. 3).

Here, as elsewhere, this discretionary power has the merit of making the law more flexible and increasing its ability to deal with an infinite variety of factual patterns: the law thereby loses its rigidity. This discretionary power does however present the inconvenience of unpredictability, the encouragement of litigation and the delayed settlement of successions.

**8. The jurisprudence: the great decisions.** -- The jurisprudence in the area of successions has the same role as it has in other areas of the civil law: it applies, moderates, and creates the law. Many landmark decisions, the so-called masterpieces of the *Cour de Cassation*, have been issued on the topic of successions. The most important decisions were those rendered in the nineteenth century, especially the 1860s, when the reforms of the Napoleonic Code were assimilated and mastered, for example, the rules governing forced heirship. These decisions are models of their kind, noteworthy for their elegant style, psychological depth, and their method of reasoning. The reasoning always commences with an articulation of the principles

38. *Infra*, no. 20.

in question, because the complex and technical questions can only be resolved through reference to the fundamental principles which stand above the law of successions. The coherence of the law of successions is due to the case law.

There are few cases,[39] but litigation once undertaken is generally quite bitter. The most violent hatred that exists is the one between family members, especially siblings. The cases primarily concern estate liquidation and division, especially the issue of preferential attribution that places the equality of succession in question.[40] "Equality, how many suits are brought in your name!" These court battles have occurred during all of history and among all classes.[41] However, in the nineteenth century, as distinguished from today, the cases all involved the very wealthy, whereas today the litigants are families of more modest circumstances and are often farmers.

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39. M. FAUCHEUX-BUREAU, *Le contentieux des successions en France*, Rev. rech. jurid., 1987, 241 et s., sp. p. 253. Between 1975 and 1984 cases relating to successions represented 1.6% of the decisions rendered in France. (The Directory of Judicial Statistics found it to be 2.84% for 1983 and 1984.) During the period 1975-84, there were five to nine cases per thousand deaths. (The Directory of Judicial Statistics found it to be 18 to 20 per thousand deaths for 1983 and 1984.)

40. M. FAUCHEUX-BUREAU, *op. supra*, note 39. Half of the cases dealing with successions concern estate liquidation and division (1983: 47.29%, 1984: 58.42%). The cases are brought predominantly by farmers (23.65% of cases concern farmers while in the actual French population they represent only 2%) and merchants (4.5% of the cases versus 1% of the population).

41. The cases present a human panorama that reminds one of *les danses macabre* of the sixteenth century. At the head of the farandole is the tax collector who comes to claim his due accompanied by a recent arrival, the bank, who is today omnipresent. Followed by the grand funeral procession: of princes (*Youssopoff*), of princesses (*de Beauveau-Craon*), of dukes (*de Gramont*), of marquises (*d'Ecquevilley*), of barons (*de Méneval*), of well known families (*de la Rochefoucauld, de la Boussinière*), of priests and monks (especially in the early 1900s because of the "secular" laws), of actors (*Sacha Guitry*), of dancers (*Nijinsky*), of writers (*Zola, Alphonse Daudet*), of doctors, of charlatans, of press magnates (*Amaury*), of painters (*Claude Monet, Bonnard*), of designers (*Coco Chanel*), of swindlers (*Stavisky*), of merchants (*the Gilbert cafes, the Fauchon grocery stores*), of a few notaries, of charitable organizations (*the French Red Cross, the Orphans d'Auteuil* (often), *the French Foundation* (in process)), of cultural groups (*Goncourt Academy, the Catholic Institute of Lille*), of country folk (many), of soldiers (of all wars beginning at Waterloo and then Sébastopol, the deportation camps, the North African campaign). There are natural deaths and violent deaths (suicide), second and third wives (very often they do not get along with the children, especially daughters of the first wife), large families (in the past) and smaller families (today), bachelors, lovers, and homosexuals. One relives the glory of the Empire (*the Baron of Méneval*), the construction of the Suez Canal (*the Duke of Gramont*). But let us stop this litany: it is all life and all death.

**9. Doctrine: dwarfs perched on the shoulders of giants.** -- The doctrine is rich and wise in content. The law of succession is an exalted area of the law because of its complexity and interrelationship with all other areas of the law. The law of succession unites theory and practice and reveals the deep and intimate workings of a society. The past has known the greatest in the field; we are all indebted to them. We are dwarfs perched on the shoulders of giants.[42]

The theoretical debates concerning the law of successions are famous and continue to be transmitted from generation to generation even if the problem giving rise to the controversy has been resolved. Academicians continue to debate issues such as the continuity of the deceased's person, seizin, the declaratory effect of partition, and the nature of matrimonial advantages. Contemporary authors are freely positivists and technicians.[43] Certain among them are futurists, notably the notaries, who at each annual convention continue to request reform of the law of successions.

**10. Sociology.** -- By means of information provided to the tax authorities,[44] one can determine contemporary succession and donation practices. These are only approximations, however, since an estate is sometimes exempt from tax. In addition, there are many ways of evading the law:[45] undervaluation, disguised and indirect donations, manual gifts, and other frauds.

Since the 1950s, the number of successions declared to the tax authorities has varied little. Donations, which had been steadily declining since 1960, started to increase in the 1970s. "Donation-partition," after having greatly diminished until the 1960s, has since

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42. Gabriel le Bras used this expression in his history course on canon law given at the Faculty of Law at Paris in the fifties. The phrase has also been ascribed to Saint Thomas Aquinas, speaking of Saint Augustin. An English poet can console us for being the dwarfs that we are. Coleridge said "The dwarf sees farther than the giant when he has the giant's shoulder to mount on."

43. M.-C. DE ROTON-CATALA, *Essai de contribution à une réforme des successions entre époux*, th. Paris II, 1986, mimeographed, no. 53.

44. A. FOUQUET et M. MERON, *Héritages et donations*, Economie et statistiques, juin 1982, p. 83.

45. *Infra*, no. 114.

then been utilized more frequently. Donations by means of marriage contracts have markedly decreased.[46]

In 1977, 95 billion francs changed hands because of donations and successions (2% of the value of all patrimonies). Successions comprised 57.8% of the total; and donation- partitions and other kinds of donations accounted for 27.5% and 9.9% respectively.

Three out of four donors are past the age of sixty. They are somewhat younger (by six years) than persons whose property is transmitted through successions. This minimal age difference reveals the close ties between donations and successions. Gratuitous transfers are made primarily by men (56% by successions, 58% by donations). Donations are made primarily by farmers (62%). Enterprises, especially agricultural enterprises, are most likely to be given by donation. A donation, as opposed to a succession, permits the donor to make a transfer of property at an earlier age. Of course, this is relative because in practice these gratuitous transfers are made by persons over sixty years old. These deferred transfers are one of the causes of France's economic stagnation. The French legislature has even passed tax measures to encourage donation-partition at an earlier age.[47]

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| Years | Successions | Donations | | |
|---|---|---|---|---|
| | | Total | Donation-partitions | Donations by marriage contract |
| 1951 | 284873 | 100940 | 32659 | 22089 |
| 1964 | 123915 | 92130 | 28082 | 12766 |
| 1980 | 242733 | 144862 | 53800 | 500 |

SUCCESSIONS AND DONATIONS IN PRACTICE

47. *Infra*, no. 1046. *See also* M. FAUCHEUX-BUREAU art. *supra*, note 39 sp. p. 250. "The great majority of inheritances are not large in value. Not infrequently there is no inheritance to be distributed which is often the case when the deceased is a minor or foreigner." In 1984, eighty percent of successions went untaxed even though the government had decreased the real value of the exemptions so that successions of lesser value which are more numerous would be subject to tax.

Children represent the majority of heirs (58%) followed by spouses (18%). Siblings and ascendants are most likely to inherit when a person dies young. Their share diminishes as the deceased's age increases.

The most salient feature of contemporary successions law is its proletarianization, a product of the slow dissipation of acquired family fortunes.[48] The estate is increasingly comprised of what the *de cujus* earned during his lifetime (the "acquêts" under old law) which serves to explain the growth of a surviving spouse's rights to the detriment of the consanguineous heir.

Therefore, the inheritance no longer fulfills the function it once had. Before World War I, the person who received an inheritance saw his life change. At that time a "fortune"[49] was an important factor in determining one's social status; the fortune was a product of past generations and destined for future generations. Today the principal source of an individual's wealth is earned income, especially with women working more and more. An inheritance now constitutes nothing more than a settlement of accounts (with the possible exception of landed property). One should not forget, however, the moral and cultural heritage that is the most precious of inheritances.[50]

## C. -- Factors

The law of successions and donations pursues social goals governed by four kinds of factors: ideological, demographic, political, and economic.

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48. According to a study made by the C.R.E.P. (Center for Economic Research on Savings) in 1975, 45% of couples over 65 disposed of a patrimony of less than 50,000 FF, less than 30% of blue collar workers were in a position to leave a substantial patrimony; 90% of professional couples were in a position to leave property: D. KESSLER, *Aides, donations et héritages*, Economie et statistiques, janv. 1979, p. 31.

49. **Etymology** - from the Latin *fors* = chance, which gave *fortuna* = destiny, in the plural *fortunae* = riches.

50. *Supra*, no. 3.

**11. Ideology.** -- Like the rest of family law, patrimonial family law interprets a system of ideas and values which vary according to time and place. We will limit ourselves to enumerating a partial list of the key questions. How is the family defined? Is it comprised solely of the couple, or the couple and their children, or the couple, children, and ascendants, or the couple, children, ascendants, and collateral kin? If collaterals are included, to what degree? Is the spouse part of the family? Is the family linked through marriage? What is more important: solidarity or independence? What place should liberty and affection have in family relations? Do men and women occupy identical positions? Should an illegitimate child have the same rights as a legitimate child?

What is the role of law in this area? Should it be indifferent or take an active role through the issuance of commands and prohibitions?

**12. Demography: The elderly without children.** -- The influence of demography on the law of successions is unquestionable, though hard to measure. Two facts are evident: the increase in life expectancy and the steep fall of the birth rate, which combine to produce a rapidly aging population. However, these two givens have not significantly altered the rhythm of transmission of property by succession: about three times per century.

In 1817, the average life expectancy was 39; in 1967 it was 70; and today it is probably around 74 or 75.[51] Over half of the national wealth belongs to septuagenarians, an age where it is generally not advisable to enter into new undertakings especially if one is a surviving spouse who is subject to the economic inconveniences of usufructuary restrictions.[52] At the time the Civil Code was promulgated, the heir was generally a minor. His inheritance allowed him to start his active life. Today, an heir is generally in his pre-retirement years. The inheritance no longer serves as a beginner's investment fund, but rather serves as a pension.

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51. J. CARBONNIER, cours *supra*, note 5; L. SEBAG, *La méthode quantitative en droit privé*, D. 1963, Chr. 203; TERRÉ ET LEQUETTE, no. 25. *Cf.* également M. BUREAU-FAUCHEUX, art. *supra*, note 39.

52. *Infra*, no. 91.

These realities are unquestionable. What is the proper legislative response? Should it be the abolition of the surviving spouse's usufruct? The preferential treatment of early estate settlements accomplished by means of donation-partition?

The effect of a falling birth rate on the law of successions is even more uncertain.[53] Perhaps it will lead to the development of collateral successions.

In any case, the combination of longer life expectancies and a falling birth rate means that a growing number of families comprise four generations. The great-grandparents and grandparents outnumber children, grandchildren, siblings and cousins: a pyramid turned upside down. Ascending successions are thus coming about, which is contrary to the normal meaning of succession.

**13. Politics: aristocrats or equals?** -- The law of successions and donations influences a nation's politics.[54] For a long time, it was a body of law that concerned only the rich, the class most likely to leave a succession and to make donations.[55] The politics pursued by the law of successions and donations can reflect either aristocratic or egalitarian preferences. It can be an instrument of socialization.

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53. *Infra*, note 59.

54. A. DE TOCQUEVILLE, *La démocratie en Amérique*, t. I, 1835, pp. 76, 77. "I am surprised that ancient and modern writers did not attribute succession laws with a greater influence on the conduct of human affairs. These laws belong, it is true, to the civil order, but they should be placed ahead of the political institutions because they have incredible influence on the social organization of a people of which the political laws are but the expression. To a certain degree they take hold of generations before their birth." Comp. TERRÉ ET LEQUETTE, nos. 17-23.

55. For Montesquieu, under a **monarchy** where the guiding principle is honor, that is to say, social rank, one's wealth must be preserved so that there exists a nobility capable of sustaining the monarchy. In contrast, in a **democracy** where the guiding principle is frugality, there must be equality of fortunes. For example, in *Esprit des lois*, L.V. Ch. VI: "As the equality of fortunes promotes frugality, so frugality promotes the equality of fortunes . . .. It is a very good law in a commercial republic that gives to every child an equal share of his parents' succession. The law through estate division assures that every child will always be less rich than his father; he is thereby encouraged to flee from a life of luxury and to work as hard as his father."

An **aristocratic society** is governed by the principle that wealth must be conserved within the family: all the assets that come from the family must remain with the family. In contrast, acquets, the property acquired by the *de cujus* from the fruits of his labor and investments, are not governed by this principle.

This principle of wealth conservation becomes the command of an aristocratic law of successions. Special rules must be conceived for the family property, especially real property, so that it devolves unequally to a consanguineous heir by the system of male preferences and primogeniture. Some rules must take into account the family origin of the real property: *paterna paternis, materna maternis*. The property of paternal origin goes to heirs under the paternal line and the property of maternal origin goes to heirs under the maternal line.

Family wealth preservation becomes also the principle of matrimonial law where separate property is given special treatment in order to prevent it from passing to the spouse.[56]

Finally, an aristocratic regime of donations favors provisions that keep property within a family. That law frowns upon provisions that strip away family property to the benefit of third parties, notably the spouse, especially in the case of a second marriage.

All of the above characteristics of the law serve to contrast an aristocratic society from an egalitarian society.

The rejection of inheritance is the romantic and political theme of an **egalitarian society** (J.J. Rousseau, Saint-Simon) which few jurists have taken up, save in a moderate form.

The law of successions will then be dominated by an egalitarian spirit: all property regardless of its nature or origin, be it family property or acquisition, movable or immovable, must be apportioned in equal shares to legally designated heirs. In addition, transfer taxes make property return to the state so that it can subsequently apportion it.

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56. *Droit des régimes matrimoniaux*, no. 10.

For the same reasons, donations made to heirs must be forbidden since they would create the disgrace of inequality. The practice of making donations is less objectionable, however, when the recipient is a third party, notably the spouse.

In regard to matrimonial regimes, egalitarianism has been less pronounced until the day arrived when a new civil equality, that between the sexes, has been claimed and confirmed by the law.

**14. Economic factors.** -- Two contemporary economic phenomena have decisively affected the evolution of the law of successions. They are the proletarianization of society and the appearance of new sources of wealth which make property dependent upon its exploitation:

1) The **proletarianization** of the law of succession is the result of a gradual dissipation of acquired fortunes. The principal source of wealth has become one's employment rather than capital.

2) Paradoxically, the proletarianization of the civil law coincides with the appearance of **new sources of wealth** - for instance, all the incorporeal property rights. Examples are literary and artistic property, industrial property, commercial property, all corresponding to a transformation of the concept of property into one of appropriation closely linked to exploitation. The successorial devolution of these forms of wealth is often subject to laws different from those governing other property.

In addition, other forms of after-death transfers have been developed such as life insurance, social security, and annuities granted because of the deceased's on-the-job accident or traffic accident. These acquisitions of capital are distinctly original in that the "successorial" transfer is done through a third- party intermediary, and above all these are work-related successions where the fund's capital has been provided indirectly by the *de cujus*' income.

In the last century, Balzac[57] then Frederic Le Play[58] and his school denounced the egalitarian spirit of the Napoleonic Code. Le Play characterized it "as a machine to hack up the ground." The mandatory partition of property into equal shares certainly had an impact on France's agrarian landscape and even had an effect in terms of family planning if one is to believe certain authors.[59]

However, from 1938 on, the law of successions has attempted to maintain or rather reestablish the economic unity of enterprises. It has sought to avoid the fragmentation of inheritance, first in the case of agricultural successions and then later for other types of enterprises.

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57. For example, H. DE BALZAC, *Le curé du village:* "'You have put your finger on France's great ill,' said the justice of the peace. 'The cause of this harm springs from the Title on Successions of the Civil Code that requires an equal division of assets. There is the pestle whose constant grinding breaks up the territory of France, individualizes fortunes in denying them stability, and, by decomposing without ever recomposing, shall finish by killing France."

58. For example, F. LE PLAY, *La réforme sociale en France*, I, 1866, pp. 183 et s.: "Under a system of forced conservation, a father can with the agreement of the son who shall inherit, continue to work until the end of his days. Under a system of mandatory division (which for Le Play meant the Civil Code system) a father is forced to abandon his work as soon as he approaches old age. The enterprise he has established by his genius and foresight is destined to perish, and this view dissuades him from working toward the end. The enterprise could not in effect be run by all his children simultaneously because for an economic operation to be prosperous it requires a unified management and agreement on its objective. The enterprise could not be run by either father or son without subjecting the enterprise to legal problems with mortgage and collective ownership. In practice, the enterprise is almost always sold to a third party or divided up among the heirs; in either case, the enterprise has lost the elements of its success, those linked to the practices of the enterprise's founder." At the end of the century, all the great novelists (R. Bazin, H. Bordeaux, P. Bourget) would criticize successions based on an equal partition of the deceased's assets.

59. Compare the skepticism of J. Carbonnier (Preface to P. CATALA, *La réforme des liquidations successorales*, Defrénois, 3rd edition, 1982, p. 11 no. 8): 1) The Napoleonic Code, according to Balzac and Le Play, would have encouraged couples to have only two children. 2) The right of the eldest according to Diderot caused persons not to have more than one child. But the decline in the birth rate begins in the middle of the eighteenth century, a time when the law of successions allowed primogeniture and favored males.

## § 2. -- EVOLUTION

The law of successions and donations has directly followed the evolution of property law and especially family law. Its sources can be found in Roman law (I), customary law (II), revolutionary legislation (III), the Civil Code (IV), and in contemporary law. Each epoch continues and at the same time departs from the tradition of the period that preceded it.

## I. Roman Law

**15. Unity of succession, *ordo successivus*.** -- The essential characteristics of Roman law can, through substantial simplification, be reduced to three.

1) Even though the issue today is a controversial one, early law seems to have been governed by the idea of family co-ownership from which flow the principles of unity of succession, of *patria potestas* and the agnatic family.[60] The head of the family (the *pater familias*) exercised the communal family rights. The heirs of the deceased, at least when they were *heredes sui*, took the place of the deceased. The *continuatio domini* therefore signified that children did not, properly speaking, receive an inheritance, but rather received the right to freely manage the property. All heirs had the same rights be they female or male, the youngest or the eldest child.

2) In the sixth century Justinian, in Novels 118 and 127, totally reorganized successions *ab intestat*[61] by creating the *ordo*

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60. *Supra*, note 6.

61. **Etymology**: from the Latin *intestatus*; "in" represents the Latin negative.

*successivus*, inspired by the presumed wishes of the deceased. This corresponded to a more individualistic than family-oriented understanding of successorial transfers. The devolution of a succession was done in accordance with the class and degree of kinship. One's forefathers were divided into classes and within each class, kinship was divided into degrees. Heirs were classified into four classes: descendants, ascendants, privileged collaterals (brothers, sisters, and their descendants), and ordinary collaterals (uncles, cousins, nephews) up to the sixth degree. The closest class was preferred over the furthest class. Within each class, the closest relative by degree was preferred over the furthest. This was the system employed by the Napoleonic Code and set forth in Article 731 to which was added the spouse by the ordinance of December 23, 1958.

The addition of the spouse does render the *ordo successivus* more complex. In Rome, even under Justinian, the spouse was considered an intruder and therefore did not inherit until after collateral kin of the sixth degree. However, in the case of closer heirs, the widow without resources could benefit from the "marital fourth."[61a] One should also note that a will could modify these rules, and this frequently occurred.

3) Lastly, Roman law was characterized by the predominance of testamentary successions, the main object of which was the institution of an heir, and thus a result inconsistent with *ab intestat* devolution.

## II. Customary Law

**16. Fragmentation of succession: lineage.** -- A French customary law of successions did not exist because in this area, more so than in others, customs were diverse and chaotic.[62] There

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61a. J. TURLAN, *Recherches sur la quarte du conjoint pauvre*, R.H.D. 1966, 210-239.

62. **Biblio.** P. PETOT, Doctoral classes taught at the University of Paris Law School, 1952-53; 1955-56, *Les cours de droit*, mimeographed.

were some common principles, however, which were more or less inspired by feudal ideas and which resulted in a system profoundly different from Roman law. The guiding concept was conservative: to insure the cohesion of a family line by preserving the family property, that is, the property acquired through successions or donations. An inheritance belonged less to an individual than it did to his family, an almost immortal group of whom he was but an ephemeral representative. Death did not, properly speaking, entail a succession: the property simply returned to its origin. This had three important consequences:

1) Devolution according to legally set preferences predominated. Wills were introduced quite late, never played an important role and never permitted the institution of an heir: *Deus solus heredes fecit* (Only God creates heirs).

2) Customary law was governed by the principle of family wealth conservation; the family ought especially to protect land, the primary source of power in those days. There no longer existed the concept or unity of the deceased's estate. The succession was divided, and the nature and origin of each piece of property determined its devolution. The real property that the deceased had received by succession or donation (his separate real property) was to return to the family members through which it had entered the family *(paterna paternis, materna maternis).*[63] In contrast, movable property and acquets devolved as they had under Roman law.

3) Finally, certain heirs benefited from the successorial privileges of primogeniture and the male preference,[64] notably the *droit d'aînesse*. At the end of the *ancien régime*, in many of the *coutumes* only vestiges of these rules existed, although very visibly. The law of

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63. BEAUMANOIR, *Coutumes de Beauvoisis* (1283), no. 494; "If I inherit from my father and my father dies and I die without heirs, then what I inherited from my father shall not go to my mother because my mother is alien to the inheritance received from my father, as is my father alien to the inheritance that comes to me through my mother." V.J. PLAENEL-ARNOUX, *La règle paterna paternis materna maternis en droit coutumier français*, th. Caen, 1962, mimeographed.

64. Cf. FERRIERE, *Corps et compilation de tous les commentateurs sur la coutume de Paris*, 1714, "Women are born to be housewives and not to lead armies or fight."

successions was insidiously becoming egalitarian. In fact, the customary law had always had egalitarian aspirations, attempting to insure an equitable distribution among the different heirs. The complexity of customary law can therefore in part be explained by its attempt to reconcile privilege and equality.

## III. Law of the Revolutionary Era

**17. Equality, unity and public order.** -- The legislation of the Revolutionary era[65] completely remodeled the law of successions by pronouncing a uniform rule applicable to all of France, the law of 17 Nivose, Year II.[66] It can be summarized in five points: (1) It wished to establish a new egalitarian social order. Any privilege granted on the basis of nationality, sex, age, or legitimacy was abolished. (2) It assured the unity of succession. No differentiation was made between real and movable property or family property and acquets. (3) Measures such as the division of the estate for apportionment to the heirs of the mother's or father's side and inheritance by representation were developed in order to splinter successions. (4) It based the system of devolution on parentage. (5) Testamentary freedom was reduced to almost nothing in order to assure adherence to the new law's principles.

In contrast to Roman law, the law of the Revolution was not based on the right of the individual to control the disposition of his property but rather on what the law considered to be the best method of organizing the family, a theory abandoned by the Napoleonic Code.

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65. **Biblio.:** A. DEJACE, *Les règles de la dévolution successorale sous la Révolution* (1789-1794), préf. P. Petot, Bruxelles-Liège, 1957; M. GARAUD, *La Révolution et l'égalité civile*, Sirey, 1953; Ph. SAGNAC, *La législation civile de la Révolution française*, 1898; ARON, *Etude sur les lois successorales de la Révolution française depuis 1789 jusqu'à la promulgation du Code civil*, R.H.D., 1901. 444 et s., 585 et s., 1903, 673 et s.

66. Jur. gén., *see Succession*, p. 152.

## IV. Napoleonic Code

**18. Rome plus the Revolution.** -- Simplifying considerably one can state that the provisions of the Napoleonic Code on successions have three characteristics: a more or less conscious return to Roman law, important areas left to individual volition, and the maintenance in essence of republican ideology.[67]

The principle posited by the law of the Revolution on the **unity of succession** was kept and even reinforced. All distinctions based on the nature and origin of property were set aside (Article 732). Anomalous successions and *la fente* (the apportionment of property to the mother's and father's side) became exceptions of little significance. The unity of succession constitutes one of the cornerstones of French succession law. In the nineteenth century, Aubry and Rau would systematize it and provide its ideological justification. They related the unity of succession to the unity of the patrimony (Article 2092); both emanate from the personality of the deceased.[68]

The heirs are determined on the basis of their **successorial class** and their degree of kinship (Article 731), as in Justinian's Novels 118 and 127. Nevertheless, contrary to traditional French law, the family circle is no longer without boundaries. The family, while still quite extended, does stop at the twelfth degree (Code Napoleon article 755, al. 1)[69]

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67. **Biblio.**: A. COLIN, *Le droit de succession dans le Code civil*, Livre du centenaire, 1904. I, 295-325.

68. Ex.: AUBRY ET RAU, IX, 6th éd., par P. Esmein, 1953, §573, p. 306: "The concept of a patrimony is the corollary of the concept of a personality." §575, p. 310: "Based on the human being who is indivisible, a patrimony logically has the same characteristic." §582, p. 343: "The collection of a person's assets does not lose by his death its character of juridical universality." §609, p. 465. "Inheritance by its very nature, is one and indivisible like the patrimony of a living being."

Aubry and Rau's theory is today often criticized. *E.g.* J. HÉRON (see Footnote 13), who goes as far as to say (No. 26): "Aubry and Rau's theory that the person of the deceased continues through his heir is no longer widely held." (No. 29): "If one absolutely must use the word at least one should specify that it is what's left of a patrimony, in other words, the cadaver of a patrimony to which succession law attaches."

69. Art. 755, al. 1 anc.: "No relative beyond the 12th degree inherits."

Similar to Roman law, though the technique has changed, a substantial share of the estate can be freely disposed of by the testator, the disposable portion being a function of the proximity and number of heirs (Articles 913-916).

The egalitarian ideology of the Revolution continues to manifest itself in many respects. The masculine preference and primogeniture have been abolished (Article 745, al. 1). Property will be diffused since each heir is entitled to receive a share of the estate. (Article 826, 827, al. 1 anc.[70] and 832 anc., 2d sentence[71]).

## V. Contemporary Law

**19. Legislative evolution: fragments and various movements.** -- The law of successions has experienced a legislative evolution similar to family law.[72] But its evolution began at an earlier date and was comprised of a series of piecemeal reforms. It has not undergone the same large-scale transformation which family law has undergone since 1964. Due in all probability to its technical nature, it has not incited the same passionate debate as family law .

From the end of the nineteenth century, legislation has consistently modified certain portions of succession law in blow-by-blow fashion: reduction of the successorial degree (L. 31 déc. 1917); spouses' rights (the most important of these laws being the first one, that of March 9th, 1891) and rights of illegitimate children (L. 25 mars 1896 et 3 janv. 1972); collation, reduction, and ascendant's partition (L. 7 fév. 1938; D.L. 17 juin 1938; L.3 juil. 1971); preferential

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70. Art. 827 anc.: "If the real property cannot be divided easily then it must be sold, the sale to be overseen by the court."

71. Art. 832 anc.: "One should attempt to make sure that every share has the same quantity of real property, rights and debts of the same character and value.

72. H. VIALLETON, *Famille, patrimoine et vocation héréditaire en France depuis le Code civil*, Et. Maury, Dalloz, 1960, II, 577-594. Comp., M. DAGOT, *L'esprit des réformes récentes du droit successoral*, Et. Marty, Toulouse, 1978, 305-340. Ph. RÉMY, Trav. Ass. H. Capitant, Istambul, 1988.

attribution (a series of laws since February 7, 1938); indivision (L. 31 déc. 1976); deferred compensation (D.L. 29 juil. 1939); revision of taxes on donations (L. 4 juil. 1984); and endowment funds (L. 23 juil. 1987 on patronage of the arts).

Each law was the legal expression of diverse and complex societal changes: the decrease in size of the family group, the improved treatment of illegitimate children and spouses, and the need to compensate for the effects of inflation.[73] The unity of succession has been beseiged by the appearance of new forms of wealth that have their own rules of devolution. The traditional rule of unity was altered especially in order to preserve "professional patrimonies,"[74] notably agricultural enterprises. Reform in the sector of agricultural successions paved the way for later reforms in other sectors. Equality has been accepted as a moral principle, though it is slowly being transformed into an equality based on value: it tends to be sometimes insidiously abandoned for the benefit of a sort of privilege of the person managing an enterprise.

**20. Draft reforms: a little bit of everything.** -- Proposed reforms have been long and carefully studied and should shortly be submitted to Parliament (this book is written in December of 1988). In contrast to past reforms, these reforms cover a variety of rules; they do not limit themselves to one in particular. Nor do they seek to rewrite the entire section of the Civil Code but only several chapters and sometimes not in their entirety. These proposed reforms are hardly marked by a modernistic ideology. Many of the reforms have, in effect, already been achieved.

Under the current version, the proposed reforms are styled "various provisions related to successions" and deal mostly with technical questions: the opening of a succession, the successorial option (especially the benefit of inventory), partition, and vacant

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73. P. HÉBRAUD, *L'instabilité monétaire et les règlements d'intérêts familiaux*, Et. G. Ripert, L.G.D.J., 1950, t. I, pp. 499 et s.; P. CATALA, *Les règlements successoraux depuis les réformes de 1938 et l'instabilité économique*, th. Montpellier, 1954.

74. M. GRIMALDI et B. REYNIS, *Brèves réflexions d'avant-congrès sur le patrimoine professionel*, Def. 1987 a. 33947, no. 1.

successions. The proposed reforms are the work of Messrs. J. Carbonnier (author of other past civil reforms), P. Catala, and G. Morin. Parliament is likely to add the sole political item which interests it, a reform of titles concerning the vocation to the succession and the forced inheritance of a surviving spouse.

The reforms do not pay the same respect to "the key numbers" which other revisions of the Civil Code have shown. Even if Articles 815 (precariousness of indivision) and 883 (declarative effect of partition) remain in place, Article 832 (preferential attribution), which is a famous text, has been renumbered to become Articles 838 to 841. Some of the new renumbered articles are elegant in their language. Article 832 which states, "The law shall not consider the nature nor the destination of property to determine its apportionment" is symmetrically similar to a key article of the Code, Article 732 which reads, "The law shall not consider the nature nor the origin of property to determine its succession." The proposed reform thus continues to perpetuate the unity of the patrimony despite its contemporary disintegration. The texts of some other articles are also elegant. For example, note the conciseness of paragraph 2 of Article 832: "The equality in partition is an equality in value." This provision is revolutionary in principle, but in reality reflects an acceptance of changed conditions (which is often the case with revolutions). The proposed reforms are therefore a mixture of transformations, of completions, and of preservation, with preservation no doubt prevailing.

More insidious are changes in tax laws to deal with the growth of transfer taxes and the termination of numerous tax exemptions. Tax law does not directly concern the civil law, but it indirectly challenges the foundations of the law of successions.

## SECTION II

## NATURE AND FOUNDATIONS OF THE LAW OF SUCCESSIONS

### § 1. -- NATURE

**21. One will: the law's or the deceased's?** -- Successorial devolution *ab intestat* can be analyzed from two points of view.

One view is that *ab intestat* devolutions should reflect primarily the presumed wishes of the deceased. This idea, Roman in origin, derives from the majority of testamentary dispositions and ties itself to the autonomy of the will, thereby making the succession *ab intestat* rest on the presumed wishes of the deceased. The law's role is to reveal the probable wishes of the deceased.

A contrary view is that the succession *ab intestat* rests on the force of the law. The law imposes its concepts of family and property by designating those persons who shall inherit. This is certainly the theory behind French law even though the relationship between successions by law and testamentary successions remains uncertain. The current tendency is to accord priority to the succession by law, but this is only a tendency.[75]

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75. *E.g.*, BEUDANT-LE BALLE, no. 88, asks if in reality universal legatees are not instituted heirs. Other authors hold that no hierarchy exists between these two modes of succession. *E.g.*: H. VIALLETON, *Les legs faits par les réservataires et l'attribution de la réserve*, R., 1940-41, p. 1, sp. p. 23: "These two post-death methods of transmission perform parallel functions in separate settings. Each is perhaps capable of complementing the other without requiring a hegemony which would upset the established balance." See also: *Regards sur quelques problèmes d'organisation successorale*, Annuario di diritto comparato, 1938, p. 299 et s.; n. S., 1938.I.181; M.A. GUERRIERO, *L'héritier légataire*, Et. P. Hébraud, Toulouse, 1981, p. 441 et s.

## § 2. --FOUNDATIONS

The foundations of succession law are two in number: transmission (I) and devolution (II).[76]

### I. Transmission

**22. Property and succession.** -- In the past one would debate the very issue of property transmissions through successions, an issue linked to the foundations of property law. In the seventeenth century, Grotius and Domat viewed the transmissions of property through successions as a question of natural law, whereas Montesquieu[77] in the eighteenth century connected it to civil law in order to underline the power the law had in this domain, most notably the power to impose equality, an equality that did not result from the nature of things. What remains true today is that the negation of every successorial transmission is related to the negation of property itself. There is no such thing as property if successorial transmissions do not occur.

Today the true question is essentially one of the scope of successorial transmission. It appears legitimate that one share of the successorial patrimony return to society principally through taxation. The debate over successorial transmission has largely become a fiscal one.

### II. Devolution

There is also the question of knowing who shall inherit a succession and what is the basis of his right to receive. Numerous explanations have underlined the relationship between the law of successions and family, economic, and social policies. There does not exist one single idea that explains successorial devolution in France;

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76. **Biblio.**: M. VALLIER, *Le fondement du droit successoral en droit français*, th. Paris, 1903; J. TESTUT, *L'influence de la destination des biens sur leur transmission successorale*, th. Paris, 1983, mimeographed.

77. *Esprit des lois*, L. XXVI, ch. VI: "The law of succession relies on the principles of civil and political law and not natural law principles."

rather, it is primarily a combination of four concepts: the conservation of family wealth, the presumed affection of the *de cujus*, the duty of the *de cujus* towards his heirs, and social stability.

**23. Preservation of family wealth.** -- Since the Revolution, the law's concern for family wealth preservation is not as important as it was under customary law. The concept still plays a role, but it is no longer in conformity with the economic realities of our time. The principle has a purpose with regard to immovables of family origin. These are linked to one's ancestors. However, one cannot offer a similar justification for property acquired by the *de cujus*, or for movables, which are destined to circulate.

The principle does still have a double influence - one negative, the other positive.

The principle has a **negative** effect in the context of *ab intestat* devolution. It tends to prevent a person outside the family from acquiring property of maternal or paternal origin. Thus we find *la fente* (Article 733). When a succession devolves to ascendant or collateral kin, certain of which are tied to the paternal line and others to the maternal line, the succession is divided in half: one half for the paternal line and one half for the maternal line. The principle disfavoring outsiders also applies to the spouse (Articles 765-767), and, up until 1972, to the illegitimate child (Articles 756-763-3), who were both considered outside the family even though bound by very close ties to the deceased. The spouse's right of succession continues to be a weak one.

The **positive** side of property conservation within the family is that it justifies the first rule of devolution to heirs by blood, who are even forced heirs when they are descendants. It also has the result of attributing property to a member of the family from whose side it originates. This is the regime of the anomalous succession. The general rule is that the law of successions does not consider the property's origin to determine succession (Article 732). The anomalous succession derogates from this rule though one should note that today anomalous successions are declining. Since 1972 the only kind of anomalous succession that exists is that of simple adoption

(Article 368-1). The reasons justifying the derogation are similar to the ones propounded by the jurisprudence for family heirlooms and which the law envisioned for the preferential attribution concerning certain enterprises and for the family home. This is true even though the issue in these latter situations is more one of the property's destination than the property's nature or origin.

**24. Presumed Affection?** -- France for a long time established legal rules on *ab intestat* succession on the basis of a presumed will. This is attributable to the influence of Roman ideas. The law of succession would therefore have had certain sentiments as its *raison d'être* .

The decisive factor in *ab intestat* successions would be the closeness of the ties between the deceased and the heir. The law should try to determine what the testamentary dispositions would have been had a will been written. Family evolution appears to confirm this rule. To the extent that the family circle tightens and is reduced to the conjugal group, so the inheritance of the surviving spouse increases. However, this amount still remains inferior to what the presumption of sentimental attachment would lead one to expect, assuming one can make presumptions about feelings.

But it is difficult to base successorial law upon a simple probability, which in many cases, is inexact. It is equally difficult to base the law on sentiments which, by definition, are inconstant. Finally, even less can sentiment explain the forced share: affection is necessarily free, it does not impose itself.

**25. Family obligations.** -- This last basis on which the rules of *ab intestat* successions are founded is the most familiar. It is grounded in the conception the law has of the duties owed by each individual to various family members[78] or, to be more precise, towards one's close family, those that were a part of the deceased's daily life. Today it is less a question of duties arising from kinship than of those arising from proximity.

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78. *See, notably*, MAZEAUD-BRETON, no. 662.

This duty can be understood in three ways: a duty to provide a start for one's children, an alimentary obligation, or an obligation to reserve a certain share of the succession for particular heirs.

The family patrimony had as its *raison d'être* to assist children in establishing themselves. This reason is not as valid today because of the increase in longevity. The children inherit when they are fifty years old. The inheritance would more likely permit the grandchildren to establish themselves.[79]

The law sometimes makes an heir's rights dependent on his needs, needs which confer alimentary rights[80] upon him, rather meager in nature. This was the situation prior to 1972 for children born of adulterous unions (old Article 762, al. 2) and continues to apply today sometimes to the surviving spouse (currently, Article 207-1, red. L.3 Jan. 1972). In this case the spouse probably does not have the title of heir but there are certain advantages in that.

Finally, there exists an inter-relationship between the list of forced heirs and the alimentary creditors. This explains the duty of the *de cujus* to leave a part of his property to the closest family members. Nevertheless, the correlation is not absolute. For example, if an heir renounces his inheritance, he does not lose his alimentary rights even though he does lose his forced share. In addition, close heirs such as ascendants have no right to forced heirship if they are in competition with descendants or privileged collaterals, but they do retain their alimentary rights. This is primarily due to the fact that forced heirship is determined independently of need and therefore does not have an alimentary character.

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79. M.-L. LEVY, *Les transformations de la famille*, Population et sociétés, Inéd., nov. 1984, no. 185; H. LE BRAS et N. BROUARD, *Evolution de l'écart entre les successions en France de 1900 à nos jours*, Inéd., Population, 1979, no. 2, pp. 465-471; H. LE BRAS, *Parents, grands-parents, bisaïeux*, Inéd., Population, 1973, pp. 9-38; M. VILLAC, *Les structures familiales se transforment rapidement*. Economie et statistique, no. 152, fév. 1983.

80. E. ALFANDARI, *Droits alimentaires et droits successoraux*, Et. R. Savatier, Dalloz, 1965, pp. 1 et s.

**26. Social stability.** -- Certain contemporary authors, restating the ideas of Domat, see in successions an element of social stability and economic continuity.[81] Succession allows a society to retain the *statu quo*; this is one of society's deepest aspirations.

## SECTION III

## THE CONTENT OF A SUCCESSION

Everything that makes up the patrimony of the *de cujus* is devolved by successorial transmission: assets and liabilities, rights and obligations. The transmission is governed by the principle of unity of succession with two exceptions: rights granted for a lifetime (§1) and "special successions," which introduce a certain "breakup" of the succession (§2).

### § 1. -- LIFETIME RIGHTS

**27. Extinguished by death.** -- Rights and obligations which are extinguished upon the titleholder's death are not transmissible. For example, this includes usufruct, alimentary rights, and debts payable until death. This is also true for rights considered to be *intuitu personae*. However, a suit for damages, be it for physical or moral injuries, can be transmitted to the victim's universal successors.

A joint bank account is governed by special rules because of regulations concerning solidary liability.[82] Upon the death of one of the account holders, the bank can remit all that is contained within the account to the surviving party. The deceased's heirs may, however,

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81. FLOUR ET SOULEAU, *Successions*, no. 2; TESTUT, *op., supra*, note 76, nos. 34-40.

82. *Droit des obligations*, no. 726.

contest the bank's action under Article 1198, al. 1.[83] If the surviving account holder has made withdrawals after the death of the other party, he must reimburse the heirs for the withdrawals and give them half the account balance, unless there exists an agreement or proof to the contrary.[84]

## § 2. -- SPECIAL SUCCESSIONS

There exists property that while transmissible because of death has special rules of devolution that derogate from the fundamental principle of the unity of succession (Article 732). If the phrase did not have a precise technical meaning, one could call these kinds of successions "anomalous successions."[85] It is the peculiar quality of today's "proletarian" successions and matrimonial regimes, which stem exclusively from employment, that explains the special place of professional property and property of the spouse. Sometimes it will be up to a judge to decide who shall receive the property. This breakup of the succession reflects the singular nature of certain types of property, the decomposition of the contemporary family, the variety of family groups, and the difficulty that the law has today in fixing a general rule.

This new group of singular quasi-successorial rights subject to devolution includes social security payments,[86] pension death benefits,

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83. R.M. ministre just., 19 déc. 1969, J.C.P., 70.IV.44.

84. *Infra*, no. 398.

85. *Infra*, no. 107 *et. seq.*, A. BRETON, n. D., 1981.17; Def. 1981, a. 32580, concerning the continuation of the rural lease after the death of the holder: *see also*, Rep. civ. V. *Succession*, nos. 529-531, which has a large section on anomalous successions, Comp. MARTY ET RAYNAUD, no. 119; SÉRIAUX, no. 47 et s., TERRÉ ET LEQUETTE, no. 232 who speak, first of "special rules," then of "special vocations" and then of "special successions."

86. 1) **Old Age Pensions**: C. séc. soc., a. L. 353-1: "In case of death of the insured, the surviving spouse has the right to a reversionary pension if he satisfies criteria concerning personal income, length of marriage, and age."

2) **Death benefits**: C. séc. soc., a. L. 361-1: "Death benefits guarantee to the beneficiaries at the death of the insured an amount equal to a multiple of his base pay as defined in Article 323-4." A.L. 361-4: "The amount is paid to the surviving spouse not separated in law or in fact from the deceased, or by default to his descendants."

3) **Widowhood benefits**: C. séc. soc., a. L. 356-1: "Widowhood insurance guarantees the surviving spouse payments when certain conditions are fulfilled."

life insurance, damages received for the accidental death of the *de cujus*, and joint bank accounts.[87]

One can now take up specially family heirlooms, family burial plots, intellectual property rights, and rural and dwelling leases.

**28. Family heirlooms or souvenirs.** -- A "family heirloom"[88] is property that has such a profound meaning to the family that it eclipses its monetary value. This type of property includes family records, that is to say, quasi-historic documents addressed to or issued by a family member,[89] decorations, and family portraits. These objects are not governed by the ordinary rules of successions and partition, but rather the judge must select as the recipient the person having the closest ties with the deceased.[90] For example, the male heir, the first born,[91] or the spouse.[92] This area of succession law derogates greatly from the standard law of succession.

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87. *Supra*, no. 27.

88. **Biblio.**: J.-F. BARBIÉRI, *Les souvenirs de famille, mythe ou réalité juridique*, J.C.P., 1984 I.3156; M. REYNAUD-CHANON, *Les souvenirs de famille, une étape vers la reconnaissance de la personnalité morale de la famille*, D. 1987, Chr. 264. *See also* R. LINDON, *Dictionnaire juridique, les droits de la personnalité, see Souvenirs de famille*, Dalloz.

89. Civ. 1, 21 févr. 1978, de Méneval, B. I, no. 71; D., 78.505, n. R. Lindon; J.C.P., 78.II.18836, concl. contr. Gulphe; Def. 78, a. 31764, no. 35, p. 866, n. G. Champenois: "Family heirlooms are not subject to the laws of successorial devolution and partition established by the Civil Code but rather can be entrusted, under the title of deposit, to the care of the most qualified family member as determined by the courts; this exception to the general rules should not be extended to encompass documents that do not concern the family, that were not written by family members, or were not addressed to them." In this case "the Court of Appeal found eight letters written by the Emperor Napoleon to the Empress Marie-Louise were family heirlooms and thus not subject to successorial partition based on the fact that it was probable that these documents came into the hands of the First Baron of Méneval because of his post as Secretary to the Empress." The higher court overturned the judgment of the Court of Appeal.

90. Req., 14 mars 1939, D.P., 40.I.9., n. R. Savatier: "It is the judge's responsibility when faced with disagreements between heirs to make the decision of who shall receive objects such as war decorations, weapons, family portraits, which because of their special status as family heirlooms have an essentially sentimental value and therefore cannot be made subject to the usual rules concerning estate division."

91. Req., 30 juin 1942, D.A., 43.3; J.C.P., 43.II.2254, n. R. Savatier.

92. Req., 14 mars 1939, *supra*, note 77.

The heirloom concept is vague. Can a building be a family heirloom? In my opinion - no.[93] Can a family heirloom be given or bequeathed by its original owner? In my opinion - yes. Alienated by its present owner[94] or seized by his creditors? In my opinion - no.

The rules governing heirlooms are also vague. Who is the owner? Is there a joint family ownership with one person entrusted with care of the object[95] or are we talking about an extraordinary partition rule?[96]

The family burial, meaning both the tomb itself and the funeral arrangements, is subject to special rules. The law here is oriented more towards the respect of an individual's rights than family rights. The law's goal is for the wishes of the deceased to be respected and that his remains rest in peace.

**29. Funeral arrangements.** -- The disagreements over funeral arrangements, the place and character of the burial, are horrible. The wishes of the deceased must be respected according to the secular law of the 15th of November 1887.[97] The jurisprudence has decided despite the letter of the law that testamentary form is not required.[98] If

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93. Req., 30 juin 1942, *motifs*, *supra*, note 78; *Cf.* aussi R. LINDON, n. *supra*, note 89.

94. Paris, 7 déc. 1987 (réf.), D., 88.182; J.C.P., 88.II.21148, n. J.F. Barbiéri: This case concerned an "Emile Zola Collection" which contained the original manuscript of the article "*J'accuse.*" The last heir "in name and in blood," as possessor of these heirlooms, wished to auction them off. The court at the urging of another family member suspended the sale: "the legal title that Brigitte Emile-Zola has to the document will not allow her to evade the duties and obligations emanating, not from the fact that the document is, stricto sensu, family property, but rather because of its tie with the past and the family, a family which has not yet been reduced to a sole survivor."

95. Req., 30 juin 1942, *supra*, note 91; Civ. 1, 21 fév. 1978, *de Méneval*, *supra*, note 89.

96. Req., 14 mars 1939, *supra*, note 90.

97. *E.g.*: Civ. 1, 17 fév. 1982, B.I., no. 81; D., 83.255, n. M. Beaubrun: "The deceased had personally expressed the desire to return to his native country." The court overturned a presidential order that had authorized burial in France and had rejected the decedent's request that he be buried abroad.

*E.g.*: Civ. 1, 18 déc. 1985, *sol. impl.*, B. I, no. 360: the *de cujus* can forbid his children to take part in his funeral.

98. *E.g.*: Civ. 1, 9 nov. 1982, B.I, no. 326: the *de cujus*, a bachelor, had written to his parents three years before his death: "Not far (from the village of Mazet) there is a little plateau where from I never tire of looking at the stars during most August evenings, there are woods nearby and a cemetery which shall one day be my final resting

the deceased has not expressed a preference, the judge must decide which of the deceased's close relatives is the one best suited to make the decision in the deceased's name. The judge looks at all the circumstances but in general the decision is left to the spouse[99] and not to the deceased's descendants, ascendants, collateral kin,[100] or concubine.[101] For such pain as there can be, the ties of matrimony are stronger than those of a free union.

The will of the deceased is not omnipotent. It can only have power over heirs. For example, a deceased's will cannot obligate a Catholic priest to celebrate the burial mass in Latin.[102] The deceased's body can only be cremated or interred.[103]

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place." One would think he reads from Francis Jammes. The trial court judgment which gave no effect to this letter because "doubts existed over the letter's testamentary character" was overturned by the Court of Cassation.

The same rules apply to **revocation**: Req., 23 avr. 1912, D.P., 13.I.41, n. app. H. Capitant: "The revocation can be tacit and will have to be recognized when the change of mind is evidenced by precise and non-contradictory facts which when taken together demonstrate that the testamentary provisions are irreconcilable with subsequent acts of the deceased." In this case, the *de cujus* in his 1890 will, which had not been expressly revoked, "had set forth his desire to be buried with a civil ceremony," but the president of the tribunal in 1911 "nevertheless ordered the deceased would receive a religious ceremony because it was established that in the days preceding his death, the deceased, who was lucid and of sound mind, had through his general attitude, his words, and deeds manifested the intention to alter his will on the subject of the nature of his burial." This is similar to the story R. Martin de Gard told in his novel, *Jean Barois* (1910-1913). On this same holding see also *infra*, no. 527.

99. *E.g.*: Civ. 1, 31 mars 1981, B. I, no. 114: "the widow of the deceased was the person most qualified to interpret and execute the presumed wishes of the deceased on this point."

100. Example of where the sister won over the spouse: Civ. 1, 14 oct. 1970, B. I, no. 265; D., 71.94: "The sisters of the deceased, with whom he had kept affectionate relations, were more qualified than his widow to determine his wishes and execute them, because at the time of death the widow was in the process of getting a divorce, the divorce having been instigated by the husband."

101. Douai, 19 avr. 1975, D., 78.86. In this case, the battle was between the deceased's lover and his legitimate child: "Whatever ties of affection may have united the lady Germaine LeFebvre to Grillo with whom she lived for seven years and by whom she had a child, she still cannot be considered a member of the deceased's family within the legal meaning of the term and therefore cannot prevail against Grillo Nicolas, the legitimate son of the deceased." *Contra*, Dijon, 22 avr. 1986, D., 86, I.R., 408; *Cf.* also Civ. 1, 8 juil. 1986, *infra*, note 115.

102. T.G.I., Argentan, 1 fév. 1973, D., 74.789, n. J.F. Vouin; J.C.P., 73.II.17473, n. H. Mazeaud; G.P., 73.I.243; Chambèry, 26 nov. 1985, G.P., 86.I.423. Cf. also C. comm., a. L. 364-1, al. 1: The funeral arrangements are organized in accordance with the wishes of the deceased or those of his close family "in conformity with custom and according to different religions."

103. C. comm., a. R., 363-16, al. 1: "Before his burial or cremation, the corpse of the deceased is put in a coffin." The only exception being fetuses of less than six months. Cr. 7 août 1874, D.P., 75.I.5, 2d case; S., 75.I.41: "The being that comes

Funeral arrangements are expensive.[104] Today certain life insurance policies allow the *de cujus* to pay for these costs in advance.[105] Current law does not regulate contracts entered into between individuals and funeral homes. The law in this field limits itself to awarding a monopoly to the municipality and its chosen agents (L. 9 janv. 1986; D. 14 janv. 1987; C. comm., a. L. 362 et s.). The courts will only annul a contract with a funeral home if the consent was legally defective, such that the funeral home exploited the heir's emotional pain to the home's advantage,[106] a mixture of fraud and duress. The courts will not readjust a mortician's fees solely because they are excessive, because the contract is considered to be a "contrat d'entreprise."[107]

**30. Burial place.** -- The **transmission** of burial places[108] is not subject to the general rules of successorial devolution[109] because burial places are property of a special nature. The civil rules are based

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into the world prematurely who is not only deprived of life but also the organic qualities necessary to exist constituted but an undefinable being and not a child." Comp. R. THÉRY, *La condition juridique de l'embryon et du fœtus*, D. 1982, Chr. 231.

Burials at sea are however allowed if the person died on the ship. Cryogenics, the conservation of a cadaver in the hopes that it can be brought back to life, is forbidden. Mummification is also forbidden.

104. Examples of costs. A class A burial in Paris which consists of body conservation, religious ceremony (luxury coffin in mahogany, copper plaque, bronze cross with Christ), and burial in pre-existing plot is 36,972 FF. A class B burial in a rural community, transportation of the body, and burial: 34,231 FF.

105. The future decedent can sign a "burial contract" with an insurance company, the premium paid depending on his age and chosen policy. Upon the individual's death, the insurance company will pay the funeral home and if there is any money left over will remit it to the beneficiary named by the policy holder.

106. Req., 5 déc. 1932, D.H. 33.3; S., 33.I.61: "G. . . paid the funeral home for additional services; the court found because of the emotional pain he was suffering due to the death of his sister, he lacked the liberty to discuss, or accept, or understand the nature and scope of these additional services; therefore, G could deduct the price of these additional services from the amount owed the funeral home."

107. Civ. 23 oct. 1945, S., 48.I.144; R., 49.99, n. J. Carbonnier: *Cf.* MALAURIE ET AYNES, *Droit des contrats spéciaux*, 2d éd., no. 707.

108. **Biblio.**: A. RAISON, *La transmission des concessions funéraires et des tombeaux*, Journ. not. 1988, a. 59291. Rep. Civ., *see Sépulture*, 1987, par Berchon; R. LE BALLE, *De la nature de droit du concessionnaire de sépulture*, th. Paris, 1924.

109. Req., 7 avr. 1857, D.P., 57.I.311: "Tombs have always been held sacred with all people and during all periods, by religion and by family piety; the tombs as well as the ground on which they are built have always fallen outside the ordinary rules governing property and its free alienability; these pious constructions cannot be sold, exchanged, or alienated in any other fashion nor do they have a monetarily determinable value and do not form part of the partitionable inheritance."

purely on custom, the written regulations being administrative in nature. When the tomb is located in a communal cemetery, then the rights attached to it are established by a grant (L. 23 prairial an XII, a. 12; auj. C. comm., a. L. 361-12); it can be transmitted, to the extent of spaces available, to the founder's descendants or his spouse.[110] In the case of numerous descendants, this will create a perpetual indivision.[111] The grant's titleholder can himself freely determine who shall have burial rights if the tomb is not yet occupied but, if it is, then the titleholder may only choose from his family members.[112]

Litigation concerning **exhumation** was for a long time very rare but is today growing (perhaps due to family crises and immigrants torn between their native country and France). These suits are subject to the same rules.[113] If a significant number of years has passed since the burial[114] or if the burial site had been selected with family members' approval,[115] then a body's transfer can only be ordered for very serious reasons[116] or if the burial had been provisional.

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110. Civ. 1, 1 juil. 1970, B. I, no. 232; J.C.P., 72.II.17004, n. P. Ourliac: "The tomb's property is in principle only transferrable to the natural heirs of the grantee to the exclusion of third parties unless they are universal legatees."

111. Req., 12 nov. 1940, D.H., 40.194: "If the sepulchre rights of the grantee are passed to his heirs, in a state of permanent indivision, then each of the co-proprietors must respect the rights of his co-heirs." The case held that the right to the tomb could not be granted to the father-in-law of one of the grantee's daughters.

112. Civ. 1, 6 mars 1973, B. I, no. 85; J.C.P. 73 II 17420, n. R. Lindon: "there is no law that forbids an individual from giving or bequeathing to a blood heir a funerary grant which has already been utilized . . .; the family purpose with which the crypt is dedicated does not imply that all family members have a right to be buried in it." *Cf.* also: Civ. 1, 23 oct. 1968, B. I, no. 245; J.C.P., 69.II.15715, n. R. Lindon; Def. 69, a. 29275, n. R. Savatier. In this case the original grantee of the crypt had given burial rights to one of his children, excluding the other (probably for religious reasons); this exclusion was judged legitimate.

113. See however, C. comm., a. R. 361-15, al. 1: "All requests for exhumation must be made by the deceased's close family members." For a definition of what is not considered exhumation: C.E. 11 déc. 1987. Lebon, p. 413; D. 88, som. 378.

114. T. G.I. Paris, 20 mai 1980, *Tombeau de Nijinski*, D. 80. 575, n. R. Lindon; J.C.P., 81.II.19604: "Once the site of the tomb has been decided with the agreement of the interested family, it cannot be changed unless absolutely necessary especially if a certain number of years have passed since the burial."

115. Civ. 1, 21 juil. 1980, B. I, no. 231; Riom, 23 juin 1981 et Lyon, 18 nov. 1981, J.C.P., 83.II.19956.

116. Civ. 1, 8 juil. 1986, B. I, no. 205; D. 86, I.R. 312: "Once the site of the tomb has been decided with the agreement of all the interested parties, then it cannot be changed unless absolutely necessary, the respect for the peace of the dead cannot be upset by the disagreements of the living." In this case, it was the lover who had decided the site of the deceased's grave even though their relationship was only a month old at the time of his death. Subsequently, the deceased's family tried in vain to get the grave

**31. Literary and artistic property rights.** -- Literary and artistic property encompasses a bundle of different rights organized by the law of March 11th, 1957. Each right's successorial devolution is governed by a specific rule. As in matrimonial regimes, property is split.[117] The right of **respect of the artist's name** is transferred according to ordinary devolution rules (Article 6). The right to receive **royalties** or other monetary benefits devolves for fifty years (70 years for musical compositions) after the death of the author to his heirs but subject to the usufruct granted the surviving spouse (Article 24). The right to order the **release** of posthumous works and the moral right are exercised by the testamentary executors or, if none, then by the descendants, the spouse, the other heirs, and the universal legatees in that order. This order differs from the ordinary successorial order; the spouse is placed in a better position. These rules are not mandatory. The *de cujus* can, for example, place the spouse ahead of descendants. However, the ***droit de suite*** (3% of the price of each succeeding sale of a work of art) is subject to a special rule: "The heirs[118] and the spouse's usufruct rights are supreme to the exclusion of all legatees and assignees." (Article 42, al. 2).

**32. Rural leases and habitation.** -- For a long time leases were subject to the ordinary rules of succession law. The basic principle is that death does not cancel the lease (Article 1742) and, therefore, the leaseholder's rights are transmitted to his heirs and universal legatees;[119] the lease can even be bequeathed to a specific

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moved. The court found that since at the time of death the family had consented to the lover's actions, it had not now established "the absolute necessity of transfer."

117. *Droit des régimes matrimoniaux*, nos. 370-373.

118. Civ. 1, 9 fév. 1972, *aff. Claude Monet*, B. I, no. 41; D. 72. 289, concl. R. Lindon; R. 72.800, n. R. Savatier: "The term 'heirs' is understood to mean the legal heirs of the author in the order of successorial devolution even if there are contrary testamentary dispositions." In this case, a Monet painting had been sold at an auction; the lower Paris court denied the niece's right to exercise her droit de suite because she was an heir of the painter's heir (Monet's son Michael who was deceased). "This *droit de suite* attaches to the person of the titleholder and is extinguished at the time of his death since there are no more heirs of the author." This judgment was overturned by the higher court.

119. Soc. 11 oct. 1957, B. IV, no. 947; J.C.P., 58.II.10349: "in the case of a tenant's death, the right to the lease passes to his heirs or his universal legatees or legatees under universal title." *Cf. also* when the law of September 1st 1948 was applicable: Soc. 15 nov. 1956, B. IV, no. 837; G.P. 57 I 150.

legatee if the lease is transferrable.[120] These rules are not, however, mandatory. It can be stipulated within the lease that the lease shall terminate upon the holder's death,[121] which is called a lease for life, where an *intuitus personae* clause is inserted in the lease.

Contemporary legislation, however, has now removed rural[122] and dwelling leases from the ordinary rules probably because, having granted the tenant important rights, the legislators wish to prevent the lease's patrimonialization.

The transmission of **rural leases**[123] is governed by specific provisions of the Rural Code. On one hand, the lease's *inter vivos* transfer is forbidden except for the benefit of certain individuals under certain conditions (Article 411-35). The lease, therefore, in law has no patrimonial value, which in fact is not true. On the other hand, if the lessee has just died, "the lease continues to the benefit of his spouse, ascendants, and descendants who work on the farm or who have participated in the farm work during the five years preceding the lessee's death." (Article 411-34). The Article's text is unusual. 1) It speaks of the contract's continuation when one party to the contract is dead - one is forced to return to the Roman law concept of *continuatio domini*.[124] 2) Besides, it is difficult to speak of successorial transfers when under the law the lease has no patrimonial value and is not considered property. 3) The persons who continue the lease, the "continuing" heirs, differ from the successors at death according to succession law: collateral kin are excluded and the spouse and ascendants come before descendants. 4) In order to acquire a

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120. Soc. 25 mars 1955, B. IV, no. 294; D. 55.414: "If Article 1742 benefits in all cases those who continue the person of the deceased lessee by succeeding to his rights and obligations in their entirety or a fractional share of the estate, then it does not follow from the very general terms of this article that a lease cannot be the object of a specific bequest." In this case, a testamentary bequest of a lease was judged void because the lease was non-transferable.

121. *E.g.*: C.R. 5 mars 1927, D.H., 25.257. This case dealt with a lease granted by the Theater of Nations specifically to Sarah Bernhardt; but the son was able to benefit from the legal extension of the lease. V.M. BÉHAR-TOUCHAIS, *Le décès du contractant.*, th. Paris II, Economica, 1988, no. 153. V. *Droits des contrats spéciaux*, 2d éd., no. 637.

122. A. BRETON, n. D. 1981. 17; Def. 1981, a. 32580.

123. Civ. 1, 17 mars 1980, B. I, no. 93; D. 81. 17, n. A. Breton; Def. 81, a. 32.580, m n.; R. 81. 189, n. J. Patarin.

124. *Supra*, no. 24.

recognizable right, one must have worked with the deceased, and, in a way, must have "calloused hands." 5) Finally, there is no successorial order. All the persons designated by the law have an equal right. In the case of conflicting demands, the court resolves the issue by a method similar to the one employed in the area of preferential attributions:[125] "the court bases its decision on the individual interests and aptitudes of the claimants to run and maintain the agricultural endeavor" (a. L. 411-34, al. 1, *in fine*).

This right is so idiosyncratic that it does not even enter into the undivided ownership,[126] thereby sacrificing the interests of "non-continuing" heirs.[127]

For **residential leases**, the law of December 23rd, 1986 (Article 13) treats the death of a tenant like an abandonment of domicile (would death be, therefore, as the good men say, an eternal departure without hope of return?). The rental contract is "transferred" (note this time the law avoids the succession term: "transmitted") to "descendants who lived with him at the time of his death, to ascendants, and, to a known concubine (expressed in the singular--no polygamy!), and to persons under his care who lived with him at the time of his death." The spouse benefits from Article 1751.

**33. Framework.** -- There are many different ways to approach and explain the law of successions and liberalities due to the number of issues presented. No one method of approach is good because the rules are interdependent and overflow into each other. Also, classic though the division be, one can not use the bipartite division between successions and donations because the two are too closely interrelated.[128] Testamentary succession, collation, and ascendant partition illustrate the overlap. The most difficult subject is collation for it touches upon donations and partition, yet also resembles

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125. *Infra*, no. 961.
126. *Infra*, no. 815.
127. PATARIN, n. *supra*, note 123.
128. M.J. Héron (*op, supra*, note 13) speaks of "the overflowing" of the law of successions (no. 161). *Cf. also*, the draft reform, Article 721: "Successions devolve by law if the decedent has not disposed of his property by donation. They devolve by the donations of the decedent to the extent that these are compatible with the forced portion."

reduction. It belongs everywhere. Even though an analytical framework is always arbitrary and imperfect, it appeared necessary to start at the beginning, that is to say, with *ab intestat* successions and end with the partition that completes the successorial transmission.

The work will therefore be divided into five parts: *ab intestat* succession, donations as juridical acts, the relationship between donations and succession, special donations and indivision, and partition.

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