Title IV. — SUCCESSION

'Succession' in General Defined

In its *generic* or *general* sense, *succession* (from the Latin *"sub"* and *"cedere,"* meaning the placing of one person in the place of another) is defined as the transmission of rights and properties from one person to another. In this sense, succession may be *inter vivos* or *mortis causa,* depending upon whether the transfer is effective during the *lifetime (inter vivos)* of the giver, or *after his death (mortis causa).* An example of succession *inter vivos* occurs in an ordinary donation. *(See 6 Manresa, 5th Ed., pp. 188-189).* Succession *mortis causa* is what is discussed in this Title.

'Succession' Defined in Its Technical Sense

In its *technical* signification, *succession* is restricted to succession *mortis causa.* The succession referred to in our Civil Code, in this Title (Title IV) and in Art. 774 is succession *mortis causa.* It is in this limited sense that succession denotes the transfer of title to property under the laws of descent and distribution, taking place as it does, only on the death of a person. *(Ibid.).*

Kinds of Succession

(1) *As to effectivity*

- (a) succession *inter vivos* (example: donation)
- (b) succession *mortis causa* (this is succession in the specific sense meant in Art. 774)

(2) *As to whether a will exists or not*

- (a) testamentary succession (there is a will)
- (b) intestate or legal succession (there is NO will)
- (c) mixed succession (*part* of the property has been disposed of in a will)

(3) *As to the transferees of the property*

(a) compulsory succession (refers to the legitime)

(b) voluntary succession (refers to the free disposal)

(4) *As to the extent of rights and obligations involved*

(a) *universal* succession (covering ALL juridical relations involving the deceased)

(b) *particular* succession (covering only certain items or properties)

(5) *Special kind*

*Contractual s*uccession — that kind where a future husband and a future wife give to each other future property, effective *mortis causa,* by means of a marriage settlement.

Law on Succession is Animated by a Uniform General Intent

Being so, no part should be rendered inoperative by, but must be construed in relation to, any other part as to produce a harmonious whole. *(Manuel v. Ferrer, 63 SCAD 764 [1995]).*

Chapter 1

GENERAL PROVISIONS

Article 774. Succession is a mode of acquisition by virtue of which the property, rights and obligations to the extent of the value of the inheritance, of a person are transmitted through his death to another or others either by his will or by operation of law. (n)

COMMENT:

(1) 'Succession Mortis Causa' Defined

Art. 774 speaks of *succession mortis causa;* it also defines the term.

(2) Important Elements of the Definition

(a) mode of acquisition (or ownership)

(b) transfer of property, rights, and obligations to the extent of the value of the inheritance of a *person* (called grantor or transferor, decedent, testator, or intestate)

(c) transmission *thru death* (not during life)

(d) transmission to *another* (called grantee, or transferee, heir, legatee, or devisee)

(e) by *will* or by *operation of law* (testamentary or legal succession)

(3) Bases for Succession

(a) The natural law which obliges a person to provide for those he would leave behind (this is a consequence of *family relations;* a recognition of the natural law of con-

sanguinity, or of blood, and the natural affection of a person toward those nearest him in relationship. *(Henry v. Thomas, 20 N.E. 519, 118 Ind. 23).*

(b) A socio-economic postulate which would prevent wealth from becoming inactive or stagnant (this is essential from an *economic* standpoint to enable social economy to be firm. *(4 Castan 148).*

(c) The implicit attributes of ownership which would be imperfect, if a person is not allowed to dispose of his property, such disposal to take effect when he is already dead (this is a consequence of *rights to property*). *(See 6 Manresa 297-298). (See also Guevara v. Guevara, et al., L-5405, Jan. 31, 1956).*

Art. 775. In this Title, "decedent" is the general term applied to the person whose property is transmitted through succession, whether or not he left a will. If he left a will, he is also called the testator. (n)

COMMENT:

'Decedent' Defined

The *decedent* is the person whose estate is to be distributed. He is also called:

(a) *testator* — if he left a will

(b) *intestate* — if he left no will *(See Rodolfo V. Jao v. CA & Perico V. Jao, GR 128314, May 29, 2002)*

Art. 776. The inheritance includes all the property, rights and obligations of a person which are not extinguished by his death. (659)

COMMENT:

(1) 'Inheritance' Distinguished From 'Succession'

Inheritance is the *property or right* acquired; *succession* is the *manner* by virtue of which the property or right is acquired.

In American law, *succession* is also referred to as "descent." *(In re Bradley's Estate, 201 N.W. 973). "Title by descent,"* is defined as the title by which one person on the death of another, acquires the estate of the latter as his heir at law. *(See Orr v. White, 6 N.E. 909).*

Administration is distinguished from *succession* as follows: the former means *dealing* with a deceased person's property according to law; the latter, the *transferring* to it beneficially. *(See Barrielle v. Bettman, D.C. Ohio, 199 F. 838).*

(2) What Inheritance (Latin — *"hereditas"*; Spanish — *"herencia"*) Includes

(a) property

(b) rights not extinguished by death

(c) obligations not extinguished by death (to the extent of the value of the inheritance)

Nacar v. Nistal
L-33006, Dec. 8, 1982

A person has no obligation to pay for the debts of his stepfather.

(3) Properties

These include real as well as personal properties. Moreover, the transferee will also own accessions to the property accruing thereto, from the moment of death to the time of actual receipt by said transferee. This is because ownership is transferred at the moment of death. The human corpse is not a property and is therefore not part of the estate. This is without prejudice to RA 349, as amended by RA 1056 allowing under certain conditions the granting to certain entities of a person's organs *after death*.

It is understood, of course, that properties NOT BELONGING to the estate must be *excluded*, for they are not part of the inheritance. Hence, it is important to determine the ownership of the properties involved.

Anderson v. Perkins
L-15388, Jan. 31, 1961

Before the perishable and other property of the estate of the deceased are sold by the *special administrator,* it is clear that proceedings must first be taken to segregate the alleged exclusive property of the surviving spouse. The issue of the ownership of said properties should be decided first, and the conjugal properties liquidated, or at least the surviving spouse should agree as to which properties he or she does not mind to be sold. Any sale done without this requirement should be considered premature, and the court must therefore refuse to grant permission.

Magallanes v. Kayanan
L-31048, Jan. 20, 1976

The CFI (now RTC) has no *jurisdiction* to pass *finally and definitely* upon the ownership of properties involved in probate proceedings or in the summary settlement of estates. Such questions must be submitted to the CFI (now RTC) in the exercise of its general jurisdiction to try and determine ordinary actions. *(Cordova Vda. de Mañalac v. Ocampo, 73 Phil. 661).* The probate court may do so only for the purpose of determining whether or not a given property should be included in the inventory of the estate of the deceased, but such determination is not conclusive and is still subject to a final decision in a separate action to be instituted between the parties. *(Janquera v. Borromeo, L-18498, Mar. 30, 1967; See also Vda. de Valera v. Ofilada, L-27526, Sep. 12, 1974).* Likewise, the probate court may also determine questions of title to property, if the parties voluntarily submitted to its jurisdiction, and introduced evidence to prove ownership. *(Cordova Vda. de Mañalac v. Ocampo, 73 Phil. 661).*

(4) Rights

(a) Some rights are extinguished by death: some are not.

(b) Examples of rights *extinguished* by death (and which therefore are not part of the estate):

1) intransmissible personal rights because of their nature (such as those appertaining to family rights, marital and parental authority, support, action for legal separation, partnership, agency, life annuity).

2) right to claim acknowledgment or recognition as a natural child. *(Conde v. Abaya, 13 Phil. 240).*

3) right to hold public or private office or job. *(Hu Niu v. Collector of Customs, 36 Phil. 433).*

[*NOTE*: The above-mentioned rights have no inheritability, *i.e.*, they are not transmissible *mortis causa*.].

(c) Examples of rights *not extinguished* by death (and which therefore are *part* of the estate):

1) Right to bring or continue an action for forcible entry or unlawful detainer.

2) Right to compel the execution of a document necessary for convenience, provided that the contract is valid and enforceable under the Statute of Frauds. *(See Araneta v. Montelibano, 14 Phil. 117).*

3) Right to continue a lease contract either as lessor or lessee, unless otherwise provided for in the contract. (Of course, it is understood here that if the lessee-heir continues as lessee, he should still pay the rents as they fall due from time to time, even if the inheritance has already disappeared — the obligations being his, and no longer the decedent's.).

4) Property right in an insurance policy (the interest of a beneficiary in a life insurance policy) is a *vested* interest (provided, the designation of the beneficiary is irrevocable), and as such is transmissible by hereditary succession, unless by the terms of the policy it is otherwise provided. *(Belden v. Belden, 183 N.Y.S. 350; Anderson v. Groesbeck, 26 Colo. 3).*

[NOTE: Therefore, that generally, the life insurance policy or the right to the indemnity belongs to the beneficiary, transmissible to his own heirs; and NOT to the insured, or the latter's own heirs. *(See*

Carter v. First National Bank, 237 Ala. 47; Cook v. Cook, 17 Cal. 2d. 639).].

Mabalot v. Madela
L-56700, Mar. 28, 1983

FACTS: In an unlawful detainer suit, one issue brought out was whether or not petitioners (lessees of the apartment involved in the case) could continue the lease as a result of inheritance. It was then alleged that because of this issue, the case becomes one which is not capable of pecuniary estimation, and that consequently, it is the CFI (not the city or municipal court) that should have jurisdiction. Which court has jurisdiction?

HELD: The city or municipal court has jurisdiction because the legal question about the inheritance is only *incidental* in determining whether the petitioners are entitled to the possession of the apartment or not.

Noel v. Court of Appeals
58 SCAD 67
(1995)

The rights to inheritance of a person who died, with or without a will, before the effectivity of the Civil Code were governed primarily by the provisions of the Spanish Civil Code of 1889.

Under the Spanish Civil Code of 1889, a spouse who is survived by brothers and sisters or children of brothers or sisters of the decedent, was entitled to receive in usufruct the part of the inheritance pertaining to said heirs. The surviving spouse, as the administrator and liquidator of the conjugal estate, under the law in force in 1945, occupies the position of a trustee of the highest order and was not permitted by the law to hold that estate or any portion thereof adversely to those for whose benefit

the law imposed upon him the duty of administration and liquidation.

Illegitimate children who were not natural were disqualified to inherit under the Spanish Civil Code of 1889.

The buyer of a parcel of land at a public auction to satisfy a judgment against a widow acquires only one-half (1/2) interest on the land corresponding to the share of the widow and the other half belonging to the heirs of her husband becomes impressed with a constructive trust in behalf of said heirs.

The prescriptive period within which collateral heirs could file an action to recover their share in the property sold to a third person accrued from the date of the registration of the deed of sale with the Register of Deeds, not from the moment of death of the decedent.

(5) Obligations Not Extinguished by Death

In general, all obligations are transmissible *(Araneta v. Montelibano, 14 Phil. 117)* unless purely personal (like the obligation to support) or non-transferable by law or contract. Hence, it is proper to say, from *one viewpoint,* that an heir still pays for the debts of his deceased father, but only if same can be covered by the inheritance. Thus, if a father leaves P100 million as assets and P20 million as debts, the heir really collects only P80 million. Upon the other hand, if the debt was P120 million, the heir is not required to pay the balance of P20 million.

Viardo v. Belmonte, et al.
L-14122, Aug. 21, 1962

FACTS: A father was the defendant in a civil case. During its pendency, he died, and his children were substituted as defendants. If judgment is rendered against the defendants, can the children be held *personally* liable with their own individual properties?

HELD: No. The children cannot be held personally liable, despite the substitution. The remedy of the plaintiff, the creditor, is to proceed against the estate of the deceased father.

Pamplona v. Moreto, et al.
L-33187, Mar. 31, 1980

FACTS: A father sold a parcel of land to a buyer, but had not yet delivered the parcel by the time he died. Are his heirs required to make the delivery?

HELD: Yes, for under Art. 776 the heirs inherit also the obligation of the deceased which are not extinguished by his death.

NOTE: From still another angle, it is correct to say that money debts are NOT inherited at all, since only the balance is left for distribution among the heirs — thus it has been held —

> That while the debts of the deceased still remain unpaid, no residue may be divided among the heirs, legatees, and devisees. Indeed, the court may order the sale of sufficient property for the satisfaction of the debts and the heirs cannot question this. Such a step is necessary for the eventual partition of the estate. *(Lao v. Dee, L-3890, Jan. 23, 1952)*. No residue may also be divided among the creditors of said heirs without first settling the debts of the deceased. *(See Litonjua v. Montilla, L-4170, Jan. 31, 1952)*.

NOTE: A creditor of an HEIR (who is not the creditor of the DECEASED), who intervenes in the estate proceedings, cannot therefore ask the court to sell the properties which the HEIR-DEBTOR expects to receive. This is because the debts of the DECEASED himself must first be paid. Then and only then can we determine if there is a sufficient residue left for the HEIRS or for the HEIRS' CREDITORS. *(Litonjua v. Montilla, supra)*.

(6) Cases

Ledesma v. McLachlin
66 Phil. 547

FACTS: A has a child *B* who has a child *C*. *B* is indebted to a stranger, but dies before he pays the same. *A* then died, leaving *C* as heir. In *A's* intestate proceedings, the stranger presents his claim for the credit. *Question:* Is *C* bound to pay for the debt, or will *A's* estate answer, or will no one be held responsible?

HELD: Neither A's estate nor *C* is liable, for neither contracted the debt, nor may it be said that *C* is inheriting from *B* — for the truth is, *C* in the case presented, is inheriting only from *A*. Therefore, the creditor-stranger must shoulder the loss himself.

Montesa v. Court of Appeals
L-33632, Oct. 23, 1983

If the parties say that the properties involved in the case were inherited by them from their deceased parents and grandparents, we can assume that the properties were the conjugal lots of said grandparents. A contrary conclusion would be *very technical*.

Rabadilla v. CA
GR 113725, June 29, 2000

Under Art. 776, inheritance includes all the property, rights, and obligations of a person, not extinguished by his death.

Conformably, whatever rights Dr. Jorge Rabadilla had by virtue of subject Codicil were transmitted to his forced heirs, at the time of his death. And since obligations not extinguished by death also form part of the estate of the decedent, corollarily, the obligations imposed by the Codicil on the deceased, Dr. Jorge Rabadilla, were likewise transmitted to his compulsory heirs upon his death.

(7) When Judicial Administration Is Not Essential

Judicial administration is not essential when the deceased left *no pending obligations*. To compel the submission of the property inherited to judicial administration is unnecessary or superfluous. *(See Vda. de Rodriguez v. Tan, L-6044, Nov. 24, 1952).* It is understood, of course, that the heirs inherit the property subject to the decedent's liabilities. Such liabilities, if not monetary, can be threshed out in an *ordinary* action, despite the lapse of the estate *proceedings*. *(De Guzman Vda. de Carillo v. Salak de Paz, L-4133, May 31, 1952).*

Guico, et al. v. Bautista, et al.
L-14921, Dec. 31, 1960

The *law* allows the partition of the estate of a deceased person by the heirs, extrajudicially or thru an ordinary action for partition, without the filing of a special proceeding and the appointment of an administrator for the purpose of the settlement of said estate only if the decedent left no debts and the heirs and legatees are all of age, or the minors are represented by their judicial guardians. *(Sec. 1, Rule 74, Rules of Court).* The reason is that where the deceased dies without pending obligations, there is no necessity for the appointment of an administrator to administer the estate for them, and to deprive the real owners of their possession to which they are immediately entitled. *(Javier v. Magtibay, L-6829, Dec. 29, 1954).* The situation, however, is DIFFERENT where the deceased left pending obligations. In such cases, the obligations must be first paid before the estate can be divided; and unless the heirs reach an amicable settlement as to how such obligations should be settled, the estate would inevitably be submitted to administration for the payment of such debts.

Art. 777. The rights to the succession are transmitted from the moment of the death of the decedent. (657a)
COMMENT:

(1) Conditions for the Transmission of Successional Rights

It is true that death transfers the rights to the succession — but only if the following conditions are present, namely:

(a) that indeed there has been a *death* (either actual or presumed)

(b) that the rights or properties are indeed *transmissible* or *descendible*

(c) that the transferee is *still alive* (no predecease), willing (no repudiation), is *capacitated* to inherit. [*NOTE*: These are also called the requisites for succession *mortis causa*.].

[*NOTE:* Though the law says *"are transmitted,"* the proper words should be "are made effective," for otherwise, we may be led to believe that the decedent's right to succeed are what are transmitted, and not the rights to the inheritance.].

Gabil v. Perez
GR 29541, Jan. 27, 1989

The rights to the succession are transmitted to the heirs from the moment of death of their predecessor.

Maria Vda. de Reyes, et al. v. CA
GR 92436, July 26, 1991

The rights to the succession are transmitted from the moment of death of the decedent. The estate of the decedent would then be held in co-ownership by the heirs. The co-heir or co-owner may validly dispose of his share or interest in the property subject to the condition that the portion disposed of is eventually allotted to him in the division upon termination of the co-ownership.

Danilo I. Suarez, et al. v. CA, et al.
GR 94918, Sep. 2, 1992

FACTS: Petitioners are brothers and sisters. Their father died in 1955 and since then his estate consisting of several valuable parcels of land in Pasig, Metro Manila has not been liquidated or partitioned. In 1977, petitioners' widowed mother and Rizal Realty Corporation lost in the consolidated cases for rescission of contract and for damages, and were ordered by Branch 1 of the then Court of First Instance of Rizal (now

Branch 151, RTC of Pasig) to pay, jointly and severally, herein respondents the aggregate principal amount of about P70,000 as damages. The judgment against petitioner's mother and Rizal Realty Corporation having become final and executory, five (5) valuable parcels of land in Pasig, Metro Manila (worth to be millions then) were levied and sold on execution on June 24, 1983 in favor of the private respondents as the highest bidder for the amount of P94,170.00. Private respondents were then issued a certificate of sale which was subsequently registered on Aug. 1, 1983. On June 21, 1984, before the expiration of the redemption period, petitioners filed a reivindicatory action against private respondents and the Provincial Sheriff of Rizal, thereafter docketed as Civil Case 51203, for the annulment of the auction sale and the recovery of the ownership of the levied pieces of property. Therein, they alleged, among others, that being strangers to the case decided against their mother, they cannot be held liable therefor and that the five (5) parcels of land, of which they are co-owners, can neither be levied nor sold on execution. On July 31, 1984, the Provincial Sheriff of Rizal issued to private respondents a final deed of sale over the properties. On Oct. 22, 1984, Teofista Suarez joined by herein petitioners filed with Branch 151 a Motion for Reconsideration of the Order dated Oct. 10, 1984, claiming that the parcels of land are co-owned by them and further informing the Court the filing and pendency of an action to annul the auction sale (Civil Case 51203), which motion however, was denied. On Feb. 25, 1985, a writ of preliminary injunction was issued enjoining private respondents from transferring to third parties the levied parcels of land based on the finding that the auctioned lands are co-owned by petitioners. On Mar. 1, 1985, private respondent Valente Raymundo filed in Civil Case 51203 a Motion to Dismiss for failure on the part of the petitioners to prosecute; however, such motion was later denied by Branch 155, Regional Trial Court, Pasig. On Dec. 1985, Raymundo filed in Civil Case 51203 an *Ex-Parte* Motion to Dismiss complaint for failure to prosecute. This was granted by Branch 155 through an Order dated May 29, 1986, notwithstanding petitioner's pending motion for the issuance of alias summons to be served upon the other defendants in the said case. A motion for reconsideration was filed but was later denied. On Oct. 10, 1984, RTC Branch

151 issued in Civil Cases 21736-21739 an Order directing Teofista Suarez and all persons claiming right under her to vacate the lots subject of the judicial sale; to desist from removing or alienating improvements thereon; and to surrender to private respondents the owner's duplicate copy of the Torrens Title and other pertinent documents. Teofista Suarez then filed with the then Court of Appeals a petition for *certiorari* to annul the Orders of Branch 151 dated Oct. 10, 1984 and Oct. 14, 1986 issued in Civil Cases 21736-21739.

On Dec. 4, 1986, petitioners filed with Branch 155 a Motion for reconsideration of the Order dated September 24, 1986. In an Order June 10, 1987, Branch 155 lifted its previous order of dismissal and directed the issuance of alias summons.

Respondents then appealed to the Court of Appeals seeking to annul the orders dated Feb. 25, 1985. May 19, 1989 and Feb. 26, 1990 issued in Civil Case 51203 and further ordering respondent judge to dismiss Civil Case 51203. The appellate court rendered its decision on July 27, 1990, the dispositive portion of which reads: "WHEREFORE, the petition for *certiorari* is hereby granted and the questioned orders dated Feb. 25, 1985, May 19, 1989 and February 26, 1990 issued in Civil Case 51203 are hereby annulled; further respondent judge is ordered to dismiss Civil Case 51203." Hence, this appeal.

HELD: It would be useless to discuss the procedural issue on the validity of the execution and the manner of publicly selling *en masse* the subject properties for auction. To start with, only one-half of the 5 parcels of land should have been the subject of the auction sale. The law in point is Article 777 of the Civil Code, the law applicable at the time of the institution of the case: "The rights to the succession are transmitted from the moment of the death of the decedent." Article 888 further provides: "The legitime of the legitimate children and descendants consists of one-half of the hereditary estate of the father and of the mother. The latter may freely dispose of the remaining half, subject to the rights of illegitimate children and of the surviving spouse as hereinafter provided." Article 892, par. 2 likewise provides: "If there are two or more legitimate children or descendants, the surviving spouse shall be entitled to a portion equal to the legitime of each of the legitimate chil-

dren or descendants." Thus, from the foregoing, the legitime of the surviving spouse is equal to the legitime of each child. The proprietary interest of petitioners in the levied and auctioned property is different from and adverse to that of their mother. Petitioners became co-owners of the property not because of their mother but through their own right as children of their deceased father. Therefore, petitioners are not barred in any way from instituting the action to annul the auction sale to protect their own interest. WHEREFORE, the decision of the Court of Appeals dated July 27, 1990 as well as its Resolution of Aug. 28, 1990 are hereby REVERSED and set aside; and Civil Case 51203 is reinstated only to determine that portion which belongs to petitioners and to annul the sale with regard to said portion.

Nelson Nufable, et al. v. Generosa Nufable, et al.
GR 126950, July 2, 1999

It should be noted that the late Esdras Nufable died on Aug. 9, 1965. When the entire property located at Manjuyod was mortgaged on Mar. 15, 1966 by his son Angel Custodio with the Development Bank of the Philippines (DBP), the other heirs of Esdras — namely: Generosa, Vilfor, and Marcelo — had already acquired successional rights over the said property. This is so because of the principle contained in Art. 777 to the effect that the rights to the succession are transmitted from the moment of death of the decedent.

Accordingly, for the purpose of transmission of rights, it does not matter whether the Last Will and Testament of the late Esdras Nufable was admitted on Mar. 30, 1966 or thereafter or that the Settlement of Estate was approved on June 6, 1966 or months later.

(2) Actual Death

If a decedent dies on July 5, 2002, and the property is actually delivered to the heir only on Aug. 4, 2002 — the heir, unless otherwise disqualified, becomes the *owner* and *possessor* of the property, beginning July 5, 2002. This is because it is not tradition (delivery) that transfers ownership here, but *succes-*

sion. Moreover, the effects of an acceptance (of the inheritance) retroact to the moment of death. *(Art. 1042)*. If, upon the other hand, instead of acceptance, there is *repudiation,* it is as if the heir *never owned, never possessed* the property, also because of the retroactive effect of a repudiation. *(See Art. 1042)*. In the last case, in the absence of any other heir, the State inherits the property, and the same will be considered *patrimonial*.

(3) Presumed Death

There are two kinds of presumed death under the law, the *ordinary* presumption (caused by an "*ordinary* absence") and an *extraordinary* presumption (caused by an "*extraordinary or qualified* absence").

(a) *Ordinary* presumption because of *ordinary* absence.

An absentee (who disappears under normal conditions, there being no danger or idea of death) shall be presumed dead for the purpose of opening his succession — at the end of *ten* years (at the end of *five years* in case he disappeared after the age of *seventy-five*). *(Art. 390, Civil Code)*. Here, the death is presumed to have occurred at the *end* of the 10-year or 5-year period as the case may be. *(Tribunal Supremo, Dec. 5, 1908)*.

(b) *Extraordinary* presumption because of *extraordinary* or *qualified absence*.

Under Art. 391 of the Civil Code, *qualified* absence occurs (qualified or extraordinary because of great probability of death). The law says that the following shall be presumed dead for *all purposes* including the division of the estate among the heirs:

1) A person on board a vessel *lost* during a sea voyage, or an *aeroplane* which is missing, who has not been heard of for *four years* since the loss of the *vessel* or *aeroplane;*

2) A person in the *armed forces* who has taken *part* in *war,* and has been *missing* for *four years;*

3) A person who has been in *danger* of *death* under *other* circumstances and his existence has not been known for *four years*. *(Art. 391).*

[NOTE: Please observe that in extraordinary absence, it has been held that the person is presumed to have died at the time of the disappearance, that is, at the time the calamity took place, and not at the end of 4 years. In other words, at the end of 4 years, the *presumption* will arise that death had occurred 4 years before. Thus, a member of the Philippine Armed Forces, Geronimo Gonzales, who was said to be "missing in action" when our Army surrendered to the Japanese on May 7, 1942, was presumed to have died on or before said date (May 7, 1942), and not later. *(Judge Advocate General v. Gonzales, [CA] 48 O.G. 5329, 17 C.J. 1174).* This ruling does not contradict the law because the law says that "*division* of the estate" will be made only at the end of 4 years. In other words, the succession really took place *4 years before* (on the day of the disappearance) but actual *division will* only be at the end of 4 years. In other words, from the beginning of said 4 years, the heir shall be considered the *owner* and *possessor* of the property, and not only from the end thereof.*]*.

[NOTE: *In both ordinary or extraordinary absences, the succession* is only of *provisional* character because there is always the chance that the absentee may still be alive. Moreover, the presumptions regarding the *time of death are rebuttable,* that is, proof may be presented as to when death actually occurred.*]*.

(4) Effect of Absentee's Return or Appearance

If the absentee appears, or without appearing his existence is proved, he shall *recover* his property in the condition in which it may be found, and the *price* of any property that may have been alienated or the property acquired therewith; but

he *cannot* claim either *fruits or rent*. *[Query*: Suppose the heir had already spent the money (for food, for example), is there an obligation to reimburse its value? It is submitted that there is no obligation to reimburse, inasmuch as the consumption had been made in good faith.*]*. The recovery may *not* be made anymore, however, if the heir, devisee, or legatee has acquired the property through *prescription* (*extraordinary prescription* in view of the lack of a *just title,* there being no true succession).

(5) Problem on Transitional Provisions

Under the old Civil Code, spurious children were not entitled to inherit even if their filiation had been judicially decreed or declared. Under the new Civil Code, said children if recognized voluntarily or by judicial decree are entitled to inherit. *(The new Civil Code took effect Aug. 30, 1950; Lara v. Del Rosario, L-6339, Apr. 30, 1954; see also Paulino v. Paulino, 3 SCRA 730 and Velez and Bato v. Velez, L-28873, July 31, 1973).* Now then, if a spurious child was born in 1938, but his father died in 1951, will said child inherit?

ANS.: Yes, he will inherit so long as he can prove his filiation because the rights to the succession are transmitted or effected only from the moment of death — 1951. Thus, since it is the father's death that gave rise to the succession, and since the death occurred when the new Civil Code was already effective, it is certain that the spurious child should inherit, despite his being born under the old Code — there being no vested right of the legitimate children that would be prejudiced. *(See Bulos v. Tecson, L-18286, Oct. 31, 1962; Montilla v. Montilla, L-14462, June 30, 1961; Tecson v. del Rosario, L-4962, Jan. 29, 1953).*

[NOTE: Had the father died before Aug. 30, 1950, the spurious child would not have been entitled since this time, vested rights of the legitimate children would be prejudiced. This is true even if there are settlement proceedings in court, resulting in the *delivery* of the property to the heirs only after the new Civil Code had become effective. *(See also Jayme v. Gamboa, 75 Phil. 479).* After all, the transfer of ownership takes place not after "delivery" but from the moment of death, succession

being by itself (and without the necessity of delivery) a mode of acquiring ownership. Upon the other hand, the rights to the inheritance of a person who died, with or without a will, before the effectivity of the new Civil Code shall be governed by the Civil Code of 1889, by other previous laws and by the Rules of Court. *(Members of the Cult of San Miguel Arcangel v. Narciso, L-24843, July 15, 1968).].*

(NOTE: *In the case of Lilia Juana Barles, et al. v. Don Alfonso Ponce Enrile, L-12894, Sep. 30, 1960,* the Supreme Court held that while the Civil Code nowhere specifies the period within which the action to investigate spurious paternity should be brought, still the action is *similar* to the action for compulsory *recognition of natural children*. Both are actions whereby the child may prove that the defendant is in fact the father or mother of the plaintiff, notwithstanding the refusal of the parent to admit the generative link. *Generally,* the investigation should take place during the lifetime of the putative parent, for only the parent is in a position to reveal the true facts surrounding the claimants' conception. Logically, therefore, the same time limitation, in the absence of an express legal provision to the contrary, should apply to BOTH actions*.).*

Jayme v. Gamboa
75 Phil. 497

Under the Leyes de Toro, an acknowledged natural child had no right to inherit. Under the old Civil Code, which replaced the Leyes de Toro, such a child had a right. Now then, before the old Civil Code took effect, the deceased had 2 legitimate children and an acknowledged natural child. After the old Civil Code became effective, 2 more legitimate children were born. If the deceased died in 1937 (under the old Code), would the acknowledged natural child inherit?

HELD: Yes. No vested rights of the legitimate children to the inheritance were impaired, because successional rights begin only from the moment of death. Before such death, no rights had accrued.

[*NOTE*: *There is now no more distinction between the natural* and *spurious* children under the Family Code *(See*

Art. 165), where the — (a) natural children were those born outside wedlock with parents who were *capacitated* to marry each other at the time of the conception of the child; and (b) spurious children (if otherwise). Incidentally, the spurious child was referred to in the Civil Code as an *illegitimate child* other than natural.].

(6) Some Effects of Transmission of Rights from Death

Prior to a person's death, his heirs merely have an inchoate right to his property. Therefore, during his lifetime, the heirs have no right of disposition or alienation over said properties. *(Tordilla v. Tordilla, 60 Phil. 162; Rivero v. Serrano, 46 O.G. 642).* After death, the heirs own the property, subject to the decedent's liabilities. Therefore, they may dispose of the same, and this is so, even if, in the meantime, the property is under administration. *(Barretto v. Tuason, 59 Phil. 845; Jakosalem v. Rafols, 73 Phil. 628).* Indeed, there is no doubt that an heir can sell whatever right, interest, or participation he may have in the property under administration. This matter certainly comes under the jurisdiction of the probate court, and if the seller-heir should die in the meantime — pending the said probate proceedings — the validity of the sale should not be threshed out in a *separate* action. *(Dolores C. Vda. de Gil v. Agustin Cancio, L-21472, July 30, 1965).* In fact, a *declaration* of heirs may be made even BEFORE all debts, expenses, and taxes have been paid. What is prohibited prior to such payment is the assignment or distribution of the residue of the deceased's estate. *(Ngo The Hua v. Chung Biat Kang, L-17091, Sep. 30, 1963).* Pending liquidation of the estate, the heirs are entitled to certain allowances for their support — and these, in the proper cases, are chargeable against the estate. *(Dolores C. Vda. de Gil v. Agustin Cancio, L-21472, July 30, 1965).*

While it is true that "future" inheritance cannot be sold, it is valid for an heir, after the testator's death, to sell his share in the estate even pending its liquidation, for here the inheritance is "present," no longer "future." *(Mondonido v. Roda, L-5561, Jan. 26, 1954).* "Future inheritance" is that which *may* eventually be received *from* a person still *alive.* It is any property or right not yet in existence or not yet capable of determination at the time a contract is made which a person in the future

may acquire by succession. *(Blas v. Santos, L-14070, Mar. 29, 1961, 1 SCRA 899).* Similarly, a donation of said property *after* the predecessor's death but *before* a judicial declaration of heirship, is NOT a donation of "future property." Hence, it is *VALID. (Osorio v. Osorio and Ynchausti Steamship Co., 41 Phil. 531).*

Felipe v. Heirs of Aldon
GR 60174, Feb. 16, 1983

If a wife sells conjugal land without the husband's consent, the heirs may question the transaction *but only after* the death of the husband for it is only at that time when their right to the property becomes choate. The wife herself cannot sue for annulment or cancellation because it was she who had unlawfully alienated the property. It is of course understood that the heirs may question only insofar as *their inherited share* of the land is concerned.

Blas, et al. v. Santos, et al.
L-14070, Mar. 29, 1961

While "future inheritance" cannot be the subject of a sale or a donation, inheritance that has "accrued already" may be the subject of such a contract. "Future inheritance" is any property or right not in existence or capable of determination at the time of the contract, that a person may in the future acquire by succession. Thus, a wife may properly dispose of her share of the conjugal properties, since this share is her own, not future inheritance. It is not even accrued inheritance. It is indeed her own existing property.

Saturnino v. Paulino, et al.
L-7385, May 19, 1956

FACTS: If *A* and *B* inherit an estate, and *A* sells the whole to *C* without *B's* consent, may *B* ask for the cancellation of the sale insofar as his share is concerned even if there are still administration proceedings?

HELD: Yes, because he became owner of his share upon the decedent's death. He therefore does not have to wait for the result of the administration proceedings.

Ibarle v. Po
L-5046, Feb. 27, 1953

Similarly, a *widow's* sale of conjugal property (owned after the husband's death by herself and by the children), is not valid insofar as the children's share is concerned. This is so even without a formal judicial declaration of ownership of the children, for their rights accrued from the moment of the father's death.

Gayon v. Gayon
L-28384, Nov. 26, 1970

Generally, heirs may be sued, after the testator's death, not as representatives of the decedent, but in their own right as owners of an aliquot interest in the property in question. This is so even if the precise extent of their interest may still be undetermined. Generally also, they may be sued without a previous declaration of heirship.

(7) When There is No Necessity of Prior Declaration of Heirship

If there are no pending settlement proceedings for the distribution of an estate, there is no *necessity* for a *prior* declaration of heirship before the heirs are allowed to begin an action arising from any right of the deceased, such as the right to bring an action to annul a deed of sale *(De Vera v. Galauran, 67 Phil. 213),* or to bring about a partition. *(Quison v. Salud, 12 Phil. 109).*

Gayon v. Gayon
L-28384, Nov. 26, 1970

Heirs may be sued, not as representatives of the deceased, but in their own right as OWNERS, and this is so even without a prior declaration of heirship, provided that there is *no* pending special proceeding whereby the estate of the deceased is to be settled.

(8) Administration of the Estate

When the heirs are all of legal age, and there are no debts to be settled, there is generally no necessity to appoint

an administrator, and the heirs themselves may enter upon the administration of the property. They may even decide to have a *joint administration* or if they so desire, may even, by mutual agreement, partition the property among themselves. *(Fule v. Fule, 46 Phil. 137).* Of course, even though the heirs, legatees, or devisees have already taken possession of the estate, the possession should be surrendered by them to the judicial administrator, in case one be appointed by the court. Said administrator will now be subject to orders from the Court, unless he allows the heirs to remain in possession. *(Dais v. Court of First Instance, 31 Phil. 396).* And even if an administrator has already been appointed, the heirs still have the right to intervene in judicial proceedings, if they have reasons to believe that the administrator's actuations are detrimental to their rights. *(Dais v. Court of First Instance, supra). Thus,* when an administrator is sued as defendant in a claim against the estate, based on a promissory note, failure by him to present the available defenses will make it possible for the heirs to intervene. *(Adriano v. Obleada, 58 Phil. 302).* Parenthetically, a suit may be brought even against a *special administratrix* (in a suit against the estate), otherwise, creditors would find the adverse effects of the statute of limitations running against them in cases where the appointment of a regular administrator is delayed. *(Gliceria C. Liwanag v. Court of Appeals, et al., L-20735, Aug. 14, 1965). The administrator* must render an accounting. In determining whether or not the items of expenditures presented, whether supported by receipts or not, are correct, the court may take into account their probability and the reasonableness of each and every item thereof. *(Pascual, et al. v. Santiago, et al., L-9589, Mar. 23, 1959).* The duty of an administrator to render an account is NOT a mere incident of an administration proceeding which can be waived or disregarded when the same is terminated, but it is a duty that has to be performed and duly acted upon by the court before the administration is finally ordered closed and terminated. *(Joson v. Joson, et al., L-9686, May 30, 1961).* It is understood, of course, that the expenses of administration shall be borne by the properties under administration or the income therefrom. The administrator can be held personally liable only for any malfeasance, maladministration or violation of any of his duties as administrator. Attorney's fees are, of

course, proper administration expenses. If the heirs had already been given their shares, they should be liable proportionately. *(Donata Montemayor v. Heirs of Eduardo D. Gutierrez, L-6959, Jan. 30, 1962).*

Palicte v. Hon. Ramolete, et al.
L-55076, Sep. 21, 1987

Art. 777 of the Civil Code provides that "the rights to the succession are transmitted from the moment of the death of the decedent." At the moment of the decedent's death, the heirs start to own the property, subject to the decedent's liabilities. In fact, they may dispose of the same even while the property is under administration. If the heirs may dispose of their shares in the decedent's property even while it is under administration, with more reason should the heirs be allowed to redeem redeemable properties despite the presence of an administrator.

Heirs of Guido and Isabel
Yaptinchay v. Del Rosario
304 SCRA 18
(1999)

The declaration of heirship must be made in an administration proceeding, and not in an independent civil action.

It is decisively clear that the declaration of heirship can be made only in a special proceeding inasmuch as it involves the establishment of a status or right.

Silverio, Sr. v. CA
304 SCRA 541
(1999)

The order of preference in the appointment of an administrator depends on the attendant facts and circumstances. The probate court, in the exercise of its discretion, may disregard the order of preference to the administration set forth in the Rules of Court.

The probate court is not vested with the power to order the special administrator to sell real properties of the estate

pending determination of the validity of the regular administrator's appointment.

(9) Possession of Property Both by Administrator and by Heirs

The executor or administrator shall have the right to take possession of the properties of the deceased so long as it is necessary for the payment of the debt and expenses of administration. Where there are no debts to be paid, the estate should pass to the heirs. *(Layogue, et al. v. Perez de Ulgaoan, L-13666, Oct. 31, 1960).*

While the hereditary property is materially possessed by the administrator (in the concept of *holder or administrator*), it cannot be denied that it is also possessed by the heir (as owner-possessor) thru another — the administrator. This is because the *ownership* and the *possession* of the property are transmitted to the heir from the moment of death, as long as the heir accepts. *(Art. 533).* Thus, for purposes of prescription (as when the deceased really *did not* own the property), the time during which the property was being administered should be counted in favor of the heir for then such heir would be a possessor in the concept of owner. For the same reason, a sale made by an administrator is really a sale of the heir's rights and properties, and consequently said heirs cannot be deemed strangers to the sale. *(Lagonera v. Macalalaog, 49 O.G. 569).*

(10) Inherent Duty of Trial Court Re Administrator's Inventory

The trial court has to see to it that the inventory of the administator lists all the properties, rights, and credits which the law requires the administrator to include in his inventory. Likewise, it has the inherent power to determine what properties, rights, and credits of the deceased the administrator should include or exclude in the inventory. However, it has no authority to decide whether the properties, real or personal, belong to the estate or to the persons examined. If after such examination there is good reason to believe that the person examined is keeping properties belonging to the estate, then

the administrator should file an ordinary action in court to recover the same. Thus, in case of fraudulent conveyances, a separate action is necessary to recover these assets. *(Chua v. Absolute Management Corp., 413 SCRA 547 [2003]).*

(11) Effect of Fraudulent Intestate Proceedings

If heirs conceal the existence of other heirs and as a result of such concealment, the intestate proceedings should award them with property, the prejudiced heirs can still file an action to recover their shares, notwithstanding the termination of the settlement proceedings. This is because ownership of their shares accrued to them automatically upon the decedent's death. *(Quion v. Claridad, 74 Phil. 100).*

Carreon, et al. v. Agcaoili, et al.
L-11156, Feb. 23, 1961

The right of an heir or other person unduly deprived of his lawful participation in the estate to compel the settlement of the estate in the courts for the purpose of satisfying such lawful participation is effective only for a period of two years. *(See Sec. 4, Rule 74, Rules of Court).*

(12) When No Transmission Occurs

If the heir instituted is incapacitated, repudiates the inheritance, or predeceases the testator, said heir inherits *nothing*. The same conclusion is reached when although the heir is ready, willing, and able — the right is not transmissible or descendible — as for instance, the right to support.

(13) Accrual of the Estate Tax

Lorenzo v. Posadas
64 Phil. 353

FACTS: T died, providing in his will that ten years after his death, *H* would become owner of his *(T's)* properties. Should the inheritance tax be computed at *T's* death or 10 years later?

HELD: The tax at T's death — so, the *value of the estate* must be computed as of *this time — not* ten years later. "If death is the generating source from which the power of the state to impose inheritance taxes takes its being, and if upon the death of the decedent, succession takes place and the right of the state to tax vests instantly, the tax should be measured by the value of the estate as it stood at the time of the decedent's death, regardless of any subsequent contingency affecting value or any subsequent increase or decrease in value."

[NOTE:

(a) The inheritance (estate) tax is a tax not on the property itself but on the transmission (transfer or devolution) of the property. *(61 CJ 1952).*

(b) The date the inheritance (estate) tax accrues is distinct from the date on which it must be paid. *(Lorenzo v. Posadas, supra).*

(c) The ESTATE tax is a virtual charge on the giver (the deceased) for the transmission of the property; the INHERITANCE (now changed to estate) tax is a charge on the recipient (the heirs, devisees, and legatees). The inheritance tax is paid on what is LEFT after the estate tax has been deducted from the residuary estate.

(d) Estate and inheritance taxes are complements of income taxes. Generally, because of the imperative needs of the government for revenue, the usual remedies available to citizens against creditors do not operate to the prejudice of tax collection. Thus, taxes are not considered debts, and a person may be imprisoned for failure to pay taxes. *(Meriwhether v. Garrett, 102 U.S. 472).*

(e) The administrator may not be required to pay the taxes where the government in turn is indebted to the same taxpayer for an amount greater than the amount of the tax. In fact, compensation of the concurrent debts may even take place by *operation of law,* so long as the requisites for legal compensation

are present. *(Domingo v. Garlitos, et al., L-18994, June 24, 1963).].*

[NOTE: Under the National Internal Revenue Code as amended, inheritance taxes have already been eliminated, along with donee's taxes.*].*

(14) Bar Question

When and how is the right to succeed a deceased person acquired?

ANS.: The right to the succession is transmitted from the moment of the death of the decedent *(Art. 777; Quizon v. Villanueva, L-3932, Feb. 29, 1962)* thru testamentary, intestate, or mixed succession. *(Art. 778).*

(15) Order of Adjudication

Towards the end of the testate proceedings, the court will make an "order of adjudication" distributing the properties of the estate to those entitled thereto. This "order" is the judicial recognition that in appointing persons as heirs, legatees, or devisees, the testator did not contravene the law and the recipients were *in no way disqualified* to inherit in the same manner that a final order admitting a will to probate excludes the entire world from contending that the statutory formal requisites have not been observed in executing the will. *(Lopez v. Gonzaga, L-18788, Jan. 31, 1964).*

(16) The Case of Aruego

Jose E. Aruego, Jr., et al. v. CA and Antonia Aruego
GR 112193, Mar. 13, 1996
69 SCAD 423

The action brought by private respondent for compulsory recognition and enforcement of successional rights which was filed prior to the advent of the Family Code on Aug. 3, 1988, is governed by Art. 285 of the Civil Code and not by Art. 175, par. 2 of the Family Code.

The present law (Family Code) cannot be given retroactive effect insofar as the instant case is concerned, as its application will prejudice the vested right of private respondent to have her case decided under Art. 285 of the Civil Code. The right was vested to her by the fact that she filed her action under the regime of the Civil Code. Prescinding from this, the conclusion then ought to be that the action was not yet barred, notwithstanding the fact that it was brought when the putative father was already deceased, since private respondent was then still a minor when it was filed, an exception to the general rule provided under Art. 285 of the Civil Code. Hence, the trial court, which acquired jurisdiction over the case by the filing of the complaint, never lost jurisdiction over the same despite the passage of Executive Order 209, also known as the Family Code of the Philippines.

Our ruling herein reinforces the principle that the jurisdiction of a court, whether in criminal or civil cases, once attached cannot be ousted by subsequent happenings or events, although of a character which would have prevented jurisdiction from attaching in the first instance, and it retains jurisdiction until it finally disposes of the case.

(17) Where the Waiver Is Deemed Valid

Sanchez v. CA
87 SCAD 463
(1997)

The waiver is valid because, contrary to petitioner's protestation, the parties waived a known and existing interest — their hereditary right which was already vested in them by reason of the death of their father. Article 777 of the Civil Code provides that "[t]he rights to the succession are transmitted from the moment of death of the decedent." Hence, there is no legal obstacle to an heir's waiver of his/her hereditary share "even if the actual extent of such share is not determined until the subsequent liquidation of the estate." At any rate, such waiver is consistent with the intent and letter of the law advocating compromise as a vehicle for the settlement of civil disputes.

(18) Effect Where Both Parents' Deaths Occured Before the Enactment of the New Civil Code in 1950

Social Security System v. Aguas
483 SCRA 383
(2006)

ISSUE: Where both parents' deaths occured before the enactment of the New Civil Code in 1950, how shall the sharing arrangement be involving all the children of the first marriage, *and* the children of the second marriage, respectively?

HELD: The two groups shall share equally in the subject property in accordance with the old Civil Code.

Art. 778. Succession may be:

(1) Testamentary;

(2) Legal or intestate; or

(3) Mixed. (n)

COMMENT:

(1) Mixed Succession

Parish Priest of Roman Catholic
Church of Victoria, Tarlac v. Rigor
L-22036, Apr. 30, 1979

The decedent may have died partly testate and partly intestate. Insofar as the will disposes of certain properties, this is generally the law that should govern.

(2) Other Kinds of Succession

Aside from the three kinds of succession enumerated in the law, there are two more, namely:

(a) *compulsory (or necessary or forced) succession* — or succession to the legitime. [*NOTE:* It is compulsory for the testator to give his compulsory heirs their legitimes; but it is not compulsory for the heirs to receive or accept said

legitimes, for no one is compelled to accept an economic advantage or benefit from another.].

(b) *contractual succession* — (This happens when a future husband and future wife give to each other in their *marriage settlement* as much of their future property, in the event of *death,* as they may validly dispose of in a will. *[See Art. 130]. Contractual succession,* it must be noted, does not need the formalities of a will; a marriage settlement [which must comply with the Statute of Frauds as to form, *i.e.*, in *writing*] *is sufficient.*)

Art. 779. Testamentary succession is that which results from the designation of an heir, made in a will executed in the form prescribed by law. (n)

COMMENT:

Some Rules for Testamentary Succession

(a) Testamentary succession may be done thru a will or thru a *codicil.*

(b) The will or *codicil* may be:

(1) notarial (ordinary, attested, or acknowledged)

(2) holographic (handwritten by the testator from beginning to end, complete with date and signature)

(c) In case of doubt, testamentary succession is preferred to legal or intestate succession. *(See Art. 791).*

Art. 780. Mixed succession is that effected partly by will and partly by operation of law. (n)

COMMENT:

Mixed Succession

(a) While the Civil Code (both old and new) allows mixed succession, this was prohibited under Roman Law. *(5 Manresa 326).*

(b) *A* made a will, disposing half of his properties. If the will is later on declared null and void for lack of the proper signature, is this a case of legal or mixed succession?

ANS.: Legal because the will being void, the entire estate descends to the heirs by operation of law.

Art. 781. The inheritance of a person includes not only the property and the transmissible rights and obligations existing at the time of his death, but also those which have accrued thereto since the opening of the succession. (n)

COMMENT:

(1) What Inheritance Includes

(a) the property, transmissible rights, and obligations (to the extent of the value of the inheritance)

(b) as well as those which have *accrued thereto* since the opening of the succession (such as *alluvium*)

[NOTE: *The accretions or accessions are not strictly inherited* for they form part of the estate only after the heirs become the owners thereof; hence, properly speaking, they are acquired by accretion (as an incident of ownership under the LAW), *not by succession.].*

(2) After-Acquired Properties

Note that property acquired by the testator *between* the time the will is made and the time he dies, is NOT given to the designated heir unless the contrary has been expressly provided. *(Art. 793).* Such property is acquired PRIOR to the death, *not afterwards.*

Art. 782. An heir is a person called to the succession either by the provision of a will or by operation of law.

Devisees and legatees are persons to whom gifts of real and personal property are respectively given by virtue of a will. (n)

COMMENT:

(1) Transferees ("Causahabientes") in TESTAMENTARY Succession

(a) *Heirs* (if they succeed by universal title, that is, to *ALL* or a *FRACTION* or *ALIQUOT PART* of the properties, rights and obligations). *(See 6 Manresa 343).*

[NOTE: Heirs may be *compulsory* (if entitled to the *legitime*) *or voluntary* (like a friend). *Examples* — "T institutes Y as heir"; "T gives Y 1/3 of his properties."*].*

(b) *Legatees and Devisees* (if they succeed by particular title to cash or to a particular or *specified* item or thing in the inheritance). *(See 6 Manresa 343).*

[NOTE: They are called:

1) *Legatees* — if they succeed to particular *personal* properties (legacies).

Examples: "*T* gives *L* this *Lexus* car"; "*T* gives 5 million."

2) *Devisees* — if they succeed to particular *real* properties *(devises).*

Example: "*T* gives *D* this piece of land."*].*

(2) Importance of the Distinction Between Heirs on the One Hand, and Legatees and Devisees upon the Other Hand

While in general, there is no difference in capacity, effect, and solemnities, still, one important distinction must be pointed out, namely — that while in *preterition (Art. 854)* an *instituted voluntary* heir gets *nothing,* a legatee or devisee still gets the property given as long as the legitime is *not* impaired. *(See Neri v. Aleutin, 4 Phil. 185).* (For example, see discussion under Art. 854 on *preterition.*).

[NOTE: On this point, Justice J.B.L. Reyes opines: "The distinction between heir and legatee is not drawn with pre-

cision, and yet the distinction is all-important for Arts. 854 (preterition) and 918 (disinheritance) provide cases where the institution of heirs is VOID, but the legacies remain valid. The Code *omits* to state the fundamental difference: That heirs are instituted to the *whole* or to an *aliquot* portion thereof, *i.e.*, to the whole or to a fraction of the whole; while a legatee or devisee is given *individualized* items of property. As noted by Ferrara *(Rev. Der. Priv. 1923)*, the quality of heir does not depend on the appellation given by the testator; it does not arise *"ex voluntate, sed ex re." (Observation on the new Civil Code by Justice J.B.L. Reyes, XV Lawyer's Journal, No. 11, Nov. 30, 1960).].*

[NOTE: While there can be heirs in either testate, legal, or mixed succession, legatees and devisees can exist only in testamentary succession.*].*

(3) Transferees ("Causahabientes") in LEGAL Succession

In legal succession, the transferees are called *legal* or *intestate* heirs.

(4) Possibility of Dual Status

If in a will, a compulsory heir is given more than his legitime, he assumes a *dual* status:

(a) Insofar as his legitime is concerned, he is a *compulsory* heir.

(b) Insofar as the excess is concerned, he is a *voluntary* heir.

[This distinction is important because if a compulsory heir dies ahead of the testator, his legitime is inherited by his own child. On the other hand, the child of a voluntary heir who predeceases or dies ahead of the testator gets nothing from said testator. *(Art. 856).*].

(5) Difference Between 'Sale' and 'Waiver of Hereditary Rights'

Acap v. CA
GR 118114, Dec. 7, 1995
66 SCAD 359

In a contract of sale, one of the contracting parties obligates himself to transfer the ownership of and to deliver a determinate thing, and the other party to pay a price certain in money or its equivalent. Upon the other hand, a declaration of heirship and waiver of rights operates as a public instrument when filed with the Registry of Deeds whereby the intestate heirs adjudicate and divide the estate left by the decedent among themselves as they see fit. It is in effect an extrajudicial settlement between the heirs under Rule 74 of the Rules of Court.

Hence, there is a marked difference between a sale of hereditary rights and a waiver of hereditary rights. The first presumes the existence of a contract or deed of sale between the parties. The second is, technically speaking, a mode of extinction of ownership where there is an abdication or intentional relinquishment of a known right with knowledge of its existence and intention to relinquish it, in favor of other persons who are co-heirs in the succession.

(6) The Case of Josefa Torres Who Died Intestate

Nelia A. Constantino v. CA, et al.
GR 116018, Nov. 13, 1996
76 SCAD 47

FACTS: Josefa Torres died intestate leaving a parcel of land located at Balagtas, Bulacan. Among her heirs are respondents Aurora S. Roque, Priscilla S. Luna and Josefina S. Austria. Sometime in 1984, the heirs of Josefa Torres, as vendors, and petitioner Nelia A. Constantino, as vendee, entered into a contract to sell a parcel of land with a total land area of two hundred and fifty (250) square meters. The lot, owned in common by the Torres heirs, is being occupied by petition-

ers' mother and sister. An adjoining lot, also co-owned by the heirs, is being occupied by spouses Severino and Consuelo Lim. Pursuant to their agreement, the heirs authorized petitioner to prepare the necessary *Deed of Extrajudicial Settlement of Estate with Sale.*

After having the document drafted — with several spaces left blank including the specification as to the metes and bounds of the land — petitioner asked the heirs to affix their signatures on the document. The heirs signed the document with the understanding that respondent Aurora S. Roque, one of the heirs, would be present when the latter would seek permission from the Bureau of Lands and have the land surveyed. However, without the participation of any of the Torres heirs, the property was subsequently surveyed, subdivided and then covered by TCT Nos. T-292265 and T-292266. Petitioner did not furnish the heirs with copies of the *Deed of Extrajudicial Settlement of Estate with Sale* nor of the subdivision plan and the certificates of title. Upon securing a copy of the deed from the Registry of Deeds, the respondents learned that the area of the property purportedly sold to petitioner was much bigger than that agreed upon by the parties. It already included the portion being occupied by the spouses Severino and Consuelo Lim.

On June 2, 1986, private respondents sent a letter to petitioner demanding the surrender to them of the deed of settlement and conveyance, the subdivision plan and the certificates of title; but to no avail. On June 25, 1986 respondents filed with the Regional Trial Court of Bulacan an action for annulment of the deed and cancellation of the certification of title, with prayer for recovery of damages, attorney's fees and costs of suit.

Petitioner controverted the allegations of respondents by presenting the *Deed of Extrajudicial Settlement of Estate with Sale* dated Oct. 10, 1984 wherein respondents agreed to divide and adjudicate among themselves the inherited property with an area of one thousand five hundred and three (1,503) square meters. In the same document, they caused the subdivision of the property into two (2) lots according to Plan No. PSD-03-009105 identified as Lot 4-A with an area of one thousand

ninety-six (1,096) square meters, and Lot 4-B with an area of four hundred and seven (407) square meters, and acknowledged the sale to petitioner of said Lot 4-B. As a consequence, on Mar. 18, 1985, the Register of Deeds issued TCT No. T-292265 in the name of the heirs of Josefa Torres and TCT No. T-292266 in the name of petitioner. In reply, private respondents reiterated that all the heirs signed the document before the land was surveyed and subdivided, hence, there was as yet no definite area to be sold that could be indicated in the deed at the time of the signing. They also claimed that they were not notified about the survey and the subdivision of the lot and therefore they could not have agreed on the area supposedly sold to petitioner. The respondent heirs insist that they could not have agreed to the extent of the area actually reflected in the deed because it included the portion being occupied by the Lim spouses, which was already the subject of a previous agreement to sell between them and their predecessor.

The trial court entertained serious doubts with respect to the preparation and due execution of the *Deed of Extrajudicial Settlement of Estate with Sale* taking into account that: (a) while petitioner claimed that all the heirs signed before the notary public and in her presence, she was not able to enumerate all the signatories to the document; (b) while petitioner claimed that the document was signed only after the survey of the land was completed, or on Oct. 10, 1984, such fact was negated by her own witness who testified that the survey was conducted only on Oct. 16, 1984; and (c) while petitioner alleged that the document was signed and notarized in Manila, no explanation was offered why the same could not have been signed and notarized in Bulacan where notaries public abound which could have been less inconvenient to the parties concerned. Additionally, the trial court relied heavily on the assertions of respondents as reflected in their demand letter that they did not give their consent to the sale of Lot 4-B. Thus, on the basis of the evidence on record, the trial court on Sep. 27, 1990 ordered the annulment and cancellation of the *Deed of Extrajudicial Settlement of Estate with Sale,* TCT Nos. T-292265 and T-292266 and Subdivision Plan No. PSD-03-009105. It also ordered petitioner to pay private respondents

P50,000.00 for moral damages, P15,000.00 for attorney's fees, and to pay the costs of suit.

On Mar. 16, 1994, respondent Court of Appeals sustained the decision of the trial court, and on June 20, 1994 denied the motion to reconsider its decision. Petitioner faults respondent Court of Appeals: (a) for disregarding documentary evidence already presented, marked and identified on a purely technical ground, and (b) for concluding that the *Deed of Extrajudicial Settlement of Estate with Sale* did not reflect the true intent of the parties.

Petitioner argues that the trial court should not have denied her motion to admit formal offer of evidence merely on the basis of technicality such as late filing. We are not persuaded. Indeed, we held in *Siguenza* that rules of procedure are not to be applied in a very rigid and technical sense as they are used only to help secure, not override, substantial justice. Yet the holding is inapplicable to the present case as the trial court had a reasonable basis for denying petitioner's motion, to wit: On Feb. 6, 1990, Atty. Ponciano Mercado, defendant's counsel, manifested in Court that he has (sic) no more witness to present. He asked that he be given 15 days to make a formal offer of evidence and which the Court granted. At the scheduled hearing of Apr. 3, 1990, Atty. Ponciano Mercado x x x was not in Court. Atty. Veneracion, plaintiff's counsel, called the attention of the Court that Atty. Mercado had not yet filed and/or complied with the Court Order dated Feb. 6, 1990, which is to file his formal offer of evidence. On motion of Atty. Veneracion, defendant's right to file a formal offer of evidence was deemed *waived*. Atty. Veneracion waived the presentation of rebuttal evidence considering that the defendant can (sic) no longer make a formal offer of evidence. On May 11, 1990, the Court was in receipt of a motion to admit formal offer of exhibits filed by the defendant thru counsel, Atty. Ponciano Mercado, on May 2, 1990. Considering that the same was filed out of time and the plaintiffs having filed their memorandum already, the motion to admit formal offer of exhibits was denied (underscoring supplied).

HELD: The trial court was correct in holding that petitioner waived the right to formally offer his evidence. A con-

siderable lapse of time, about three (3) months, had already passed before petitioner's counsel made effort to formally offer his evidence. For the trial court to grant petitioner's motion to admit her exhibits would be to condone an inexcusable laxity if not non-compliance with a court order which, in effect, would encourage needless delays and derail the speedy administration of justice. Petitioner also insists that the real intent of the parties was to make the entire Lot 4-B the subject matter of the sale. She claims that during cross-examination, respondent Aurora S. Roque admitted that she signed in behalf of her co-heirs a receipt for P30,000.00 as partial payment for the lot occupied by Ka Baring and *Lina* (relatives of petitioner) and *Iling* (Consuelo Lim). Moreover, according to petitioner, the assertions of private respondents to petitioners contained in the demand letter should not necessarily be true and that the validity of the *Deed of Extrajudicial Settlement of Estate with Sale* was not affected by the fact that it was notarized in a place other than where the subject matter thereof was situated.

These other arguments of petitioner are barren and futile. The admission of respondent Roque cannot prevail in the face of the clear evidence that there was as yet no meeting of the minds on the land area to be sold since private respondents were still awaiting the survey to be conducted on the premises. Obviously, the trial court only lent credence to the assertions in the demand letter after having weighed the respective evidence of the parties. But even without the letter, the evidence of respondents had already amply substantiated their claims.

We ruled in *Sales v. CA, 211 SCRA 858,* that the extrinsic validity of a document was not affected by the fact that it was notarized in a place other than where the subject matter thereof was located. What is more important under the *Notarial Law* is that the notary public has authority to acknowledge the document executed within his territorial jurisdiction. The ruling in *Sales* is not applicable to the present case. Our concern here is not whether the notary public had the authority to acknowledge the document executed within his territorial jurisdiction but whether respondents indeed appeared before him and signed the deed. However, the quantum of evidence shows that they did not.

The trial court correctly appreciated the fact that the deed was notarized in Manila when it could have been notarized in Bulacan. This additional detail casts doubt on the procedural regularity in the preparation, execution and signing of the deed. It is not easy to believe that petitioner and the ten (10) Torres heirs traveled all the way to Manila to have their questioned document notarized considering that they, with the exception of respondent Roque, are residents of Balagtas, Bulacan, where notaries public are easy to find. Consequently, the claim of private respondents that they did not sign the document before a notary public is more plausible than petitioner's feeble claim to the contrary. Likewise, we find the allegation of respondents that they signed the deed prior to the survey, or before determination of the area to be sold, worthy of credit as against the contention of petitioner that they signed after the survey or on Oct. 10, 1984. As found by the trial court, such contention was contradicted by petitioner's own witness who positively asserted in court that the survey was conducted only on Oct. 16, 1984 or six (6) days after the signing. Quite obviously, when respondents affixed their signatures on the deed, it was still incomplete since petitioner who caused it to be prepared left several spaces blank, more particularly as regards the dimensions of the property to be sold. The heirs were persuaded to sign the document only upon the assurance of petitioner that respondent Roque, pursuant to their understanding, would be present when the property would be surveyed after obtaining permission from the Burea of Lands. As it surfaced, the supposed understanding was merely a ruse of petitioner to induce respondents to sign the deed without which the latter would not have given their conformity thereto. Apparently, petitioner deceived respondents by filling the blank spaces in the deed, having the lots surveyed and subdivided, and then causing the issuance of transfer certificates of title without their knowledge, much less consent. Thus, all the elements of fraud vitiating consent for purposes of annulling a contract concur: (a) It was employed by a contracting party upon the other; (b) It induced the other party to enter into the contract; (c) It was serious; and (d) It resulted in damages and injury to the party seeking annulment.

Perhaps, another compelling reason for the annulment of the document of settlement and conveyance is that the

second page thereof clearly manifests that the number of the subdivision plan and the respective areas of Lots 4-A and 4-B were merely handwritten while all the rest of the statements therein were typewritten, which leads us to the conclusion that handwritten figures thereon were not available at the time the document was formalized.

(7) Situation Where Heirs Did Not Inherit Any Property Right

Where an applicant for homestead did not acquire any vested right over the land and fully owning it at the time of his death, his HEIRS did *not* inherit any property right from him. In one case, failure on the part of the Bureau of Lands to act on the application up to the time of death of the applicant prevented his heirs to be subrogated in all his rights and obligations with respect to the land applied for. *(Lopez v. CA, 998 SCRA 550 [2003]).*

Chapter 2

TESTAMENTARY SUCCESSION

Section 1

WILLS

Subsection 1. — WILLS IN GENERAL

Art. 783. A will is an act whereby a person is permitted, with the formalities prescribed by law, to control to a certain degree the disposition of his estate, to take effect after his death. (667a)

COMMENT:

(1) Essential Elements and Characteristics of a Will

(a) The making of a *will* is a *statutory* (not a natural) right. This is evident from the clause "permitted . . . to control to a certain *degree*." The consequence of this is that the making of a will should be considered subordinated to both the law and public policy. *(Herreros v. Gil, L-3362, Mar. 1, 1951). (See Art. 783).*

A *will* has been defined as species of conveyance whereby a person is permitted, with the formalities prescribed by law, to control to a certain degree the disposition of his estate after his death. *(Caneda v. CA, 41 SCAD 968 [1993]).*

Reyes v. CA
88 SCAD 630
(1997)

A *will* is the testator speaking after death. Its provisions have substantially the same force and effect in the

probate court as if the testator stood before the court in full life like making the declarations by word of mouth as they appear in the will. That was the special purpose of the law in the creation of the instrument known as the last will and testament. Men wished to speak after they were dead and the law, by the creation of that instrument, permitted them to do so. All doubts must be resolved in favor of the testator's having meant just what he said.

(b) It is a *unilateral* act. (This means that no acceptance by the transferees is needed while the testator is still alive; any acceptance made prematurely is useless.)

(c) It is a *solemn* or *formal act* (executed in accordance with the formalities prescribed by law). *(See Art. 783).*

(d) There must be *animus testandi* (intent to make a will).

(e) The testator must be *capacitated* to make a will. *(Arts. 796-798).*

(f) The will is strictly a *personal act* in all matters that are essential. *(Art. 784).*

Rabadilla v. CA
GR 113725, June 29, 2000

A *will* is a personal, solemn, revocable, and free act by which a person disposes of his property, to take effect after his death. *(Art. 783).*

Since the *will* expresses the manner in which a person intends how his properties be disposed, the wishes and desires of the testator must be strictly followed. Thus, a *will* cannot be the subject of a compromise agreement which would thereby defeat the very purpose of making a *will*.

(g) It is effective *mortis causa* (*i.e.*, it produces effects only after the death of the testator — hence, the will is termed "ambulatory"). *(Art. 777).*

(h) It is essentially revocable or ambulatory. *(Art. 828).*

(i) It is *free from vitiated consent, i.e.*, it must have been executed freely, knowingly, and voluntarily, otherwise it will be disallowed. *(Art. 839).*

(j) It is an *individual* (as distinguished from a *joint*) act (if executed by a Filipino, whether in the Philippines or abroad). *(See Arts. 818 and 819).*

(k) It disposes of the testator's estate (whether totally or partially) in accordance with his wishes ("to a certain degree" only, because *legitimes* are reserved for compulsory heirs).

[NOTE: If the will does not dispose of property, such as when a person is merely named executor, or when a natural child is recognized, while the instrument may in one sense still be called a will *(57 Am. Jur., Sec. 27; Re Meade 118 Cal. 248),* still such will need not be probated, for under our law, it would seem that a probate is needed *only if* property is to be conveyed by testamentary succession. *(See Art. 838).* Furthermore, it has been held that for the purpose of recognizing a natural child by virtue of a will, the will need not be probated *(Guevara v. Guevara, C.A., L-7564)* though it must, of course, still be a valid will. *(Onyaga v. Omilia, 50 Phil. 820).].*

[NOTE: While a will is generally an act of liberality, even if certain conditions are stated therein — like the condition to marry a particular person *(57 Am. Jur., Sec. 7)* — still in some instances, a will may be illiberal, particularly if the burdens imposed are very onerous.*].*

(2) Difference Between a 'Last Will' and a 'Testament'

While today, common usage notes no difference between the two, still under Anglo-American law, a *"testament"* disposes of personal property; while a *"will"* disposes of real property. *(See Costigan, On Wills, p. 11).*

(3) Problem

In *T's* will, *A* was given a house, effective *immediately.*

(a) Is this a disposition by virtue of a will?

ANS.: No, since it is supposed to take effect immediately. There was, therefore, no *animus testandi* insofar as this provision is concerned.

(b) Is *A* entitled to get the house now?

ANS.: No, unless he signifies his acceptance, in the form prescribed by law for *donations,* and unless the instrument be notarized as a public instrument. *(See Art. 749).*

(c) How will the house be disposed of?

ANS.: In accordance with the rules on legal succession, in case the donation is not effective. *(See Art. 960).*

(4) Oral Conveyances

It is not uncommon practice of country folks in the Philippines to convey their properties to their heirs without executing any private or public document to that effect. The consistent jurisprudence in this country, despite express codal provisions, has recognized oral contracts as valid and efficacious to bring about partition of a decedent's estate among his heirs provided such partition does not affect the interest of third persons. *(Lasam v. Lasam, CA, L-18184-R, Mar. 29, 1962, 58 O.G. 7232).*

Art. 784. The making of a will is a strictly personal act; it cannot be left in whole or in part to the discretion of a third person, or accomplished through the instrumentality of an agent or attorney. (670a)

COMMENT:

(1) Will-Making Is a Strictly Personal Act

The mechanical act of drafting may be entrusted to another, as long as the disposition itself expresses the testator's desires, and all the formalities of the law are complied with, such as the signing by the testator and the witnesses (in the case of a notarial will), or the *copying by the testator in his own handwriting* (in the case of the *holographic* will). *(See Castañeda v. Alemany, 3 Phil. 426; Bagtas v. Paguio, 22 Phil. 227).*

(2) Advisability of Employing an Attorney

In making a will, it is advisable to employ an attorney, for if we employ an attorney in so many cases involving little

money, it should be wiser to employ one when our whole estate is involved. *(57 Am. Jur., Sec. 21).* Moreover, if an attorney drafts a will and is present at the time of its execution, there is a strong presumption that the will was regularly made. *(Ibid.).*

Art. 785. The duration or efficacy of the designation of heirs, devisees or legatees, or the determination of the portions which they are to take, when referred to by name, cannot be left to the discretion of a third person. (670a)

COMMENT:

Discretion of a Third Person

This provision reinforces the rule that the making of a will is strictly a *personal act.* If, for example, the testator says "I give my land to *X* for as long as my friend *Y* allows," this would be a clear case of illegal delegation of testamentary power.

Art. 786. The testator may entrust to a third person the distribution of specific property or sums of money that he may leave in general to specified classes or causes, and also the designation of the persons, institutions or establishments to which such property or sums of money are to be given or applied. (671a)

COMMENT:

(1) When a Third Person May Be Entrusted

This Article does not really contradict the preceding one, for in Art. 786 the particular names are *not designated* whereas in Art. 785, the names of particular persons are given. Moreover, in Art. 786, a *class* or a *cause* is what is specified.

(2) Examples of Specified Classes

The high school seniors class in the Poveda Learning Centre; the first ten topnotchers in the bar examinations.

(3) Example of Specified Causes

Charitable institutions.

NOTE: In these cases, the distribution (partition or delivery) and the designation of *who will receive,* and *how much* (as long as they fall within the class or cause; and as long as *specific property* or a *sum of money* — [say P5 million] — has been set aside for the purpose) can be entrusted to a *third person*.

Art. 787. The testator may not make a testamentary disposition in such manner that another person has to determine whether or not it is to be operative. (n)

COMMENT:

Non-Determination by Third Person

This Article strengthens the rule that the making of a will is strictly a personal act.

Example:

"I institute *X* as my heir provided that my friend, *Y* will agree." The institution of *X* is void, as well as the participation or delegation of *Y*.

Art. 788. If a testamentary disposition admits of different interpretations, in case of doubt, that interpretation by which the disposition is to be operative shall be preferred. (n)

COMMENT:

(1) Possible Different Interpretations

(a) This rule is similar to the rule in the interpretation of laws or contracts.

(b) The reason is that testate succession, provided the will is valid, is preferred to intestacy. *(See Allen v. Almy, 87 Conn. 517; see also Art. 791).*

(c) The provision applies only in case of DOUBT. If no doubt exists, and the disposition is clearly illegal, same should not be given effect. *(See Cottman v. Grace, 19 N.E. 839).*

(2) The Fixed Law of Interpretation

The intention and desires of the testator if clearly expressed in the will, constitute the fixed law of its interpretation. *(Vda. de Villanueva v. Juico, L-16737, Feb. 28, 1962).*

Art. 789. When there is an imperfect description, or when no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence, excluding the oral declarations of the testator as to his intention; and when an uncertainty arises upon the face of the will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into consideration the circumstances under which it was made, excluding such oral declarations. (n)

COMMENT:

(1) Kinds of Ambiguity in a Will

(a) *Latent or Intrinsic Ambiguity* — that which does not appear on the face of the will, and is discovered only by extrinsic evidence. *Example:* "I institute my *brother-in-law*" (when it is discovered that I have two brothers-in-law). This ambiguity is not found in the will itself, which is clear. The doubt arises only because of things *outside* the will.

[NOTE: In a will, this kind of ambiguity arises:

1) when there is an *imperfect description* of the heir, legatee, or devisee;

2) when there is an *imperfect description* of the gift being given;

3) when only one recipient is designated but it turns out that there are two or more who fit

the description. *(See Gilmer v. Stone, 120 U.S. 586).].*

(b) *Patent or Extrinsic Ambiguity* — that which appears *on the face of the will itself;* in other words, by examining the provision itself, it is evident that it — is not clear. *Example:* "I hereby institute *some* of my seven brothers." (It is evident here that we do not know how many of the brothers are being instituted.)

[NOTE: In this case, extrinsic evidence, as well as the will itself may be examined (but not the oral declarations of the testator) to ascertain the testator's intent, but if after everything has been done, the doubt still remains, not one of the seven brothers will get as instituted heirs, because then, the heirs will be considered as unknown persons under *Art. 844, 2nd par.].*

(2) Under Art. 789 — What Kind of Ambiguity Is Referred to?

ANS.:

(a) The *first clause* — refers to a latent or intrinsic ambiguity — "imperfect description or when no person or property exactly answers the description."

How may this be cured?

BY EXAMINING:

1) the will itself

2) extrinsic evidence *such as* written declarations of the testator (*NOTE* — extrinsic evidence taken from the alleged ORAL declarations of the testator should NOT be allowed, as this can result in fraud, confusion, and unfairness to the dead man whose words may be distorted or perjured.).

(b) The *second clause* — refers to a patent or extrinsic ambiguity — "when an uncertainty arises *upon the face* of the will."

How may this be cured?

ANS.: Same as what was stated for curing a latent ambiguity.

[NOTE: This is because the law allows us to get the intention from:

1) the words of the will

2) the *circumstances* under which the will was made (clearly allowing *extrinsic evidence* also, like written declarations of the testator, but clearly *disallowing* oral declarations of the *testator*).*]*.

[NOTE: It is submitted, therefore, that construing the law as written, it would seem that the new Civil Code really provides for no difference *in* the curing of latent or patent ambiguities although the rule in some Anglo-Saxon countries is different on said point. *(See 57 Am. Jur. 676-677).]*.

(3) Problem on Ambiguity

Jose in his will gave his house to Juan Ramirez. Among Jose's friends are three Juan Ramirezes. In the making of the will, Jose orally stated that he was referring to Juan Ramirez of Pandacan; but among Jose's files was found a memorandum to the effect that he wanted to give the house to Juan Ramirez of *Green Meadows*.

(a) What kind of ambiguity is this?

(b) Is Jose's oral declaration extrinsic evidence (evidence *aliunde*)?

(c) To whom should the house be given upon Jose's death?

ANS.:

1) This is a latent or intrinsic ambiguity, because the provision is by itself clear, the doubt arising only because of circumstances outside the will.

2) Jose's oral declaration is *extrinsic evidence* but should not be admitted, by express provision of the law, in order to discourage perjury.

3) The house should be given to Juan Ramirez of Green Meadows in view of the written memo-

randum, which is indeed admissible *extrinsic evidence*. (That written memoranda may be admitted can be implied from the fact that *oral declarations* are to be excluded.).

Del Rosario v. Del Rosario
2 Phil. 321

FACTS: A made a will giving to *B* a legacy. *B* was pointed out by name in the will, but was also described as the natural child of *C*. In case *B* does not, or cannot present proof that he is the natural child of *C,* do you believe that he can still get the legacy?

HELD: Yes. If a legatee is pointed out by name in the will, the fact that he is referred to as the natural son of a third person does not necessarily make the legacy conditional upon proof of such relationship, the reference being descriptive merely. Of course, had it clearly been shown to be a condition, the answer would have been different.

Johnny S. Rabadilla v. CA and Maria
Marlena Coscoluella y Belleza Villacarlos
GR 113725, June 29, 2000

FACTS: Petitioner contends that private respondent has only a right of usufruct but not the right to seize the property itself from the instituted heir because the right to seize was expressly limited to violations by the buyer, lessee, or mortgagee.

Subject codicil provides that an instituted heir is under obligation to deliver 100 piculs of sugar yearly to Marlena Belleza Coscoluella. Such obligation is imposed on the instituted heir, Dr. Jorge Rabadilla, his heirs, and their buyer, lessee, or mortgagee should they sell, lease, mortgage or otherwise negotiate the property involved. The codicil further provides that in the event that the obligation to deliver the sugar is not respected, Marlena Belleza Coscoluella shall seize the property and turn it over to the testatrix's near descendants.

HELD: There is no tenability in the contention. The non-performance of the said obligation is with the sanction of

seizure of the property and reversion thereof to the testatrix's near descendants. Since the said obligation is clearly imposed by the testatrix, not only on the instituted heir but also on his successors-in-interest, the sanctions imposed by the testatrix in case of non-fulfillment of said obligation should equally apply to the instituted heir and his successors-in-interest.

In the interpretation of *wills*, when an uncertainty arises on the face of the *wills*, as to the application of only of its provisions, the testator's intention is to be ascertained from the words of the *wills*, taking into consideration the circumstances under which it was made. *(Art. 789).* Such construction as will sustain and uphold the *wills* in all its parts must be adopted.

Art. 790. The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be gathered, and that other can be ascertained.

Technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense. (675a)

COMMENT:

Rules for Interpretation of Words

(a) *Ordinary* words have their *ordinary* meanings. *EXCEPTION* — If there is a clear intention that another meaning was used — provided that other meaning can be determined. *(Reason for exception*: The supreme law for interpretation is *INTENTION). (See Solla v. Azcueta, 49 Phil. 333).*

(b) *Technical* words have *technical* meanings.

(Example — "natural child" means that kind defined in the law of PERSONS*.)*.

EXCEPTIONS:

1) If there is a contrary intention.

2) If it appears that the will was drafted by the testator *alone,* who *did not know* the technical meaning.

(Reason: Wills drafted by experts like lawyers are construed more strictly than those made by ordinary laymen*). (See Buchwald v. Buchwald, 199 Atl. 795).*

Example: A layman may use "natural child" to mean a *legitimate* child as distinguished from an *adopted* child; or to mean a *real* child as distinguished from a *"test-tube"* baby or child by *artificial insemination.*

NOTE: An *idiomatic* translation is preferred to a *literal* translation since the former expresses more clearly the testator's desires. *(Dionisio v. Dionisio, 46 Phil. 609).*

If the testator's intention is manifest from the context of the will and surrounding circumstances, but is obscured by inapt and inaccurate modes of expression, the language will be subordinated to the intention; and in order to give effect to such intent, the court may depart from the strict wording, and read a word or phrase in a sense different from that which is *ordinarily* attributed to it, and for such purpose may mould or change the language of the will, such as by restricting its application or supplying omitted words or phrases. *(Rodriguez v. Court of Appeals, L-28734, Mar. 28, 1969).*

Art. 791. The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative; and of two modes of interpreting a will, that is to be preferred which will prevent intestacy. (n)

COMMENT:

(1) Interpretation as a Whole

(a) The will must be interpreted as a *whole.*

(b) While testacy is preferred over intestacy, this is true only if the will has been validly made.

Vda. de Villaflor v. Juico
L-15737, Feb. 28, 1962

FACTS: In the will of the testator, he gave certain properties to his wife for her "*use and possession* while still living and *she* does not remarry, otherwise the properties will pass to my grandniece." The widow lived for 34 more years but never remarried. On the widow's death, the grandniece wanted to get said properties. It was contended that since the widow never remarried, the grandniece cannot get the properties.

HELD: The grandniece can get the property, despite the fact that the widow never remarried. It would have been different had OWNERSHIP over the properties been given to the widow. In such a case, since there was no remarriage, the grandniece cannot inherit. However, as will be observed, what had been granted to the widow were only the "use and possession" of the properties "while living," the clear intent of the testator being only to grant her a life interest or usufructuary interest — an interest which could have ceased even during her lifetime had she remarried. Art. 791 of the Civil Code requires that each word of the will be given some effect.

(2) Priority or Preference of Testate Over Intestate Proceedings

Vicente Uriarte v. CFI of Negros Occidental, et al.
L-21938-39, May 29, 1970

The Court ruled that:

(a) Testate proceedings take precedence over intestate proceedings for the same purpose.

(b) If in the course of intestate proceedings pending before the CFI (now RTC) it is found that the decedent left a will, proceedings for the probate of the will should replace the intestate proceedings (in the same court), *even if* at that stage, an administrator had already been appointed, the latter being required to render his final accounts and to turn over the estate to the executor subsequently named. This is without prejudice to the fact that if, the will be disallowed, the intestate proceedings should be resumed.

Art. 792. The invalidity of one of several dispositions contained in a will does not result in the invalidity of the other dispositions, unless it is to be presumed that the testator would not have made such other dispositions if the first invalid disposition had not been made. (n)

COMMENT:

Effect of Invalid Dispositions

(a) Even if one disposition or provision is invalid, it does not necessarily follow that all the others are also invalid.

(b) The exception occurs when the various dispositions are *indivisible* in intent or nature.

Art. 793. Property acquired after the making of a will shall only pass thereby, as if the testator had possessed it at the time of making the will, should it expressly appear by the will that such was his intention. (n)

COMMENT:

(1) General Rule Respecting After-Acquired Properties

What are given by the will are only those properties already possessed and owned by the testator *at the time the will was made, not* those acquired after ("after-acquired property").

Example: In 2003, *T* made a will "giving *X* all my automobiles." In 2003, *T* had 5 automobiles; but in 2005, when *T* died, he had at the time of his death 8 automobiles. How many will *X* get?

ANS.: X will get only 5 automobiles, because the rest were acquired after the making of the will.

(2) Exceptions (Here, the after-acquired properties are also given to the persons designated in the will.)

(a) If it *expressly* appears in the will that it was the intention to give such "after-acquired" properties.

Example: "I hereby give *X* all my automobiles, *including all the automobiles I will acquire before I die.*"

(b) If the will is *republished* or *modified* by a subsequent will or codicil (in which case, the properties owned at the *time* of such republication or modification shall be given). *(Art. 836).*

Example: In 2003, *T* made a will "giving *X* all my automobiles." At that time he had 5. In 2005, *T* made a codicil, disposing of certain *other* properties in favor of another. One effect of the codicil is that the will must be construed, for this purpose, as having been made in 2005. If in 2005, *T* had 8 automobiles, and in 2007 when he died, he had 12 automobiles, how many will *X* inherit?

ANS: *X* will get 8 automobiles because it is as if the will was made in 2007. This is so even if the will had really been made in 2003, when he had only 5 automobiles. However, the other 3 automobiles acquired after the republication will not be given unless again the contrary intention had been expressed.

(c) If at the time the testator made the will he *erroneously* thought that he owned certain properties, the gift of said properties will not be valid, unless after making the will, said properties will belong to him. *(See Art. 930).*

Example: In 2003, *T* made a will "giving *X* my 5 automobiles." However, at that time, *one* of the automobiles was not really his. Therefore, ordinarily, *X* should get only 4 at the time *T* dies. But if after making the will *T* becomes the owner of the 5th automobile, and at *T's* death, he was owner of the 5 automobiles, all of said 5 automobiles will be given to *X*.

(d) Legacies of credit or remission are effective only as regards that part of the credit or debt existing at the time of the death of the testator. *(Art. 935, par. 1).*

Examples:

1) *Legacy of a credit*

T is the creditor of *D* to the amount of P1,000,000. *T* made a will in 2003 giving this credit

to *X*. If by 2006, at *T's* death *D* has paid already P600,000 to *T*, how much will *X* get?

ANS.: Only the remaining P400,000, which still exists at *T's* death.

[NOTE: If upon the other hand, *D borrowed* P600,000 more instead of paying, how much will *X* get, P1,600,000 which represents the total credit, or only P1,000,000 which represents the credit originally existing at the time the will was made?

ANS.: Only the original P1,000,000, since the extra P600,000 will be "after-acquired property." It is clear that Art. 935 cannot apply because said article contemplates a credit that is *reduced,* not increased.*]*.

[NOTE: It is understood, of course, that the legacy includes all interests on the credit or debt which may be due the testator at the time of his death.*]*.

2) *Legacy of Remission*

T is the creditor of *D* to the amount of P1,000,000. *T* made a will in 2002 *remitting or waiving D's* debt. This is a legacy of a remission of a debt, in favor, naturally, of the debtor. If in 2004, *D* who does *not* know of the provision in the will, (and even if he does know) pays P600,000 to *T*, how much is the legacy of remission if *T* subsequently dies?

ANS.: Only P400,000 because this is the debt still remaining at the time of *T's* death, including interests due, if any, of course.

[NOTE: It is important to know how much exactly is the legacy, in order to determine whether or not it is inofficious or impairs the legitime.*]*.

(3) Query

Does Art. 793 apply if an heir (as distinguished from a mere legatee or devisee) is instituted? In other words, if in 2003, *T* makes a will "instituting *X* as my heir" and *T* dies in 2003, will *X* get only the properties owned in 2003 or should

the inheritance include those properties acquired between 2003 and 2005?

ANS.: Strictly speaking since the law makes no distinction, Art. 793 should also apply to this case. Therefore, *X* will get only the properties owned in 2003. The "after-acquired" properties will have to go to the legal heirs by intestate succession.

Yet, this would seem to destroy the testator's intent, and if thus applied, the rule would apply not only to properties and rights, but also to *transmissible obligations,* thus rending as under the basic philosophy behind the "institution of heirs."

Moreover, the Article was taken from Sec. 615, Act 190 *(The Code of Civil Procedure),* and under said Act the word "heir" did not apply to one instituted in a will, but to the legal or intestate heirs and relatives.

It would seem wise, therefore, to apply the Article only to legatees and devisees. It would even be better to eliminate the Article altogether; and instead substitute one which *will pass* all the property existing at the *time of death,* unless a contrary intention has been expressed. This, it is believed, would better express the testator's presumed intention.

Note carefully the difference between "after-acquired" property (that acquired *between* the time of making the will and the testator's death) and the property "accruing since the opening of the succession" (or the property added *after death* referred to under Art. 781).

Art. 794. Every devise or legacy shall convey all the interest which the testator could devise or bequeath in the property disposed of, unless it clearly appears from the will that he intended to convey a less interest. (n)

COMMENT:

(1) General Rule as to What Interest May Be Disposed of

The entire interest of the testator in the property is given — not more, not less.

Examples: The owner of a house who devises the same transfers ownership over the entire house; if he were a mere co-owner or a usufructuary, he conveys his share in the co-ownership, or his usufructuary right, no more, no less.

(2) Exceptions

(a) He can convey a lesser interest if such intent *clearly appears* in the will. *(Art. 794).*

Example: The owner in his will states "I hereby give to *X* the usufruct of my house."

(b) He can convey a *greater* interest, thus, the *law* provides "If the *testator* … owns *only* a part of, or an interest in the thing bequeathed, the legacy or devise shall be understood limited to such part or interest, UNLESS the testator *expressly declares* that he gives the thing in its entirety." *(Art. 929).*

[NOTE: This can be done thru the *purchase* by the testator or his executor or administrator of the extra interest or by giving its *equivalent value* to the legatee or devisee. *(See Art. 931).].*

(c) He can even convey property which he very well know does not belong to him *(See Arts. 930 and 931),* provided that it also does *not* belong to the legatee or devisee. *(See Art. 937).*

Art. 931 provides: "If the testator orders that a thing belonging to another be acquired in order that it be given to a legatee or devisee, the heir upon whom the obligation is imposed or the estate *must* acquire it and give the same to the legatee or devisee; but if the owner of the thing refuses to alienate the same or demands an excessive price therefor, the heirs or the estate shall only be obliged to give the just value of the thing."

[NOTE: If the testator thought the property was his, although it is *not* really his, the legacy or devise is void, unless the property subsequently becomes his. *(See Art. 930).].*

Art. 795. The validity of a will as to its form depends upon the observance of the law in force at the time it is made. (n)

C0MMENT:

(1) Kinds of Validity With Respect to Wills

There are two kinds of validity:

(a) extrinsic validity

(b) intrinsic validity

[NOTE:

1) *Extrinsic validity refers to the forms and solemnities needed*. (*Examples:* the number of witnesses to a will; the kind of instrument — whether public or private — that is needed). Extrinsic validity may be seen also from two viewpoints, the viewpoint of TIME and the viewpoint of PLACE (or country).

2) *Intrinsic validity* — refers to the legality of the provisions in an instrument, contract or will. *(Examples:* whether or not the omission of a child in the will renders the whole will void; whether or not a [disposition in favor of a friend impairs the legitime; whether or not a compulsory heir has been given his rightful share]. Intrinsic validity may also be viewed from the viewpoint of TIME and the viewpoint of PLACE.*)*.

(2) General Rules on Validity

(a) *EXTRINSIC VALIDITY*

1) *From the viewpoint of TIME* — what must be observed is the law in force at the time the will is MADE (executed). *(Art. 795)*.

2) *From the viewpoint of PLACE or COUNTRY* — what law must be observed *depends:*

a) If the testator is a Filipino, he can observe *Philippine laws (Arts. 804-814);* or those in

the country where *"he may be" (Art. 815);* or those in the country where he *executes* the will *(Art. 17) (lex loci celebrationis or locus regit actum).*

b) If the testator is an *alien* who is *abroad,* he can follow the law of his *domicile,* or his *nationality* or *Philippine laws (Art. 816)* or *where he* executes the will. *(Art. 17).*

c) If the testator is an *alien* in the Philippines, he can follow the law of his *nationality (Art. 817)* or the *laws of the Philippines,* since he executes the will here. *(Art. 17).*

(b) *INTRINSIC VALIDITY*

1) *From the viewpoint of TIME* — successional rights are governed by the law in force *at the time of the* DECEDENT'S DEATH. *(See Art. 2263).*

2) *From the viewpoint of PLACE or COUNTRY — the national law* of the *decedent,* that is, the law of his *country or nationality (Art. 16)* — regardless of the *place of execution* or the *place of death. (See Miciano v. Brimo, 50 Phil. 867).* Thus, a proviso in the will of an alien to the effect that his properties should be distributed in accordance with internal Philippine law, and not in accordance with his own national law, is void because said proviso contravenes Art. 16, par. 2 of the Civil Code. *(Bellis v. Bellis, L-23678, June 8, 1967).* However, if the conflict rules under the *national* law of the deceased refer the matter to the law of the *domicile* and the foreigner was domiciled in the Philippines at the moment of death, our courts will have to apply the Philippine internal law on succession. *(See Testate Estate of Christensen, L-16759, Jan. 31, 1963).* (This is an instance where we ACCEPT THE RENVOI which is the *referring back* to the forum of the problem.)

(3) Particular Use of Art. 795

As has been seen, Art. 795 refers to extrinsic validity from the viewpoint of *time.* Said provision "is the same prin-

ciple enunciated by our Supreme Court in the cases of *Bona v. Briones, 38 Phil. 76,* and *In Re Will of Riosa, 39 Phil. 23." (Comment of the Code Commission).*

The Legislature cannot validate a will void at the time it was made by changing the formalities required. *(See Enriquez, et al. v. Abadia, et al., 50 O.G. 4185).* This is because if it were otherwise, the testator would be deprived of property without due process of law. *(See Thompson, pp. 53-64).* However, said rule applies only to formal or extrinsic validity. Change in successional rights or intrinsic validity may be done even after the will is made, as long as the testator is still alive. This is because until death comes, no right has become vested as yet, the right to the property accruing only at the moment of death. *(Art. 777).*

(4) Reason for Art. 795

A testator cannot be expected to know the future, hence, it is enough that he follows the law in force at the time he makes the will.

(5) Illustration of Art. 795 (BAR QUESTION)

Vda. de Enriquez, et al. v. Miguel Abadia, et al.
L-7188, Aug. 9, 1954

FACTS: In 1923, when holographic wills were not allowed, Sancho Abadia executed a holographic will. It was presented for probate in 1946. In 1952, the trial court allowed the will on the ground that under the new Civil Code, holographic wills are now allowed. The case was appealed.

HELD: The will should not be allowed because under Art. 795, the extrinsic validity of a will should be judged not by the law existing at the time of the testator's death nor the law at the time of probate, but by the law existing at the time of the execution of the instrument. This is because, although the will becomes operative only after the testator's death, still his wishes are given expression at the time of execution.

(6) Example Illustrating the Rule on Intrinsic Validity from the Viewpoint of Time

T died in 1949 leaving no legitimate descendants or ascendants or wife. He however had a recognized spurious child. *T* had made a will instituting a friend *X* as heir without giving anything to the spurious child. Granting that the will is now still before our courts, will you as judge, allow the recognized spurious child to inherit, considering that under the old Civil Code, such a child was NOT entitled to inherit but under the new Civil Code (effective Aug. 30, 1950), such a child is entitled to inherit?

ANS.:

I will *not* allow the child to inherit inasmuch as the father died in 1949 (under the old Civil Code). This is because the intrinsic validity of a will is governed by the law in force at the time of the testator's death. *(Art. 2263).* While it is true that the right of a recognized natural child to inherit is a new right granted for the first time, still the right cannot be accorded a retroactive effect. This is because the right of *X* as instituted heir became *vested* in 1949, and it is well known that a new right cannot be granted a retroactive effect if it will impair a vested right. *(Art. 2253).* The right indeed became vested in 1949, because the rights to the succession are transmitted from the *moment of the death of the decedent. (Art. 777).* This is true *whether or not* the properties have already been distributed or are still undergoing administration or settlement proceedings. *(See Ibarle v. Po, L-5046, Feb. 27, 1953; see also Saturnino v. Paulino, et al., L-7385, May 19, 1956).*

[NOTE: The answer would have been different had the testator died after the date of effectivity of the new Civil Code. In this case, the spurious child would have been entitled to inherit even if he had been born *prior* to the date of the effectivity of the new Civil Code, and even if the will had been executed in accordance with the formalities prescribed by the old law.*].*

(7) Example Illustrating the Rule on Intrinsic Validity from the Viewpoint of Place or Country

(a) A Turk executed in the Philippines a will, observing Philippine laws. In the will, he stated that he wanted his

estate distributed in accordance with Philippine law on succession. Is the provision valid?

HELD: The provision is void, because the estate must be distributed in accordance with the laws of his country, Turkey, and not the law of the Philippines. Art. 16 provides: "Real property as well as personal property is subject to the law of the country where it is situated.

However, intestate and testamentary succession, both with respect to:

1) the order of succession

2) the amount of successional rights

3) and the *intrinsic validity* of testamentary provisions

shall be regulated by the *national law* of the person whose succession is under consideration, whatever may be the nature of the property, and *regardless* of the country wherein said property *may be found*." *(See Miciano v. Brimo, 50 Phil. 867). (Query:* Suppose *Turkish law allows* the distribution of the property in accordance with *Philippine law,* would the decision still be the same?*).*

Bellis v. Bellis
L-23678, June 6, 1967

If a Texan (US) provides in his will that his properties in the Philippines should be distributed in accordance with the Philippine law on succession, the provision is to be regarded as VOID because it contravenes Art. 16 (par. 2) which ordains the application of his own national law.

Thus, if the Texan, under Texan law, has no compulsory heirs, the Philippine law on the legitimes of compulsory heirs cannot be applied.

[NOTE: In the case of *Collector of Internal Revenue v. Fisher, et al., L-11622 and L-11668, Jan. 28, 1961,* the Supreme Court held that Art. 16 of the new Civil Code (Art. 10 of the old Civil Code) does NOT govern the ques-

tion of property relations between spouses. Said Article distinctly speaks of the amount of successional rights, and this term, "property" refers to the extent or amount of property that each heir is legally entitled to inherit from the estate available for distribution.*]*.

(b) A Chinese had a legitimate child. Said Chinese made a will in the Philippines observing Philippine solemnities. In said will, he gave all his properties to *X,* a friend. The child was not given anything. Assuming that in China, a legitimate child is *not* a compulsory heir (and therefore, not entitled to any legitime) and assuming furthermore that all of the properties are in Manila, would you as a judge give any share of the inheritance to the child?

ANS.: Let us determine first if the will is extrinsically valid. We find that it is, because a Chinese may make a will observing Philippine formalities. *(Art. 17).* Let us now see if the will is intrinsically valid. Since under Chinese law as assumed in the problem a child is *not* a compulsory heir, it follows that it was all right for the testator to disregard him. Hence, since the will does *not* violate Chinese Law, and is in fact in accordance with it, the child will not be given anything. *(Art. 16).* This is true even if the properties are all in Manila. *(Art. 16). (See also Philippine Trust Co. v. Bohanan, et al., L-12105, Jan. 30, 1960* where a will was held valid although a divorced wife was not given anything in the will, inasmuch as this omission was allowed under the national law of the deceased.*)*.

(c) If the deceased was a citizen of California but was *domiciled* in the Philippines at the time of death, we ordinarily should apply California law; but since California *conflict rules* provide that the successional rights shall be governed by the law of the place of *domicile* — *i.e.*, the Philippines — we should apply our *internal law on wills and succession* to avoid "international football." In effect, we would be *accepting the RENVOI* (the *return* or the *referring back* to us of the problem). *(Testate Estate of Edward Christensen, L-16759, Jan. 31, 1963).*

Testate Estate of Amos G. Bellis, et al.
v. Edward A. Bellis
L-23678, June 6, 1967

FACTS: Amos G. Bellis was a *citizen and resident* of Texas at the time of his death. Before he died, he had made two wills, one disposing of his Texas properties, the other, disposing of his Philippine properties. In both wills, his recognized illegitimate children were *not* given anything. Texas has no conflicts rule (rule of Private International Law) governing successional rights. Furthermore, under Texas Law, there are no compulsory heirs and therefore, no legitimes. The illegitimate children opposed the wills on the ground that they have been deprived of the legitimes (to which they would be entitled, if Philippine law were to apply). *Issue:* Are they entitled to their legitimes?

HELD:

(1) Said children are NOT entitled to their legitimes for under Texas law which we must apply (because it is the national law of the deceased), there are *no* legitimes. *(See Art. 16, par. 2, Civil Code).*

(2) The *renvoi* doctrine, applied in *Testate Estate of Edward Christensen, Aznar v. Christensen Garcia, L-6759, Jan. 31, 1963, cannot be* applied. Said doctrine is usually pertinent where the decedent *is a national of one country,* and a *domiciliary of another.* In the present case, the decedent was BOTH a national and a domiciliary of Texas at the time of his death. So that even assuming that Texas has a conflicts of law rule providing that the law of the domicile should govern, the same would *not* result in a reference back *(renvoi)* to Philippine law, but would still refer to Texas Law. Nonetheless, if Texas has a conflicts rule adopting the situs theory *(lex rei sitae)* calling for the application of the law of the place where the properties are situated, *renvoi* would arise, since the properties here involved are found in the Philippines. In the absence however of proof as to the conflicts of

law rule in Texas, it should *not* be presumed different from *ours. (Lim v. Collector, 36 Phil. 427; In re Testate Estate of Suntay, 95 Phil. 500).*

(3) The contention that the national law of the deceased *(Art. 16, par. 2; Art. 1039)* should be disregarded because of Art. 17, par. 3 which in effect provides that our prohibitive laws should *not* be rendered nugatory by foreign laws, is WRONG, firstly, because Art. 16, par. 2 and Art. 1039 are *special* provisions while Art. 17, par. 3 is merely a *general* provision; and secondly, because Congress *deleted* the phrase "notwithstanding the provisions of this and the next preceding article" when it incorporated Art. 11 of the old Civil Code as Art. 17 of the new Civil Code, while reproducing without substantial change, the second paragraph of Art. 10 of the old Civil Code as Art. 16 in the new. It must have been its purpose to make the second paragraph of Art. 16 a *specific provision* in itself, which must be applied in testate and intestate successions. As further indication of this legislative intent, Congress added a new provision, under Art. 1039, which decrees that capacity to succeed is to be governed by the national law of the decedent. It is, therefore, evident that whatever public policy or good customs may be involved in our system of legitimes, Congress has not intended to extend the same to the succession of foreign nationals.

(4) It has been pointed out by the oppositor that the decedent executed two wills — one to govern his Texas estate and the other his Philippine estate — arguing from this that he intended Philippine law to govern his Philippine estate. Assuming that such was the decedent's intention in executing a separate Philippine will, it will NOT ALTER the law, for as this Court ruled in *Miciano v. Brimo, 60 Phil. 867, 870,* a provision in a foreigner's will to the effect that his properties shall be distributed in accordance with Philippine law and not with his national law, is

illegal and void for his national law, in this regard, cannot be ignored.

Van Dorn v. Romillo, Jr.
139 SCRA 139
(1985)

Owing to the nationality principle embodied in Art. 15, only Philippine Nationals are covered by the policy against absolute divorces, the same being considered contrary to our concept of public policy and morality. Nonetheless, *aliens* may obtain divorces abroad provided they are valid according to their national law.

Pilapil v. Ibay-Somera
174 SCRA 653
(1989)

Divorce obtained by the respondent in his country, the Federal Republic of Germany, as well as its legal effects, may be recognized in the Philippines insofar as respondent is concerned in view of the nationality principle in our civil law on the status of persons.

Quita v. CA
300 SCRA 406
(1998)

Once proven that respondent was no longer a Filipino citizen when he obtained the divorce from petitioner, the ruling in *Van Dorn v. Romillo, Jr. (139 SCRA 139 [1985])* would become applicable and petitioner could "very well lose her right to inherit" from him.

Paula T. Llorente v. CA and Alicia F. Llorente
GR 124371, Nov. 23, 2000

True, foreign laws do not prove themselves in our jurisdiction and our courts are not authorized to

take judicial notice of them. Like any other fact, they must be alleged and proved. *(Collector of Internal Revenue v. Fisher, 110 Phil. 686 [1961]).*

There is no such thing as one American law. The "national law" indicated in Art. 16 of the Civil Code cannot possibly apply to general American law. There is no such law governing the validity of testamentary provisions in the United States. Each State of the Union has its own law applicable to its citizens and in force only within the State. It can, therefore, refer to no other than the law of the State of which the decedent was a resident. *(In Re Estate of Edward Christensen, Aznar v. Helen Garcia, 117 Phil. 96 [1963]).*

The hasty application of Philippine law and the complete disregard of the will, already probated as duly executed in accordance with the formalities of Philippine law, is thus fatal.

In the case at bar, We hold that the divorce obtained by Lorenzo H. Llorente from his first wife Paula was valid and recognized in this jurisdiction as a matter of comity. Now, the effects of this divorce (as to the succession to the estate of the decedent) are matters best left to the determination of the trial court. The clear intent of Lorenzo to bequeath his property to his second wife and children by her is glaringly shown in the will he executed. We do not wish to frustrate his wishes, since he was a foreigner, not covered by our laws on "family rights and duties, status, condition, and legal capacity." Art. 15 of the Civil Code provides: "Laws relating to family rights and duties, or to the status, condition, and legal capacity of persons are binding upon citizens of the Philippines, even though living abroad."

Whether the will is intrinsically valid and who shall inherit from Lorenzo are issues best proved by foreign law which must be pleaded and proved.

Whether the will was executed in accordance with the formalities required is answered by referring to Philippine law. In fact, the will was duly probated. As a guide, however, the trial court should note that whatever public policy or good customs may be involved in our system of legitimes, Congress did not intend to extend the same to the succession of foreign nationals. Congress specifically left the amount of successional rights to the decedent's national law. *(Bellis v. Bellis, 126 Phil. 726 [1967]).*

The ruling in the case of *Tenchavez v. Escano*, *(122 Phil. 752 [1965])* which provides that "a foreign divorce between Filipino citizens sought and decreed after the effectivity of the present Civil Code is not entitled to recognition is valid in this jurisdiction" is NOT applicable in the case at bar as Lorenzo was no longer a Filipino citizen when he obtained the divorce.

At any rate, this Court recognizes as valid the decree of divorce granted in favor of the deceased Lorenzo N. Llorente by the Superior Court of the State of California in and for the Country of San Diego, made final on Dec. 4, 1952. Further, this Court remands the case to the court of origin for determination of the intrinsic validity of Lorenzo N. Llorente's will and determination of the parties' successional rights allowing proof of foreign law with instructions that the trial court shall proceed with all deliberate dispatch to settle the estate of the deceased within the framework of the Rules of Court.

(8) 'Recognition' Is Of Two Kinds

These are:

1. compulsory; or
2. voluntary. *(Delgado Vda. de Dela Rosa v. Heirs of Marciana Rustia Vda. De Damian, 480 SCRA 334 [2006]).*

Subsection 2. — TESTAMENTARY CAPACITY AND INTENT

Bar Question on Testamentary Capacity

Distinguish between *testamentary power* and *testamentary capacity*. (BAR).

ANS.:

This question can be answered from different viewpoints.

(a) From *one angle:*

1) Testamentary power — is the statutory right to dispose of property by acts effective *mortis causa* (a right given usually as a consequence of ownership and respect for family relations).

2) Testamentary capacity — as used in the new Civil Code is the right to make a will provided certain conditions are complied with; namely that the testator is not prohibited by law to make a will *(Art. 796);* that the testator is at least 18 years of age *(Art. 797);* and that the testator be of "sound mind" at the time of the execution of the will *(Art. 798),* "soundness of mind" being present when the testator knows the NATURE of the estate to be disposed of, the PROPER OBJECTS of his BOUNTY, and the character of the TESTAMENTARY ACT. *(Art. 799).*

(b) From *another viewpoint:*

Testamentary capacity may be classified into two kinds:

1) *active* testamentary capacity — capacity to MAKE a will or codicil

2) *passive* testamentary capacity — capacity to RECEIVE by virtue of a will

Active testamentary capacity (TO MAKE) is often referred to as testamentary POWER while passive testamentary capacity (TO RECEIVE) may also be referred to as plain testamentary CAPACITY.

[*NOTE:* The new Civil Code makes no mention of the phrase "testamentary power."].

(c) From *a third viewpoint:*

Testamentary *capacity* is the *ability* of one to make a will, while testamentary *power* is the *privilege granted by the law* to someone to make a will. Hence, in some *common* law countries, while convicts may have testamentary capacity, they are denied testamentary power, that is, they are not allowed to make a will. *(57 Am. Jur. Wills, Sec. 71).* In the Philippines, however, convicts have both testamentary capacity and power, unless otherwise disqualified.

Art. 796. All persons who are not expressly prohibited by law may make a will. (662)

COMMENT:

Who Can Make Wills

(a) The general rule is CAPACITY. It is incapacity that is the exception.

(b) Two general qualifications:

(1) 18 years old or over;

(2) soundness of mind at the time the will is made.

(c) A convict under *civil interdiction* is allowed to make a will. This is because civil interdiction prohibits a disposition of property *inter vivos,* not *mortis causa. (Art. 34, Revised Penal Code).*

(d) Since the law does not disqualify them, it is believed that spendthrifts or prodigals, even if under guardianship, can make a will provided they are at least 18 years old and are of sound mind.

(e) Art. 796 refers to *"all persons,"* but this should be understood to refer only to *natural persons,* not juridical ones, like corporations. This is evident from the requirement of soundness of mind. *(Art. 798).*

(f) Capacity to make a will is called "*testamentifaccion active*," *whereas* capacity to inherit or to receive by will is *"testamentifaccion passive."*

Art. 797. Persons of either sex under eighteen years of age cannot make a will. (n)

COMMENT:

Age Requirement — 18

(a) Under Spanish Law, a person should have passed his 18th birthday before he can make a will. *(6 Sanchez Roman 212).* Under American Law, he can make a will on the day just before his 18th birthday, on the ground that by that time, 18 years shall have passed. *(See Gardner, p. 86).* Obviously, we follow the Spanish concept.

(b) The age of 18 has been fixed for at this age, an individual is generally no longer subject to fraud, influence, or insidious machinations.

(c) An individual, though a minor, may thus still make a will, and the consent of his parents is not required. Upon the other hand, if he be less than 18, his will should be considered *void* (not merely voidable), and this is true whether or not parental consent had been obtained.

(d) According to a member of the Code Commission, the computation of the age 18 may even be to the very hour of birth. *(Capistrano, II Civil Code 179).* It is believed that this would be too strict inasmuch as the law does not recognize the fractions of a day.

Art. 798. In order to make a will it is essential that the testator be of sound mind at the time of its execution. (n)

COMMENT:

Soundness of Mind

It should be observed that the soundness of mind must exist at the time *of the execution of the will,* not before nor after.

Dorotheo v. CA
320 SCRA 12
(1999)

Due execution of a will includes a determination of whether the testator was of sound and disposing mind at the time of its execution, that he had freely executed the will and was not acting under duress, fraud, menace or undue influence and that the will is genuine and not a forgery, that he was of the proper testamentary age and that he is a person not expressly prohibited by law from making a will.

Art. 799. To be of sound mind, it is not necessary that the testator be in full possession of all his reasoning faculties, or that his mind be wholly unbroken, unimpaired, or unshattered by disease, injury or other cause.

It shall be sufficient if the testator was able at the time of making the will to know the nature of the estate to be disposed of, the proper objects of his bounty, and the character of the testamentary act. (n)

COMMENT:

(1) Requisites for Soundness of Mind

(a) The first paragraph gives the *negative* definition of soundness of mind, enunciated in the case of *Bagtas v. Paguio, 22 Phil. 277.*

Therefore, just because a person has *paralysis* and *loss of speech (Bagtas v. Paguio, supra), or cholera (Galvez v. Galvez, 6 Phil. 243), insomnia (Caguioa v. Calderon, 20 Phil. 400), diabetes (Samson v. Corrales Tan Quintin, 44 Phil. 573), sleeping sickness or Addison's disease (Neyra v. Neyra, 76 Phil. 296), cerebral hemorrhage affecting half of the body (Magsuci v. Gayona, [C.A.] 45 O.G. [5th S] p. 157), deafness, blindness, poor memory (Garcia v. Garcia, 35 O.G. 956; Neyra v. Neyra, 76 Phil. 296),* it does not follow that he was of an unsound mind at the time he executed the will.

(b) The second paragraph gives the affirmative definition as made in the case of *Bugnao v. Ibag, 14 Phil. 163.*

Soundness of mind requires:

(a) that testator knows the *nature of the estate* to be disposed of (character, ownership of what he is giving)

(b) that testator knows the *proper objects of his bounty* (by persons who for some reason expect to inherit something from him — like his children)

(c) that testator knows the *character of the testamentary act* (that it is really a will, that it is a disposition *mortis causa,* that it is essentially revocable)

Alsua-Betts, et al. v. Court of Appeals, et al.
L-46430-31, July 30, 1979

FACTS: After executing a holographic will which was later probated during his lifetime, the deceased executed another will, but this second will he did not submit to the court for probate while still alive. Can the second will be probated after his death?

HELD: Yes, for the fact of non-submission to probate during his lifetime of the second will does not indicate any defect in the requisite testamentary capacity. Besides, a will is revocable at any time by the testator while still alive.

(2) Senility

Senility (infirmity of old age) should be distinguished from *"senile dementia"* (decay of mental faculties). The latter, when advanced or absolute, may produce unsoundness of mind resulting in testamentary incapacity. *(Crisostomo v. Maclang, 46 O.G. No. 5, p. 2106).*

(3) How Unsoundness of Mind is Manifested

(a) religious delusion resulting in the unsettling of judgment. *(57 Am. Jur. Wills, Sec. 85).*

(b) blind extraordinary belief in spirits while executing a will. *(57 Am. Jur. Wills, Sec. 86).*

(c) monomania (insanity on a single subject) — if this happens to be on the subject of wills or succession. *(57 Am. Jur. Wills, Sec. 81).*

(d) insane delusions — belief in things which no rational mind would believe to exist. *(57 Am. Jur. Wills, Sec. 80).*

(e) drunkenness if this results in failure to know the nature of the testamentary act. *(57 Am. Jur. Wills, Sec. 74).*

(f) idiocy — congenital intellectual deficiency. *(I Page, Wills, Sec. 136, p. 283).*

(g) a comatose stage, resulting from hypertension and cerebral thrombosis, and preventing the testator from talking or understanding. *(Gonzales v. Carungcong, L-3272-73, Nov. 29, 1951).*

(h) state of delirium. *(Albornoz v. Albornoz, 71 Phil. 414).*

Art. 800. The law presumes that every person is of sound mind, in the absence of proof to the contrary.

The burden of proof that the testator was not of sound mind at the time of making his dispositions is on the person who opposes the probate of the will; but if the testator, one month, or less, before making his will was publicly known to be insane, the person who maintains the validity of the will must prove that the testator made it during a lucid interval. (n)

COMMENT:

(1) Presumption on Soundness of Mind

Sanity is the general rule; insanity is the exception — hence, as a rule, he who alleges the testator's insanity must prove the same.

(2) Two Instances When the Testator is Presumed Insane

(a) If the testator, one *month* or *less* before making the will was publicly known to be insane (here, the person — proponent — who maintains the will's validity must prove

that the will was made during a *lucid interval*). *(Art. 800, 2nd par.)*.

(b) If the testator made the will after he had been *judicially declared insane,* and before such judicial order had been set aside. *(Torres v. Lopez, 48 Phil. 772)*.

(3) Absence of Presumption

No presumption of insanity arises from:

(a) The presence of a mere delirium, since this is temporary, nor from intoxication, for the same reason.

(b) The insanity of the parents and children of the testator. *(See Testate Estate of Valeriano Raymundo, O.G., Mar. 18, 1941, p. 788)*.

(4) Evidence of Soundness of Mind

The attesting or subscribing witnesses' testimony as to the mental condition of the testator should be given great weight *(Unson v. Abella, 43 Phil. 494),* and should prevail over that given by a non-attending physician who merely speculates. *(Samson v. Corrales Tan, 44 Phil. 573)*. However, the physician should be believed if he was constantly near the testator, and if he actually saw the latter on the date of execution. *(Gonzales v. Gonzalez, L-3272-73, Nov. 29, 1951)*.

Art. 801. Supervening incapacity does not invalidate an effective will, nor is the will of an incapable validated by the supervening of capacity. (n)

COMMENT:

Supervening of Incapacity or Capacity

Example:

When insane, T made a will. Later, he became well, but he did not change the will. Is the will valid?

ANS.: No, because his becoming capacitated later on is not important. What is important is that his mind was not sound at the time he executed the will.

Art. 802. A married woman may make a will without the consent of her husband, and without the authority of the court. (n)

COMMENT:

Capacity of Wife to Make a Will

The Article is to be applied only if the married woman is at least 18 years old, and is of sound mind at the time of execution.

Thus, if a 17-year-old wife makes a will, same will be null and void, even if the husband consents.

This discussion is without prejudice to "contractual succession" in a marriage settlement between the future spouses.

Art. 803. A married woman may dispose by will of all her separate property as well as her share of the conjugal partnership or absolute community property. (n)

COMMENT:

What Wife Can Dispose of in Her Will

(a) The wife cannot dispose of her husband's capital, in her will, unless she knows that the same is not hers, and intends that her administrator or executor will purchase the same from her husband, for distribution to the heirs. *(See Arts. 930 and 931).*

(b) The law says that the wife can dispose of *her share* of the conjugal property. Suppose she disposes of, say, the conjugal house, how will this affect the inheritance?

ANS.: It depends. Ordinarily, the heir gets only half of the house, but if in the liquidation proceedings the house is awarded entirely to the wife's estate (the husband receiving some other property, *like cash*), the heir gets the whole house.

(c) It is understood that the married woman must respect the legitime of her compulsory heirs. *(Art. 886).*

Subsection 3. — FORMS OF WILLS

(1) Kind of Wills Allowed Under the New Civil Code

(a) *Ordinary or notarial will* — that which requires, among other things, an attestation clause, and acknowledgment before a notary public.

(b) *Holograph or holographic will* — the most important feature of which is its being written entirely, from the date to the signature, in the handwriting of the testator. Here, neither an attestation clause nor an acknowledgment before a notary public is needed.

[*NOTE:* Our new Civil Code does not recognize the validity of *nuncupative wills* — wills orally made by the testator in contemplation of death, and before competent witnesses.].

(2) Liberalization in the Formalities Required

According to the Code Commission, "the underlying and fundamental objective permeating the provisions on the law on wills in this Project consists in the *liberalization* of the manner of their execution with the end in view of giving the testator more *freedom in expressing his last wishes but with sufficient safeguards and restrictions* to prevent the commission of fraud and the exercise of undue and improper pressure and influence upon the testator. This objective is in accord with the modern tendency in respect to the formalities in the execution of wills." *(Report of the Code Commission, p. 103).*

Art. 804. Every will must be in writing and executed in a language or dialect known to the testator. (n)

COMMENT:

(1) Written Wills

Article 804 does *not* recognize *oral* wills.

(2) 'Handwriting and Handwriting Experts' Explained

The "handwriting" of a person may be proved by any witness who believes it to be the handwriting of such person because he has seen the person write, or has seen writing purporting to be his upon which the witness has acted or been charged, and has, thus, acquired knowledge of the handwriting of such person. *(Batulanon v. People, 502 SCRA 35 [2006]).*

"Handwriting experts" are usually helpful in the examination of forged documents, but resort to these experts is not mandatory or indispensable to the examination or the comparison of handwriting, and because the judge must conduct an independent examination of the questioned signature in order to arrive at a reasonable conclusion as to its authenticity. *(De Jesus v. CA, 491 SCRA 325 [2006]).*

The opinions of handwriting experts, athough helpful in the examination of forged documents because of the technical procedure involved in the analysis, are *not* binding upon the courts. Resort to these experts is not mandatory *or* indispensable to the examination *or* the comparison of handwriting. *(G & M Philippines, Inc. v. Cuambot, 507 SCRA 552 [2006]).* In other words, "[t]he opinion of handwriting experts are not necessarily binding upon the courts." *(Gulam v. Santos, 500 SCRA 413 [2006]).*

(3) A 'Rare' Thing

Club Filipino, Inc. v. Araullo
508 SCRA 583
(2006)

It is an accepted fact that it is very *rare* that two (2) specimens of a person's signature are exactly alike.

(4) Electronic Commerce

Today's digital age has brought into sharp focus the dawning of the Electronic Commerce Act (ECA) or RA 8792, signed into law on June 14, 2000.

Deliberately left undefined, the term *"electronic commerce"* (or *E-Commerce*) is "the process of buying and selling goods

electronically by consumers and from company to company thru computerized business transactions." (Kenneth C. Laudon and Jane P. Laudon, *Management Information Systems: New Approaches to Organization and Technology [New Jersey: Prentice Hall, 1998]*, cited by Geronimo L. Sy, *E-Commerce Act [Manila: Rex Book Store, 2001], p. 73*).

In the interpretation of the law, due regard is accorded its international origin, *i.e.,* the UNCITRAL Model Law on E-Commerce. Another is the need to promote uniformity in the application of the law and alongside the observance of good faith in international trade relations. *(See Sec. 37, ECA).* Taken into consideration, likewise, are the generally-accepted principles of international law *(Art. II, Sec. 2, The 1987 Phil. Constitution)* and convention on E-Commerce. *(Sec. 37, op. cit.).*

As clearly spelled-out, legal recognition of e-documents is a *given*. It is, in fact, provided that "[w]here the law requires a document to be in writing, that requirement is met by an e-document if said document maintains its reliability and integrity and can be authenticated so as to be usable for subsequent reference." *(Sec. 7[a], id.).* Nonetheless, this aforequoted provision has provoked concerns on how it could be reconciled with the requisite set forth under the Civil Code that certain documents be put in writing. *(See Arts. 1403[2], 1874, 1956, and 804, Civil Code).*

For instance, Art. 804 of the Civil Code provides that every Will must be in writing and strictly following the formalities laid down by Arts. 805 (1st par.) and 806 (*i.e.*, signed by the testator and at least three witnesses at the end of every page, and acknowledged before a notary public).

Upon the other hand, under Sec. 7(c-ii) of the ECA, "no provision . . . shall apply to vary any and all requirements of existing laws and formalities required in the execution of documents for their validity" — thus, the felt need to amend — concerning an apparent conflict in the existing laws, not excluding that of the Civil Code and the Rules of Court *vis-á-vis* issues dealt with in the e-commerce law.

Suffice it to say, from all appearances, it would seem that any contractual agreement entered into may be deemed

valid and enforceable even if it is in the form of an e-document EXCEPT IN THE EXECUTION OF A WILL.

There is that other point apropos to electronic/digital signature. As laid down by the ECA, "[a]n electronic signature on the e-document shall be equivalent to the signature of a person on a written document if the signature is an e-signature and proved by showing that a prescribed procedure, not alternable by the parties interested in the e-document, existed under which —

a) A method is used to identify the party sought to be bound and to indicate said party's access to the e-document necessary for his consent or approval thru the e-signature;

b) Said method is reliable and appropriate for the purpose for which the e-document was generated or communicated in light of all circumstances, including any relevant agreement;

c) It is necessary for the party sought to be bound in order to proceed further with the transaction, to have executed or provided the e-signature; and

d) The other party is authorized and enabled to verify the e-signature and to make the decision to proceed with the transaction authenticated by the same." *(Sec. 8, id.)*.

As defined by law, an e-signature has reference to "any distinctive mark, characteristic and/or sound in electronic form, representing the identity of a person and attached to or logically associated with the e-data message or e-document or any methodology or procedures employed or adopted by a person and executed or adopted by such a person with the intention of authenticating or approving an e-message or e-document." *(Sec. 4[e], id.)*.

(An "e-data message" refers to information generated, sent, received or stored by electronic, optical or similar means. *[Sec. 5{c}, id.].*).

(An "e-document" refers to information or the representation of information, data, figures, symbols or other modes of written expression, described or however represented, by

which a right is established or an obligation extinguished, or by which a fact may be proved and affirmed, which is received, recorded, transmitted, stored, processed, retrieved or produced electronically. *[Sec. 5{f}, id.].*).

[*NOTE:* An *e-signature* is NOT A HANDWRITTEN SIGNATURE that is scanned or graphically imprinted on the e-document. *(Marlene A. Tucker, "A Comparative Study of the Regulatory Framework of E-Commerce in the Philippines and Singapore," Phil. Law Journal, June 2001, Vol. 75, No. 4, p. 823).*].

[*NOTE further* that in the Supreme Court Resolution *re* Rules on Electronic Evidence, an authenticated e-signature *(Rule 2, Sec. 1[j], AM 01-7-01, SC Resolution*, *effective Aug. 1, 2001)* or a digital signature (also authenticated) *(Rule 2, Sec. 1[e], id.)* is admissible in evidence as the functional equivalent of the signature of a person on a written document. *(Rule 6, Secs. 1 and 2, id.).*].

Art. 805. Every will, other than a holographic will, must be subscribed at the end thereof by the testator himself or by the testator's name written by some other person in his presence, and by his express direction, and attested and subscribed by three or more credible witnesses in the presence of the testator and of one another.

The testator or the person requested by him to write his name and the instrumental witnesses of the will, shall also sign, as aforesaid, each and every page thereof, except the last, on the left margin, and all the pages shall be numbered correlatively in letters placed on the upper part of each page.

The attestation shall state the number of pages used upon which the will is written, and the fact that the testator signed the will and every page thereof, or caused some other person to write his name, under his express direction, in the presence of the instrumental witnesses, and that the latter witnessed and signed the will and all the pages thereof in the presence of the testator and of one another.

If the attestation clause is in a language not known to the witnesses, it shall be interpreted to them. (n)

COMMENT:

(1) What Art. 805 Provides

Art. 805 of the new Civil Code particularly segregates the requirement that the instrumental witnesses sign each page of the will, from the requisite that the will be "attested and subscribed by [the instrumental witnesses]" — the respective intents behind these two classes of signature are distinct from each other. Even if instrumental witnesses signed the left-hand margin of the page containing the unsigned clause, such signatures cannot demonstrate these witnesses' undertakings in the clause, since the signatures that do appear on the page were directed towards a wholly-different crowd. *(Azuela v. CA, 487 SCRA 119 [2006]).*

It is the attestation clause which contains the utterances reduced into writing of the testamentary witnesses themselves — it is the witnesses, and not the testator, who are required under Art. 805 of the new Civil Code to state the number of pages used upon which the will was written. *(Azuela v. CA, 487 SCRA 119 [2006]).*

(2) Requirements for a Notarial or Ordinary Will

Aside from the fundamental requisites that the testator be at least 18 years old, and possessed of a sound mind:

(a) The will must be in WRITING (handwritten, typed, or printed; material on which it is written is immaterial). [Note that the validity of a will is not affected by its having been written on poor stationery, or its non-preparation by an attorney or the absence of copies. *(Vda. de Roxas v. Roxas, 48 O.G. 2177).].*

(b) The will must be executed in a language or dialect *known to the testator*.

If the testator resides in a certain locality, it can be presumed that he knows the language or dialect in said locality. *(Abangan v. Abangan, 42 Phil. 476).* Naturally, it is useless to avail of this presumption if the will *is not written in the dialect of the locality*. Moreover, the presumption is only *prima facie,* and therefore, the contrary

may be proved. Thus, it may be shown, for example, by proof in court that the testator was really *ignorant* of the language of the community or locality, or of the language in which the will had been written. *(Acop v. Piroso, 52 Phil. 660).* The fact that the testator knew the will's language *need not* appear on the face of the will. Extrinsic evidence is allowed to prove this. *(Lopez v. Liboro, 81 Phil. 429).* Where the formal requisites for the validity of the will have been satisfactorily established, except the language requirement, the parties should be afforded, in the interest of justice, an opportunity to present evidence, if they so desire, on this controverted issue. *(Jimenez Vda. de Javellana, et al. v. Javellana, et al., L-13781, Jan. 30, 1960).*

(c) The will must be *subscribed* (signed) at the end thereof by the testator himself or by the *testator's name* written by another person in his *presence,* and by his *express direction*.

[NOTE:

1) If the will is not signed at the END but somewhere else, the will is NOT VALID. *(See Freiese's Estate, 336 Pa. 214).*

2) So important is this requirement that if after the signature there are additional clauses or provisions, not only should those clauses be considered void, but also the WHOLE WILL from beginning to end, and will, therefore, be denied probate. *(Matter of Tyner, 138 Misc. 192, 245 N.Y. Supp. 206; see Re Andrews, 162 N.Y. 1, 56 N.E. 529).* (Please observe that Sec. 618 of the Code of Civil Procedure, as amended by Act 2645, did not specify where the testator's signature should be placed; in the new Civil Code, the law expressly requires that it be placed at the end *of the will.*).

3) "END" of the will — means the LOGICAL, not the physical end of the will. *(See Stinson's Estate, 228 Pa. 475).* Thus, if a will starts on the 1st page, continues on the 3rd page, but is concluded on the *2nd* page,

the end of the *2nd* page is the logical end. *(57 Am. Jur. Wills, Sec. 268).*

4) If the testator's *first name* appears, *without the surname,* the will is valid. *(Yap Tua v. Yap Ka Kuan, 27 Phil. 579).*

5) If the testator's name is *misspelled, abbreviated,* or *by nickname,* or by "Father" or "Mother," or in an *assumed name,* this is all right provided the testator intended same to be his signature. *(57 Am. Jur. Wills, Secs. 244, 245, 246, 247).* This is true even in the case of a will signed by the testatrix after her *second* marriage in the name she had borne under her former marriage. *(Ibid., Sec. 247).*

6) A testator can sign with his *thumbmark (Solar v. Diancin, 55 Phil. 479; De Gala v. Gonzales, 51 Phil. 480)* or with his *initials (Yap Tua v. Yap Ka Kuan, 27 Phil. 579),* or even with a rubber stamp or an engraved dye, provided he intends the same to be his signature. *(Thompson on Wills, Sec. 108, pp. 171-173).* Even if the testator's hand is guided by another when the signing or marking is made, the signing will still be valid, and will be considered as having been done by the testator himself. *(Amata v. Tablejo, 48 Phil. 485).*

7) A testator can sign with a mere *cross* if he intends that to be his signature *(See Abaya v. Zalamero, 10 Phil. 357; Leario v. Leano, 30 Phil. 612),* but when SOMEBODY ELSE writes the testator's name for him, the *mere placing* by the testator of a *cross* after his name, *without there being in the will a statement that somebody had signed for the testator,* is NOT SUFFICIENT, and the will is considered void, not because of the cross, but because of failure to state the signing of name by somebody else. *(Garcia v. La Cuesta, et al., L-4067, Nov. 29, 1961).* The Court in the *La Cuesta case* said it would have been different had it been proved that the cross was the usual signature of the testator, or was even one of the ways by which he signed his name. If this were so,

failure to state the writing by somebody else would have been immaterial, since he would be considered to have signed the will himself.

8) Even if a person knows how to write his name, he can still sign by the use of a mark. *(67 Am. Jur. Wills, Sec. 250).*

9) Somebody else may write the TESTATOR'S NAME for the latter, provided this is done in the *latter's presence* and at the *latter's express direction. (Art. 806).* The person writing for the testator should NOT be one of the 3 witnesses. Of course, if there be *more* than 3 witnesses, one of them may sign for the testator. *(See In Re Will of Tan Diuco, 45 Phil. 807).*

10) The signing by another may be done as follows: "For the testator, Mr. Ty by Miss Ty," or "Mr. Ty, by Miss Ty." *(See Ex Parte Arcenas, 4 Phil. 700; Ex Parte Juan Ondevilla, 13 Phil. 479).*

11) As a matter of fact, the person signing for the testator does not even have to put his own name. *(Barut v. Cagacungan, 1 Phil. 461; Bolonan v. Abellana, et al., L-15153, Aug. 31, 1960).* All the law requires is that he puts the name of the testator. *(Caluya v. Domingo, 27 Phil. 330).* Upon the other hand, if he puts down his own name, and omits that of the testator, this would be a substantial violation of the law and would render the will invalid. *(Guison v. Concepcion, 5 Phil. 551; Bolonan v. Abellana, et al., L-15153, Aug. 31, 1960).*

In Re Will of Siason
10 Phil. 504

FACTS: A will ended in this way: "At the request of Señora Maria Siason."

"Catalino Geva"

"T. Silver" "F. Morin"

"R. Espinosa"

Señora Siason made her own signature, but it was contended that it should not be considered one, since it forms the end of the phrase "at the request of _____." Is the will valid?

HELD: Yes, it can be considered a valid signature, and the will is therefore valid, because after all, in this case, the name immediately follows the statement itself, and precedes names of the witnesses.

12) If the person who signs the name of the testator is one of the subscribing witnesses, this is all right. *(Barut v. Cagacungan, 21 Phil. 461).*

13) The delegate must sign in the TESTATOR'S PRESENCE [this does not necessarily mean that the testator must actually see the signing; it is enough that he *could have done so,* or felt it — (as when he is blind) — without any physical obstruction, had he wanted to]. *(Jaboneta v. Gustilo, 5 Phil. 641; Yap Tua v. Yap Ka Kuan, 27 Phil. 579).*

14) "Express direction" — means that the delegate must be *expressly authorized* to do so. Hence, mere knowledge on his part that the will is being signed in his behalf or his acquiescence to such an act is NOT sufficient. *(67 Am. Jur. Wills, Sec. 259; Anno. 16 B.R.C. 320; Waite v. Frisbe, 45 Minn. 361).* However, an *express direction* may be given by the testator *even without using words* — mere clear *gestures or motions or conduct* is sufficient. *(57 Am. Jur. Wills, Sec. 259).* Thus, in one case, when a witness asked the testatrix if he should sign for her, and she answered "Yes" or nodded her head, it was held that there was express authorization. *(Ex Parte Leonard, 139 S.C. 518).*

Taboada v. Hon. Rosal
L-36033, Nov. 5, 1982

Art. 805 uses the terms attested and *subscribed. Attestation* consists in witnessing the testator's execution of the will in order to see and take note

mentally that those things are done which the statute requires for the execution of a will and that the signature of the testator exists as a fact. On the other hand, *subscription* is the signing of the witnesses' names upon the same paper for the purpose of identifying such paper as the will which was executed by the testator. *(See Rogadale v. Hill, 269 SW 2d 911).*

(d) The will must be *attested* and *subscribed* by *three or more credible witnesses* in the *presence* of the *testator and of one another.*

[NOTE:

1) This requirement is aside from the other requirement that there must be an attestation clause, because this requires an ATTESTING. Aside from the ATTESTING itself, there must be PROOF of such attesting, and this proof is what we call the Attestation Clause. (This will be discussed later.)

2) "In the presence" does not necessarily require actually seeing, but possibility of seeing without any physical obstruction. *(Jaboneta v. Gustilo, 5 Phil. 541).* Hence, when a person merely has his back turned, the signing is done in his presence since he could have cast his eyes in the proper direction. *(Jaboneta v. Gustilo, supra).* Upon the other hand, if there is a *curtain* separating the testator and some witnesses — from the other witness — there would be a physical obstruction, and the will cannot be valid. *(See Nera v. Rimandi, 18 Phil. 450).* In case a testator is blind, the "presence" may be complied with if the signing or action is within the range of the OTHER senses like hearing, touch, etc., of the testator. What is important is that he realizes what is being done. *(I Alexander on Wills, pp. 684-686).* An authority has referred to this as the TEST of "AVAILABLE SENSES." *(See Page on Wills).*

3) Purpose of requiring "presence": to avoid fraudulent substitution of the will; and to make more difficult the invention of false testimony by the witnesses,

since they may be the witnesses of one another. *(See Road on Will, p. 238).*

4) It is important that the testator signs in the presence of the witnesses, hence, if he brings to their attention a document purportedly to be a will but already previously signed, the requirements of the law have not been complied with. However, as long as the signing is done within the presence of one another, it really *does not matter much* whether the witnesses signed *ahead of or after* the testator — as testator — as long as the signing is sufficiently contemporaneous. In either case, the will is valid. *(See Gabriel v. Mateo, 51 Phil. 216).*

[NOTE: As will be seen later on, while the *attesting* must be done in the presence of all, the act of *acknowledging* before the notary public does not have to be contemporaneous. It does not even have to be done in the presence of all of them, since the law does not mention this as a requirement; neither does the law require that execution and acknowledgment of a will be made on the same day. *(Testate Estate of A. Ledesma, L-7179, June 30, 1955).].*

(e) The *testator* or the *person* requested by him to write his name, and the *instrumental witnesses* of the will shall sign *each and every page* thereof *except the last,* on *the left margin.*

[NOTE:

1) The law says "page" not sheet. (A sheet has two pages, the *front* and *reverse* sides; if both are used, both must be paged). *(See In Re Estate of Saguinsin, 41 Phil. 875).*

2) The last page need not be signed *on the margin,* since the signatures already appear at the end. (It is wrong to say that the last page needs no signature at all.).

3) If the last page contains ONLY the attestation clause, the testator need not sign on the margin. *(Fernandez v. Vergel de Dios, 46 Phil. 922).*

4) If the whole will including the attestation clause, consists of only one page, no marginal signatures are needed since these would be purposeless as the page already has, at the end thereof, all the necessary signatures. *(Abangan v. Abangan, 40 Phil. 476).*

5) Whenever the marginal signatures are required, although the law says "left margin," the purpose is served if they are on the "*right, top, or bottom* margin," for the only purpose is to identify the pages used, and thus prevent fraud. *(Avena v. Garcia, 42 Phil. 145; Nayue v. Mojal, 47 Phil. 152).*

6) Failure to have the marginal signatures of the testator and of the witnesses, when needed, is a FATAL defect. *(In re Will of Prieto, 46 Phil. 700).* Thus, even if the second page bears the signature or thumbmark, as the case may be, of the testator, but absent on said first page, the will *cannot* be admitted to probate. *(Estate of Tampoy v. Alberastine, L-14322, Feb. 25, 1960).].*

Estate of Tampoy v. Alberastine
L-14322, Feb. 25, 1960

FACTS: The first page of a will bore the signatures of the three (3) instrumental witnesses, but not the signature or the thumbmark of the testator. Is the will valid?

HELD: No, for the absence here constitutes a fatal defect. However, if through the inadvertence or negligence of one of the three witnesses, he forgets to sign on the 3rd page of a 5-page will, but was able to sign on all the pages of the *duplicate,* the omission ought not to be considered a fatal defect. Indeed, the impossibility of substitution of this page is assured not only by the fact that the testatrix and the two other witnesses did sign the defective page, but also by its bearing the coincident imprint of the seal of the notary public before whom the testament

was ratified. The law should not be so strictly and literally interpreted as to penalize the testatrix on account of the inadvertence of a single witness over whose conduct she had no control, where the purpose of the law to guarantee the identity of the testament and its component pages is sufficiently attained, no intentional or deliberate deviation existed, and the evidence on record attests to the full observance of the statutory requisites. Otherwise, witnesses may sabotage the will by muddling or bungling it at the attestation clause. *(Celso Icasiano v. Natividad Icasiano, et al., L-18979, June 30, 1964).* The attesting witnesses must also be the very SAME marginal witnesses, otherwise the will is void. *(Will of Tan Diuco, 45 Phil. 187).*

7) A credible witness is one possessed of the qualifications imposed by law. He must be able or competent to testify. *(Costigan on Wills, pp. 188-191).* At the probate, however, the testimony of the witnesses need not be a detailed or accurate account of the proceedings (one, for instance, which would recall the exact order for the signing of the document by the witnesses). *(Javellana v. Javellana, L-13781, Jan. 30, 1960).*

8) The witness can sign with a cross or a mark, provided that such is the usual signature, and provided further, that he really knows how to read and write. Otherwise, he cannot of course be a witness. *(See Garcia v. La Cuesta, L4067, Nov. 29, 1961).*

(f) All the pages shall be numbered *correlatively* in *letters* placed on the *upper* part of each page.

[NOTE:

1) Purpose: to guard against fraud, and to afford means of preventing substitution or of detecting the loss of any of its pages. *(Lopez v. Liboro, 81 Phil. 429).*

2) Correlative numbering in letter — means "One," "Two," "Three," etc. *(Aldaba v. Roque, 43 Phil. 378),*

BUT "A," "B," "C," would be sufficient *(Ibid.),* or "Page 1," "Page 2," "Page 3," *(Nayue v. Mojal and Aguilar, 47 Phil. 152),* or even plain "1," "2," or "3," since this would amount to substantial compliance with the law. As a matter of fact, it has been held that "the omission to put a page number on a sheet if that be necessary, may be supplied by other forms of identification more trustworthy than the conventional numeral words or characters." *(Lopez v. Liboro, supra).*

3) It is not necessary to number the first page *(Lopez v. Liboro, 81 Phil. 429; Icasiano v. Icasiano, L-18979, June 30, 1964),* nor even the last page as long as, for example, said page, in its attestation clause states that "the will consists of three pages, *besides* this one" for here, it is evident that the last page is really the fourth page. This is true also even if there is no reference to "besides," if the last page contains solely the attestation clause. *(Fernandez v. Vergel de Dios, 46 Phil. 922).].*

(g) The attestation (attestation clause) shall provide:

1) the number of pages used — upon which the will is written;

Taboada v. Hon. Rosal
L-36033, Nov. 5, 1982

FACTS: The attestation clause of a notarial will failed to state the number of pages thereof, however, it is discernible from the entire will that it really consists of only 2 pages (the 1st containing the provisions, and the 2nd, both the attestation clause and the acknowledgment), BESIDES, the *acknowledgment* itself states that "This Last Will and Testament consists of two pages including this page."

HELD: Under the circumstances, the will should be allowed probate. After all, we should approach the matter liberally.

2) that the testator signed (or expressly caused another person to sign) the will and every page thereof in the presence of the instrumental witnesses;

3) that the instrumental witnesses witnessed and signed the will and all the pages thereof in the presence of the testator and of one another.

[NOTE:

a) *Example* of a very simple attestation clause — "This Will consisting of one page was signed by the testator and by all of us in the presence of all of us and the testator.

(Sgd.) A
(Sgd.) B
(Sgd.) C."

b) The absence of the attestation clause is a fatal defect. *(In Re Neumark, 45 Phil. 481).* Moreover, if the attestation clause is *not signed* by the attesting witnesses at the *bottom* thereof, the will is void since omission negates the participation of said witnesses. *(In Re Testate of Vicente Cagro, 15826, Apr. 29, 1953).].*

[NOTE: In the *Cagro* case, the *dissenting* opinion argued for the validity of the will for, after all, the attesting witnesses had signed at the *left hand margin,* and anyway, the law *does not* require this signing by the attesting witnesses at the end or bottom of the attestation clause. It is sufficient that said clause be signed, at the bottom, or at the margins.*].*

c) While Art. 809 requires mere substantial compliance — still — the failure of the attestation clause to state the *number* of pages is a fatal defect. *(See In Re Andrada, 42 Phil. 180).* However, even if not in the attestation itself, if the number of pages is put down somewhere else in the will, as long as no evidence *aliunde* or extrinsic evidence is required, there is deemed

a substantial compliance with the law. *(See Singson v. Florentino, L-4603, Oct. 25, 1952; Gonzales v. Gonzales, L-3272, Nov. 29, 1951).*

d) The attestation is, properly speaking, not part of the will itself, but same may of course be *incorporated* into the will itself. *(Aldaba v. Roque, 43 Phil. 478).* Or it may, of course, be written on a *separate* page. *(Villaflor v. Tobias, 53 Phil. 714).*

e) The attestation clause is an act of the witnesses, hence, it need *not* contain the signature of the testator. If present, said signature will be treated as mere surplusage. *(See Abangan v. Abangan, 40 Phil. 476; Testate Estate of Paula Toray, L-2415, July 31, 1950).*

f) While the testator is required to know the language of the will, the witnesses are *not* required to know the language of the attestation clause. It is sufficient that it be translated to them. *(Art. 805, last paragraph).*

g) *Purposes of the attestation clause*

1) To preserve in permanent form a *record of the facts* attending the execution of the will so that in case of failure of the memory of the subscribing witnesses, or any other casualty, they may still be proved. *(Leynes v. Leynes, 40 O.G. No. 7, p. 51).*

2) To render available proof that there has been a compliance with the statutory requisites for the execution of the will.

3) And, incidentally, to minimize the commission of fraud or undue influence. *(57 Am. Jur. 221).*

h) *BAR QUESTION*

Suppose the attestation clause of a notarial will *fails* to state that the testator signed

the will in the presence of the witnesses, will the will be considered valid or void?

ANS.: It is submitted that the answer is that the will is VOID (despite the substantial compliance of Art. 809). Unless in *some other part of the will,* such a statement is made. *In no case should evidence aliunde be allowed to prove this* — even if there are witnesses who can testify in court as to this fact, their testimony should be excluded. This is because Art. 809 refers only to "defects and imperfections in the *form* of attestation or in the *language used therein." (See for reference Testate Estate of Paula Toray, L-2415, July 31, 1950; Gil v. Murciano, L-3362, Mar. 1, 1951; see also Comment of Justice J.B.L. Reyes, Lawyer's Journal, Nov. 30, 1950, p. 556).].*

Cañeda v. CA
41 SCAD 968
(1993)

Attestation is the act of the senses, while *subscription* is the act of the hand. The attestation clause provides strong legal guarantee for the due execution of a will and insures the authenticity of the same.

The defects in the attestion clause can be cured or supplied by the text of the will or a consideration of matters apparent therefrom which would provide the data not expressed in the attestation clause or from which it may necessarily be gleaned or clearly inferred that the acts not stated in the omitted textural requirements were actually complied with in the execution of the will. The attestation clause of an ordinary or attested will, which does not form part of the testamentary disposition, need not be written in a language or dialect known to the testator.

The purpose of the attestation clause is to preserve in a permanent form, a record of the facts that attend the execution of a particular will, so that in case of failure of the memory of the attesting witnesses, or other casualty, such facts may still be proved.

(3) Other Comments on Formalities of Notarial Wills

(a) It is not essential that the will has to be read to the witnesses, or that they know their contents. *(57 Am. Jur. Wills, Sec. 300).* While they are required to participate in the acknowledgment before the notary public, still what they will acknowledge is NOT the will but attestation clause.

(b) It is not necessary that the notarial will be dated. *(Estate of Labitoria, 54 Phil. 379).* Even if erroneous, the date will not defeat a notarial will since the law does not even require it to be dated. *(Padilla v. Padilla, L-43750).*

[NOTE: The holographic will on the other hand has to be dated, otherwise it is null and void.*].*

(c) It is not essential to state the place where the will is being made or executed. *(Dionisio v. Dionisio, CA, 40 O.G. 71).*

(d) It is not essential to state in the attestation clause that the person delegated by the testator to sign in his behalf did so in the *presence* of the testator. It is enough that it be proved in court that this was what happened. *(See Jallores v. Interino, L-42463).* Nor is it possible to state therein that another person was requested by the testator to sign for him, when the testator himself has thumbmarked the will. *(See Payad v. Tolentino, 6 Phil. 849).*

(e) Essential requirements for notarial will other than those mentioned in *Arts. 804 and 805*:

1) Art. 806 (acknowledgment before notary public)

2) Arts. 807 and 808 (special cases — when the testator is deaf, mute, or blind).

[NOTE: When asked in the BAR EXAMINATIONS for the essential requisites for *notarial wills,* the following articles should all be given: *Arts. 804-809, inclusive.].*

(f) Absence of Documentary Stamp

Gabucan v. Judge Manta
L-51546, Jan. 28, 1980

The failure to affix a 30-centavo documentary stamp on a will is not a fatal defect. This is because the probate court can require the proponent of the will to affix the needed stamp to the acknowledgment of said will.

(4) Donations 'Mortis Causa'

Maglasang, et al. v. Heirs of Cabatingan
GR 131953, June 5, 2002

Donations *mortis causa* partake of the nature of testamentary provisions *(Art. 728)* and as such, said deeds must be executed in accordance with the requisites on solemnities of wills and testaments under Arts. 805 and 806.

Art. 806. Every will must be acknowledged before a notary public by the testator and the witnesses. The notary public shall not be required to retain a copy of the will, or file another with the office of the Clerk of Court. (n)

COMMENT:

(1) Necessity of Acknowledgment (in Notarial Wills)

Though the Article says "every Will," it is understood to refer only to notarial or ordinary Wills, not to holographic Wills. This is evident because the law says that the acknowledgment should be "by the testator and the *witnesses,*" and a holographic Will needs no witnesses. *(Art. 810).*

The express requirement of Art. 806 of the new Civil Code is that the will is to be "acknowledged," and not merely

subscribed and sworn to. The acknowledgment coerces the testator and the instrumental witnesses to declare before an officer of the law that they had executed and subscribed to the will as their own free act or deed. *(Azuela v. CA, 487 SCRA 119 [2006].)*

Gonzales v. Court of Appeals
L-37453, May 25, 1979

If a will is duly acknowledged before a notary public, there is in its favor the presumption of regularity.

Ma. Estela Maglasang, et al. v. Heirs of Corazon Cabatingan
GR 131953, June 5, 2002

FACTS: The deeds in question although acknowledged before a notary public of the donor and the donee, the documents were not executed in the manner provided for under Arts. 805 and 806. *Issue:* Did the trial court commit any reversible error in declaring the subject deeds of donation null and void?

HELD: No. Herein subject deeds expressly provide that the donation shall be rescinded in case petitioners predecease Conchita Cabatingan. As stated in *Reyes v. Mosqueda (187 SCRA 661 [1990]),* one of the decisive characteristics of a donation *mortis causa* is that the transfer should be considered void if the donor should survive the donee.

This is exactly what Cabatingan provided for in her donations. If she really intended that the donation should take effect during her lifetime and that the ownership of the properties donated be transferred to the donee or independently of, and not by reason of her death, she would have not expressed such proviso in the subject deeds.

Considering that the disputed donations are donations *mortis causa*, the same partake of the nature of testamentary provisions *(Art. 728)* and as such, said deeds must be executed in accordance with the requisites on solemnities of wills and testaments under Arts. 805 and 806. In the case at bar, the deeds in question although acknowledged before a notary public

of the donor and the donee, the documents were not executed in the manner provided for under the aforementioned Arts. 805 and 806. Thus, the trial court did not commit any reversible error in declaring the subject deeds of donation null and void.

(2) A 'Notarial Will' Not Acknowledged Before a Notary Public By Testator and the Witnesses Is Fatally Defective

This is even if it is subscribed and sworn to before a notary public. *(Azuela v. Court of Appeals, 487 SCRA 119 [2006])*.

(3) 'Acknowledgment' Defined

This is the act of one who has executed a deed in going before some competent officer or court and declaring it to be his act or deed. It involves an extra-step undertaken whereby the signor actually declares to the notary that the executor of the document has attested to the notary that the same is his own free act and deed. *(Azuela v. CA, 487 SCRA 119 [2006])*.

(4) Meaning of 'Jurat'

A *jurat* is that part of an affidavit whereby the notary certifies that before him, the document was subscribed and sworn by the executor. *(Azuela v. CA, 487 SCRA 119 [2006])*.

(5) A Short History of the Requirement

(a) Under the Spanish Civil Code, notarial intervention was necessary.

(b) Under the Code of Civil Procedure, the requirement of acknowledgment before a notary public was eliminated. *(Valera v. Purrugganan, 4 Phil. 719)*.

(c) The requirement was restored by the new Civil Code to insure authenticity and to minimize fraud. *(Report of the Code Commission)*. If Art. 806 is not complied with, the notarial will shall be disallowed. *(In Re Testate Estate of Alberto, L-11948, Apr. 29, 1959)*.

(6) Intervention of the Notary Public

(a) The notary public does *not* have to be present at the execution of the will. He may, of course, be present, if he wants. He cannot, however, be one of the 3 instrumental witnesses, referred to in the law. Note further that his presence is required for the *acknowledgment*.

(b) Ordinarily, the notary public is not required, not even allowed, to read the will, or to know the contents of the will, unless the testator permits him to do so. It should be remembered that the notary public is not the person acknowledging the will, it is he *before whom* it is acknowledged. The only instance when the notary public is required to read the will is in the case contemplated by Art. 808 — regarding a *blind* testator.

(c) The testator and the instrumental witnesses do not have to make the acknowledgment in the *presence* of one another. This is required only in the *attestation, not* in the acknowledgment. *(Testate Estate of A. Ledesma, L-7179, June 30, 1955).*

(d) Note that it is the *subscribing* or *attesting witnesses* who should acknowledge together with the testator, not ordinary or other witnesses.

(e) A notarial will is NOT a public instrument, although acknowledged. This is evident from the fact that *unlike* in the case of public instruments, "the notary public shall not be required to retain a copy of the will, or file another, with the Office of the Clerk of Court."

(7) Lack of Documentary Stamp

Gabucan v. Hon. Judge Manta, et al.
L-51546, Jan. 28, 1980

FACTS: A petition for the probate of a notarial will was dismissed by the Court of First Instance (now Regional Trial Court) on the ground that the will does not bear a thirty-centavo documentary stamp and is, therefore, not admissible in evidence under the Tax Code. Was the dismissal proper?

HELD: No, the dismissal of the petition was not proper. What the probate court should have done was to require the petitioner or proponent to affix the requisite thirty-centavo documentary stamp to the notarial acknowledgment of the will which is the taxable portion of that document; after all, the documentary stamp may be affixed at the time the taxable document is presented in evidence. *(Del Castillo v. Madrileña, 49 Phil. 740).*

Art. 807. If the testator be deaf, or a deaf-mute, he must personally read the will, if able to do so; otherwise, he shall designate two persons to read it and communicate to him, in some practicable manner, the contents thereof. (n)

COMMENT:

Rules When Testator is Deaf, or a Deaf-Mute

(a) The Article speaks of a testator who is deaf or a deaf-mute.

(b) If he cannot read the will (illiterate), two persons must communicate its contents to him.

(c) The two persons designated need not be the attesting witnesses.

(d) That this Article has been complied with *must be proved* in the probate proceedings. And this is why it *would seem wise* to state either in the notarial acknowledgment or in the attestation clause itself that the Article has been complied with. Yet, it is not essential to do so, as long as sufficient proof (even extrinsic or parol evidence is enough) is presented.

(e) In a case involving an illiterate testator, it was held that the fact that the will had been read to him, *need not be* stated in the attestation, and that it is sufficient if this fact is proved during the probate proceedings. *(Mascarin v. Angeles, et al., L-1323, June 30, 1948).*

Art. 808. If the testator is blind, the will shall be read to him twice; once, by one of the subscribing witnesses, and again, by the notary public before whom the will is acknowledged.

COMMENT:

(1) Rules if the Testator is Blind

(a) This Article applies if the testator is BLIND. Comments (d) and (e) under the preceding article are also applicable.

(b) Note that the reading is twice —

1) once by one of the *subscribing* witnesses,

2) and once by the *notary public*.

(c) Should this will be signed and executed in the presence of the notary public?

ANS.: The law is silent on this point, but it would seem that for the better protection of the testator, it is advisable to have same done before the notary public so that the blind man may have the benefit of the notary public's participation even before he signs the will.

(d) If a testator is a deaf-mute and *also* blind, may he still make a will?

ANS.: No, unless in some way, the contents thereof may properly be communicated to him in accordance with the legal requirements.

Alvarado v. Gaviola, Jr.
44 SCAD 73
(1993)

Article 808 of the Civil Code applies not only to blind testators but also to those who, for one reason or another, are incapable of reading their wills.

(2) Disqualification of Notary Public

The notary public before whom the will is acknowledged cannot be one of the three witnesses to said will, in view of

the absurdity of one person acknowledging something before himself. *(Cruz v. Villasor, et al., L-32213, Nov. 26, 1973).*

Art. 809. In the absence of bad faith, forgery, or fraud, or undue and improper pressure and influence, defects and imperfections in the form of attestation or in the language used therein shall not render the will invalid if it is proved that the will was in fact executed and attested in substantial compliance with all the requirements of Article 805. (n)

COMMENT:

(1) Effect of Substantial Compliance

(a) This Article provides the rule for *substantial compliance* that is, as long as the purpose sought by the attestation clause is obtained, the same should be considered valid.

Alvarado v. Gaviola, Jr.
44 SCAD 731
(1993)

Substantial compliance is acceptable where the purpose of the law has been satisfied, the reason being that the solemnities surrounding the execution of a will are intended to protect the testator from all kinds of fraud and trickery but are never intended to be so rigid and inflexible as to destroy the testamentary privilege.

Although there should be strict compliance with the substantial requirements of the law in order to ensure the authenticity of the will, the formal imperfections should be brushed aside when they do not affect its purpose and which, when taken into account, may only defeat the testator's will.

(b) Note however that the law speaks not of defects of substance but defects and imperfections —

1) in the FORM of attestation, or

2) in the LANGUAGE used therein.

In the Matter of the Petition for the Probate of the Will of Dorotea Perez (deceased); Apolonio Taboada v. Hon. Rosal L-36033, Nov. 5, 1982

FACTS: In a notarial will consisting of two pages, the first containing the entirety of the will and the second, both the attestation clause and the acknowledgment, the signature of the testator was placed at the end of the first page thereof, but the signatures of the attesting witnesses were placed at the left-hand margin of the page. Can the will be admitted or probated?

HELD: Yes, for there is nothing in the law *(Art. 805)* which requires that the attesting witnesses should also sign at the end of the will or at the end of the attestation clause. Besides the law is to be liberally construed. While perfection in drafting is to be desired, unsubstantial departures ought to be ignored.

(2) How Substantive Defect Can Be Cured

It is believed that defects of substance can be cured only by evidence WITHIN the will itself — *not by evidence aliunde (extrinsic evidence)*. It should be noted that the phraseology of the article is indeed misleading. Thus, Justice J.B.L. Reyes of the Supreme Court has made the following observation:

"I submit that the rule here is so broad that *no matter how imperfect* the attestation clause happens to be, the same should be cured by *evidence aliunde*. It thus renders the attestation of NO VALUE in protecting against fraud or really defective execution. The rule *must* be *limited* to disregarding those defects that can be supplied by *an examination of the will itself;* whether all the pages are consecutively numbered; whether the signatures appear in each and every page; whether the subscribing witnesses are three or the will was notarized. All these are facts that the will itself can reveal, and defects or even omissions concerning them in the attestation clause can be safely disregarded. But the *total number* of pages, and whether all persons required to sign did so in the presence of each other must substantially appear in the *attestation clause,*

being the only check against perjury in the probate proceeding." *(Lawyer's Journal, Nov. 30, 1960, p. 566).*

(3) Purpose of the Article

Art. 809 has been designed to attain the main objective of the new Civil Code in the liberalization of the manner of executing wills. *(Comment of the Code Commission).* The Court's policy is to require satisfaction of the legal requirements in order to guard against fraud and bad faith, but without undue or unnecessary curtailment of the testamentary privilege. *(Icasiano v. Icasiano, L-18979, June 30, 1964).*

(4) Effect on the Enactment of the new Civil Code in 1950 Re Attestation Clause

Azuela v. Court of Appeals
487 SCRA 119 (2006)

The enactment of the new Civil Code in 1950 did put in force a rule of intrepretation of the requirements of wills, at least insofar as the attestation clause is concerned.

For instance, a failure by the attestation clause to state that the testator signed every page can be liberally-construed, since that fact can be checked by a visual examination, while a failure by the attestation clause to state that the witnesses signed in one another's presence should be considered a fatal flaw since the attestation is the only textual guarantee of compliance.

(5) Purpose of the Law In Requiring the Attestation Clause To State the Number of Pages on Which the Will Is Written

The failure of the attestation clause to state the number of pages on which the will was written remains a fatal flaw, despite Art. 809 of the new Civil Code. The purpose of the law in requiring the attestation clause to state the number of pages on which the will is written is to safeguard against possible interpolation or omission of one or some of its pages and to prevent any increase or decrease in the pages. There is

substantial compliance with this requirement if the will states elsewhere in it how many pages it is comprised of. *(Azuela v. CA, 487 SCRA 119 [2006]).*

Art. 810. A person may execute a holographic will which must be entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of the Philippines, and need not be witnessed. (678, 688a)

COMMENT:

(1) Definition of 'Holographic Will'

A *holographic will* is one entirely *written, dated,* and *signed by* the *hand* of the testator. *(Caneda v. CA, 41 SCAD 968 [1993]).*

(2) Advantages of a Holographic Will

(a) easier to *make*

(b) easier to *revise*

(c) easier to *keep secret*

(3) Disadvantages

(a) easier to forge by expert falsifiers

(b) easier to misunderstand since the testator may have been faulty in expressing his last wishes

(c) no guaranty that there was no fraud, force, intimidation, undue influence; and no guaranty regarding testator's soundness of mind. *(See 4 Castan, 336-337).*

(4) Comment of the Code Commission

(a) "Almost all the Civil Codes of *modern* countries allow holographic wills with their peculiar requirements. Special mention may be made of the Civil Codes of California, Argentina, Lower Canada, China, France, Germany, Japan, Louisiana, Mexico, Spain and Switzerland.

(b) "In the execution of the holographic will mentioned in the new Civil Code, the testator may *either* —

1) *divulge* its contents, or

2) keep them secret as he may please, and thus he may execute what other Codes *call public notarial, mystic, secret or closed will.*

(c) "Considering the love of the Filipino people for *educational advancement,* holographic wills may be utilized more frequently in the future. It has the merit of being more *intimate* and *personal,* and is likely to be influenced by fraud or *undue pressure.*"

[NOTE: On this point, Justice J.B.L. Reyes says: "Holographic wills are peculiarly dangerous in case of persons who have written very little. The validity of these wills depends *exclusively* on the authenticity of the handwriting, and if writing standards are not procurable, or not contemporaneous, the courts are left to the mercy of the mendacity of witnesses. It is *questionable* whether the *recreation* of the holographic testament will prove wise. Its simplicity is an *invitation to forgery,* specifically since its text may be extremely short. 'All to X' or 'the free part to X,' plus a date and signature. Such short documents can defy real experts in handwriting, specifically in the absence of contemporaneous writing standards. If we want to permit the testator to keep his wishes secret, in order to avoid importunity, it can be done on the basis of the closed will *(testamento cerrado)* of Arts. 706 to 715 of the Code of 1889 (called 'mystic wills' in Louisiana)." *(Lawyer's Journal, Nov. 30, 1950, pp. 556-557).].*

(5) Formalities for a Holographic Will

(a) The language must be known to the testator. *(Art. 804).* (Therefore, it is not sufficient that it be interpreted to him.)

(b) The will must be entirely *written* in the hand of the testator himself. (Therefore, if it is typewritten, printed, in a computer print-out, or mimeographed, it is void. If the testator has no hands, but can write with his foot, this

would be all right, since what the law requires is a personal *distinctiveness*.)

(c) The will must be DATED.

[NOTE:

1) The will must be *dated* — so that in case of a revision of the Will, that of later date should be preferred as expressing truly the last Will and testament.

2) If the date is *not given,* the Will is null and void, since the date in the holographic Will is a mandatory requisite. *(TS, Sep. 29, 1900; July 12, 1905; Dec. 5, 1927).*

3) The date must be in the *handwriting* of the testator, hence, if *printed,* the whole Will is null and void. *(4 Castan 341).*

4) The date must be complete, that is, it must contain the *year, month,* and *day*. "Independence Day, 2002" would be all right, however, since here, there is no doubt as to the exact date. "June 8/02" would also be sufficient, since it is understood that the year is "2002." But "June 8, 200__" would not be proper, since the date would then be considered incomplete. *(See 5 Valverde, 83-84).*

5) Although generally the date should be the true one, an incorrect date, as long as it was made in good faith, does not invalidate the will. *(TS, Dec. 5, 1957).* But if the wrong date was inserted intentionally, it is as if there is no date, hence, the will is considered void. *(See 4 Castan 341).].*

Roxas v. De Jesus, Jr.
GR 38338, Jan. 28, 1985

As a general rule, the "date" in a holographic will should include the day, month, and year of its execution. However, when as in the case at bar, there is no appearance of fraud, bad faith, undue influence and pressure and the authenticity of the will is established and the only issue is whether or not the

date "Feb./61" appearing on the holographic will is a valid compliance with Art. 810 of the Civil Code, probate of the holographic will should be allowed under the principle of substantial compliance.

Ajero v. CA
55 SCAD 352
(1994)

Unless the unauthorized alterations, cancellations or insertions were made on the date of the holographic will or on testator's signature, their presence does not invalidate the will itself.

In the case of holographic wills, what assures authenticity is the requirement that they be totally autographic or handwritten by the testator himself.

In a petition to admit a holographic will to probate, the only *issues* to be resolved are:

1. Whether the instrument submitted is, indeed, the decedent's last will and testament;

2. Whether said will was executed in accordance with the formalities prescribed by law;

3. Whether the decedent had the necessary testamentary capacity at the time the will was executed; and

4. Whether its signing was the voluntary act of the decedent.

(d) The will must be SIGNED by the testator himself.

[NOTE:

1) The *full or customary signature* is needed, hence, the *full name* is not required. If, therefore, the testator's habitual signature is "Ed Paras," this is sufficient. *(See Art. 814; TS, Jan. 4, 1929; see, however, TS, June 8, 1915).*

2) The signature must appear at the *end* of the will. This is evident from the fact that *additional dispositions* can be "written below his signature." *(See Art. 812).].*

(e) There must be *animus testandi*. (Therefore, a will in the form of a letter is all right, as long as the intent to leave a will is clear, but a letter which incidentally contains *testamentary dispositions or probable property dispositions* cannot be considered a valid holographic will.)

(f) It must be executed at the time that holographic wills are allowed, not before, the time of death being immaterial. *(See Art. 796).*

Illustrative Case: (BAR QUESTION)

Vda. de Enriquez, et al. v.
Miguel Abadia, et al.
L-7188, Aug. 9, 1954

FACTS: In 1923, when holographic wills were NOT allowed, Sancho Abadia executed a holographic will. It was presented for probate in 1946. In 1952, the trial court allowed the will on the ground that under the new Civil Code (effective Aug. 30, 1950), holographic wills are now allowed. The case was appealed.

HELD: The Will should NOT be allowed because under Art. 795, the extrinsic validity of a will should be judged not by the law existing at the time of the testator's death nor the law at the time of probate, but by the law existing at the time of the execution of the instrument. This is because, although the Will become operative only after the testator's death, still his wishes are given expression at the time of execution.

(6) Other Features of the Holographic Will

(a) No witnesses are required. [If there be witnesses or an attestation clause, the witnesses and the clause will just be disregarded, and considered as mere surplusage, the

will itself remaining valid. *(See Jones v. Kyle, 168 La. 728). (See also Re Varela Calderon, 57 Phil. 280).*].

(b) No marginal signatures on the pages are required.

(c) No acknowledgment is required.

(d) In case of any *insertion, cancellation, erasure or alteration,* the testator must authenticate the same by his full signature. *(Art. 814).*

(e) May be made *in* or *out* of the Philippines, even by Filipinos. *(See Art. 810).* (Note that Art. 815 is only permissive.)

(f) May be made even by a *blind* testator, as long as he is *literate,* at least 18, and possessed of a sound mind.

(g) Even the mechanical act of drafting a holographic will may be left to someone other than the testator, as long as the *testator himself copies* the draft in his own handwriting, dates it, and signs it. *(See Art. 810).*

(7) Query

Why should *holographic wills* be construed more liberally than the ones drawn by an expert?

ANS.: Taking into account the circumstances surrounding the execution of the instrument and the intention of the parties, holographic wills are "usually prepared by one who is not learned in the law." *(Seangio v. Reyes, 508 SCRA 177 [2006]).* It is a fundamental principle that the intent or the will of the testator, expressed in the form and within the limits prescribed by law, must be recognized as the supreme law in succession. *(Ibid.).*

Note that an *holographic will* must be entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, need not be witnessed, and may be made in or out of the Philippines. *(Ibid.).*

(8) Note

An *holographic will* "may be made in or out of the [Republic of the] Philippines." *(Seangio v. Reyes, 508 SCRA 177 [2006]).*

(9) Function of a Probate Court

Its main task is to settle and liquidate the estates of deceased persons either *summarily* or thru the *process of administration*. Thus, the determination of a person's suitability for the office of administrator rests, to a great extent, in the sound judgment of the court exercising the power of appointment and such judgment will not be interfered with on appeal unless it appears affirmatively that the court below was in error. *(Uy v. CA, 484 SCRA 699 [2006])*.

Art. 811. In the probate of a holographic will, it shall be necessary that at least one witness who knows the handwriting and signature of the testator explicitly declare that the will and the signature are in the handwriting of the testator. If the will is contested, at least three of such witnesses shall be required.

In the absence of any competent witness referred to in the preceding paragraph, and if the court deem it necessary, expert testimony may be resorted to. (691a)

COMMENT:

(1) Probate of Holographic Wills

(a) *Probate* means the allowance of a will by the court after its due execution has been proved.

(b) *Proof of identity* of the signature and handwriting of the testator is important, otherwise, the will cannot be valid.

(c) The probate may be —

1) uncontested

2) or contested

(d) If uncontested, at least one identifying (not necessarily a subscribing) witness is required to avoid the possibility of fraud. If no witness is available, experts may be resorted to.

(e) If contested, at least three such identifying witnesses should be required. If *none* are available, experts may be called upon, otherwise the will of the testator may be frustrated thru no fault of his own. Upon the other hand, even if ordinary witnesses are available, still if they are *unconvincing,* the court may still, and in fact should resort to handwriting experts. The duty of the Court, in fine, is to exhaust all available lines of inquiry, for the state is very much interested in carrying into effect the true intention of the testator. Because, however, the law leaves it to the trial court to decide if experts are still needed, no unfavorable inference can be drawn from the party's failure to offer expert evidence, until and unless the court expresses dissatisfaction with the testimony of the lay witnesses. *(Azaola v. Singzon, L-4003, Aug. 5, 1960).*

On this point, Justice J.B.L. Reyes has remarked:

"Why should the Court's discretion in weighing the proof be limited by a *quantitative minimum* of proof? Three witnesses in case of contest recalls the obsolete Roman Rule — *'testis unos, testis nullius.'* The modern tendency is to leave the weight of evidence to the Courts. After all, *one witness* can be very convincing, and a probate case is not a prosecution for treason." *(Lawyer's Journal, Nov. 30, 1960, p. 557).*

Codoy v. Calugay
312 SCRA 333
(1999)

The goal to be achieved by Article 811 of the Civil Code is to give effect to the wishes of the deceased and the evil to be prevented is the possibility that unscrupulous individuals who for their benefit will employ means to defeat the wishes of the testator.

The possibility of a false document being adjudged as the will of the testator cannot be eliminated, which is why if the holographic will is contested, the law requires three witnesses to declare that the will was in the handwriting of the deceased.

(2) Effect if Holographic Will is Lost or Destroyed

If a holographic will has been lost or destroyed *without* intent to revoke, and no other copy is available, it CAN NEVER be probated because the BEST and ONLY evidence therefor is the HANDWRITING of the testator in SAID will. Evidence of *sample handwritten statements* of the testator cannot be admitted because there would be no handwritten will with which to make a COMPARISON. It is believed however that a *photostatic* copy of the holographic will may be allowed because here, there can be a COMPARISON. Evidently, the probate of a lost or destroyed will referred to in the last paragraph of Art. 830 can only refer to a notarial, not a holographic will.

(3) Are the Provisions of Art. 811 Permissive or Mandatory?

Eugenia Ramonal Codoy and Manuel Ramonal v. Evangeline R. Calugay, et al.
GR 123486, Aug. 12, 1999

FACTS: In this petition, petitioners ask whether the provisions of Art. 811 are permissive or mandatory. The article provides as a requirement for the probate of a contested holographic will, that at least 3 witnesses explicitly declare that the signature in the will is the genuine signature of the testator. Art. 811 reads in part: "If the will is contested, at least 3 of such witnesses *shall* be required."

HELD: We are convinced, based on the language used, that Art. 811 is mandatory. The word "shall" connotes a mandatory order. We have ruled that "shall" in a statute commonly denotes an imperative obligation and is inconsistent with the idea of discretion and that the presumption is that the word "shall," when used in a statute, is mandatory.

[NOTE: Thru a holographic as well as notarial wills, filiation may be established. *(Potenciano v. Reynoso, 401 SCRA 391 {2003}).].*

(4) An 'Holographic Will' May Be Made In or Out of the Philippines

Seangio v. Reyes
508 SCRA 177
(2006)

ISSUE: May an *holographic will* be made in *or* out of the Philippines?

HELD: An holographic will must be entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and *may be made in or out of the Philippines*, and need not be witnessed.

In the lucid words of the Philippine Supreme Court —

> It is a fundamental principle that the intent or the will of the testator, expressed in the form and within the limits prescribed by law, must be recognized as the supreme law in succession. Holographic wills, being usually prepared by one who is not learned in the law, should be construed more liberally than the ones drawn by an expert, taking into account the circumstances surrounding the execution of the instrument and the intention of the testator. The law favors testacy *over* intestacy, and testate proceedings for the settlement of the estate of the deceased take precedence over intestate proceedings. The probate of a will cannot be dispensed with, however.

Art. 812. In holographic wills, the dispositions of the testator written below his signature must be dated and signed by him in order to make them valid as testamentary dispositions. (n)

COMMENT:

Dispositions Written Below the Signature

(a) A testator may draft one part of a holographic will at one time, and another part at another time. It may even happen that the latter dispositions are made even after the signature had been written. Hence, the necessity for a provision like Art. 812.

(b) Dispositions after the signature must be both DATED and SIGNED by the testator to be valid. If SIGNED — but NOT dated, or if DATED but NOT signed, the additional dispositions are void, for lack of an essential requisite. Note that said dispositions are really considered independent of the will itself. *(Refer however to Art. 813).*

Art. 813. When a number of dispositions appearing in a holographic will are signed without being dated, and the last disposition has a signature and date, such date validates the dispositions preceding it, whatever be the time of prior dispositions.

COMMENT:

Rules for Curing Defects

(a) If the *last* disposition is SIGNED and DATED —

(1) preceding dispositions which are SIGNED but NOT DATED are *validated*.

(2) preceding dispositions which are NOT SIGNED but DATED are VOID. (This can be inferred from the wording of the law.)

(3) preceding dispositions which are NOT SIGNED and NOT DATED are of course VOID, unless written on the SAME date and occasion as the latter disposition.

(b) The discussion in (a) presupposes that the latter disposition was DATED and SIGNED by the testator HIMSELF. Therefore:

(1) if done by ANOTHER, without the testator's consent, same will not affect the previous dispositions, which remain VOID if in themselves VOID; and remain VALID if in themselves VALID.

(2) if done by ANOTHER with the testator's CONSENT, same effects as (1), because the latter disposition is not really HOLOGRAPHIC (not done by the testator himself).

Art. 814. In case of any insertion, cancellation, erasure or alteration in a holographic will, the testator must authenticate the same by his full signature. (n)

COMMENT:

Authentication of Correction by Full Signature

(a) Full signature here means the full or usual or customary SIGNATURE (not necessarily the FULL NAME). However, if both the first and second names are merely in initials, it is believed that this would be *contrary* to the intent of the law.

(b) QUESTION: Suppose there is an alteration *without* the full signature, is the whole will void?

ANS.: No, only the alteration is VOID. *(TS, Apr. 4, 1905).* However, if what was altered was the DATE or the SIGNATURE, the alteration without the full signature makes the WHOLE will VOID. *(TS, Apr. 3, 1905).*

NOTE: The effect on E-Commerce's Use of Signature still has to undergo further strictly the Supreme Court's Revision Rules Committee.

Art. 815. When a Filipino is in a foreign country, he is authorized to make a will in any of the forms established by the law of the country in which he may be. Such will may be probated in the Philippines. (n)

COMMENT:

(1) Formalities of Wills Executed by Filipinos Abroad

Note the word *"authorized."* This makes the Article permissive, not mandatory. Therefore, by way of example, a Filipino, if in California, can make a will there in accordance with the forms (extrinsic validity) of:

(a) California

(b) or of the Philippines (even if the Philippine form is not recognized in California)

[NOTE: If an alien abroad can do this under Art. 816, why cannot a Filipino?*].*

[NOTE: There is one exception to this article and that is, a Filipino cannot execute abroad a joint will even if the same is valid there. *(See Art. 819).].*

(2) Bar Question

Carlos Reyes, a Filipino citizen residing temporarily in Oregon, State of Washington (U.S.), executed a will in accordance with the laws of said state. Assuming the testator returns to the Philippines and dies here without modifying or executing a new will in accordance with Philippine laws, how shall his estate be dealt with, testate or intestate? Explain your answer mentioning the pertinent legal provisions and authorities.

ANS.: The succession will be testamentary, since under Art. 815 he is allowed to make a will in any of the forms allowed in the foreign state where he may be. The will he executed in Washington may indeed be probated in the Philippines. Of course, the intrinsic validity of the provisions of his will, the amount of successional rights, and the order of succession will have to be governed by his national law, that is, the Philippine law on succession. *(Art. 16).*

(3) Query on Effect of Foreign Probate

If a will is probated abroad, does it have to be probated again in the Philippines?

ANS.: In one sense, there is no need of an ordinary or usual probate here. What is required however is that there must be a proceeding here to *prove* that indeed the will had *already* been probated abroad. In other words, the rule is the same as in proving the existence of a foreign judgment. *(See Yu Chengco v. Tiaoqui, 11 Phil. 598).*

[NOTE: Of course, if the foreign will has not yet been probated abroad, a probate must be had here, and this time proof must be presented that indeed the will had been *executed* in accordance with the law established in said foreign country.

(Art. 815; See Yu Chengco v. Tiaoqui, 11 Phil. 598). In such a case, there is naturally no necessity of showing that a previous probate had been had abroad. *(Dalton v. Giberson, L-4113, June 30, 1962).].*

[NOTE: It should be observed that in the absence of contrary proof, foreign laws on the formalities of a will are presumed to be the same as those existing in the Philippines. *(Miciano v. Brimo, 50 Phil. 867).* It has also been held that if there is no proof regarding the foreign law of *probate procedure* and no proof that the foreign court that approved the will is indeed a probate court, it will be presumed that the proceedings in the matter of probate in said court are the same as those provided for under Philippine laws. *(Testate Estate of Suntay, L-3087, July 31, 1964).].*

[NOTE: What have been said here about the probate of foreign wills are applicable also to those referred to under *Arts. 816* and *817, respectively.].*

Art. 816. The will of an alien who is abroad produces effect in the Philippines if made with the formalities prescribed by the law of the place in which he resides, or according to the formalities observed in his country, or in conformity with those which this Code prescribes. (n)

COMMENT:

(1) Formalities for Wills Executed by Aliens Abroad

An alien abroad may make a will in accordance with the *formalities* (extrinsic validity) prescribed by the law of:

(a) the place of his *residence* or *domicile;*

(b) his own *country* or *nationality;*

(c) the *Philippines;*

(d) the law of the place of execution. *(Art. 17, par. 1).*

(2) Example

A Chinese, domiciled in Argentina, is on his way to Manila. The boat where he is, is staying for one day in Japan. In

Japan, can he make a will? If so, what country's formalities should he observe?

ANS.: This is a typical case of an alien abroad. Therefore, he can make a will in accordance with the testamentary formalities of:

(a) Argentina (domicile)

(b) China (nationality)

(c) Philippines

(d) Japan under Philippine law, which recognizes *lex loci celebrationis* — law of the place of execution. *(See Answer of the Code Commission and Hearings Conducted on Said Point, May, 1951 issue of the Lawyer's Journal).*

[NOTE: The Code Commission believes that Art. 17 should *supplement* Art. 816.*].*

It should be noted that Art. 816 speaks only of *extrinsic validity*. Intrinsic validity is governed by Art. 16.

Art. 817. A will made in the Philippines by a citizen or subject of another country, which is executed in accordance with the law of the country of which he is a citizen or subject, and which might be proved and allowed by the law of his own country, shall have the same effect as if executed according to the laws of the Philippines. (n)

COMMENT:

(1) Formalities for Wills Executed by Aliens in the Philippines

Example:

If a Chinese lives in Manila, he can follow the extrinsic formalities of wills required.

(a) in China *(Art. 817) — lex nationalii*

(b) or in the Philippines *(Art. 17) — lex loci celebrationis*

(2) Reason for the Provision

Reason for allowing him to make a will following his own country's formalities: Being a citizen thereof, he may be more cognizant of said laws than those in the Philippines.

(3) In Re Estate of Johnson, 39 Phil. 156

A will executed in Manila by a citizen of Illinois living in Manila, and which follows the requirements in Illinois, can be admitted to probate in the Philippines.

Art. 818. Two or more persons cannot make a will jointly, or in the same instrument, either for their reciprocal benefit or for the benefit of a third person. (669)

COMMENT:

(1) 'Joint Wills' Defined

Joint wills are those which contain in ONE instrument the will of two or more persons jointly signed by them.

Example: A and *B,* friends, made a will in one instrument, making *C* their heir. (Under the law, joint wills are VOID.)

(2) 'Reciprocal' or 'Mutual' Wills Defined

They are those that provide that the survivor of the testators will succeed to all or some of the properties of the decedent.

Example: A made a will making *B* his heir. *B* also made a will making *A* as his heir.

[NOTE: Mutual wills or reciprocal wills by themselves are VALID, but if made in *one* instrument, they are void, not because they are reciprocal, but because they are joint.*]*.

[NOTE: Joint wills, whether reciprocal or not, are void.*]*.

(3) Reasons Why Joint Wills are VOID

(a) To allow as much as possible SECRECY, a will being a purely personal act.

(b) To prevent *undue influence* by the more aggressive testator on the other. *(Dacanay v. Florendo, et al., 48 O.G. 81.)*.

(c) In case of death of the testators at different times, probate would be harder.

(d) It militates against the right of a testator to revoke his will at any time.

(Example: One testator would be prevented from revoking by an overt act, like tearing or burning, for the other may not agree.*)*

(e) In case of a husband and wife, one may be tempted to kill the other. *(In re Will of Bilbao, 47 O.G. [Sup. 12] 331, L-3200, Aug. 2, 1960)*.

(4) Query: A joint will (executed by a husband and his wife) was erroneously probated by the RTC. There being no appeal, the judgment became final. Can the joint will be given effect?

Answer: Yes, for while joint wills are prohibited and should have been disallowed, still in this case, the judgment had already become final. This is NOT a case of lack of jurisdiction: it is simply an instance of an erroneous but valid judgment. Otherwise stated, this is merely an error in law, not an error in jurisdiction. *(See Bernabe de la Cerna v. Manuela Rebaca Potot and Court of Appeals, 12 SCRA 576, L-20234, Dec. 23, 1964)*.

[NOTE: The principle just given is applicable if *both* testators of the joint will were already dead at the time the probate was made. If only one was dead, and the other was still alive, the final judgment can have reference only to the estate of said *deceased* testator. Later, when the second testator dies, and the joint will is once again presented, the same ought to be regarded as *intestate. (Ibid.).]*.

[NOTE: The same principle applies in similar cases, as when, a notarial will with only two (2) credible witnesses is erroneously allowed by final judgment.*]*.

(5) Wills that are NOT Joint Wills

(a) Those made on a single sheet of paper, the first on the front, and the second on the reverse side. (*Reason:* There are really two wills here.)

(b) Those made even on the same page with or without a dividing line between them, but neither combining the signature of BOTH together. (*Reason:* Here again there are really two instruments or two wills, which are INDEPENDENT of each other.)

[NOTE: Reciprocal wills between a husband and wife, as long as not made jointly, are valid. *(Araniera v. Rodriguez, et al., 46 O.G. 584).* This is true even if the same witnesses are used. *(57 Am. Jur. Wills, Sec. 682).].*

(6) Rules in Other Countries

Among the countries that prohibit the execution of joint wills are Argentina, Brazil, Lower Canada, France, and Mexico. In *Germany,* however, joint will may be made, but only by a *married couple. (Comment of Code Commission, Com. Report, p. 106).*

Art. 819. Wills, prohibited by the preceding article, executed by Filipinos in a foreign country shall not be valid in the Philippines, even though authorized by the laws of the country where they may have been executed. (733a)

COMMENT:

Effect of Joint Wills Executed Abroad

(a) Note that Art. 819 is an expression of public policy, and is clearly one exception to the rule of *lex loci celebrationis.*

(b) Note, however, that the prohibition refers only to *Filipinos*. Hence, if made by foreigners abroad, and *valid* in accordance with Art. 816, the same should be considered as valid here.

(c) How about joint wills executed by foreigners?

ANS.:

(1) if executed *abroad* and valid in accordance with Art. 816, same should be considered *valid* here. (This is a clear implication from Art. 819.)

(2) if executed in the *Philippines,* same should be considered VOID because although apparently allowed under Art. 817, still Art. 818, which refers specifically to joint wills, and which should be considered as an expression of public policy, should prevail.

Subsection 4. — WITNESSES TO WILLS

Art. 820. Any person of sound mind and of the age of eighteen years or more, and not blind, deaf or dumb, and able to read and write, may be a witness to the execution of a will mentioned in Article 805 of this Code. (n)

COMMENT:

(1) Qualifications for Witnesses to Notarial Wills

At the time of attesting *(Arts. 820 and 821),* the witness must:

(a) be of sound mind *(Art. 820)*

(b) be at least 18 years *(Art. 820)*

(c) be able to read and write *(Art. 820)*

(d) not be blind, deaf, or dumb *(Art. 820)*

(e) be domiciled in the Philippines *(Art. 821)*

(f) not have been CONVICTED (by final judgment) of FALSIFICATION of a document; PERJURY; or FALSE TESTIMONY *(Art. 821)*

Gonzales v. Court of Appeals
L-37453, May 25, 1979

The word "credible" with reference to the witnesses of a will does not have the same meaning of "credible witness" under the Naturalization Law. In wills, a credible witness must have all the qualifications specified by the Civil Code.

(2) Question on the Language Required

Is it essential for the witness to be able to *speak* and *write* the very language in which the will was written?

ANS.: No, since after all, the witness does not even have to know the contents of the will. Therefore, he does not have to understand the language concerned. *(See 57 Am. Jur. Wills, Sec. 311).*

[NOTE: It is not even essential for the witness to know the language in which the *attestation* has been written. It is sufficient that same be interpreted to him. *(See Art. 805).].*

Art. 821. The following are disqualified from being witnesses to a will:

(1) Any person not domiciled in the Philippines;

(2) Those who have been convicted of falsification of a document, perjury or false testimony. (n)

COMMENT:

(1) More Qualifications for Witnesses Than for Testators

Note that the qualifications of a witness to a notarial will are numerically more than those required of a testator.

Example: While a blind or illiterate person can make a will, he cannot be a witness to a notarial one.

(Of course, a blind person can witness a *holographic* will, since after all, said will requires no witness.)

Observe however that it is not essential that the witness be a citizen of the Philippines, for domicile is what the law merely requires. Domicile is defined in Art. 6 of the new Civil Code as *the place of habitual residence.*

(2) Rule if Will is Executed Abroad

If a Filipino in the U.S. wants to execute a notarial will in accordance with Philippine laws, do his witnesses have to be domiciled in the Philippines?

ANS.: It is submitted that the answer is in the negative, since after all, the will is being made in the U.S.

[NOTE: Of course, it should be observed that generally, there are two reasons for the requirement of Philippine domicile:

(a) the assurance that the witness will be *available* at the time the will is presented for probate;

(b) the likeliness of *personal acquaintance* with the *testator* (hence, greater credibility as a witness, for example, on the *soundness of mind* of the testator).*]*.

(3) Rules Regarding Convicted Witnesses

Note that regarding convicts, only *three crimes* have been mentioned:

(a) falsification of a document (whether the document be public, commercial, or even private)

(b) perjury

(c) false testimony

By implication, conviction for other crimes such as murder or arson or rape cannot be said to be a disqualification.

(4) Effect of Pardon

(a) If the pardon was given because of the *man's* innocence, as when somebody else had been proved to be the really guilty person, he can now act as a *witness* to a will. This is because there is no mental dishonesty.

(b) If the absolute pardon was an act of Executive grace of clemency, it is submitted that the *disqualification* remains, for even an absolute pardon does not remove *civil* consequences. The would-be witness still has a taint of mental dishonesty.

Example: Even an absolute pardon granted a wife by the Chief Executive, after a wife has committed the crime of adultery, will not prevent the husband from instituting a suit for LEGAL SEPARATION, as long as the prescriptive period has *not* yet lapsed.

(5) Disqualification of Notary Public Concerned

The notary public before whom the notarial will is acknowledged is *disqualified* to be a witness to said will. It would be absurd for him (as witness) to be acknowledging something before himself (as notary public). *(Cruz v. Villasor, et al., L-32213, Nov. 26, 1973).*

(6) Credibility of a Witness to a Notarial Will

Gonzales v. Court of Appeals
L-37453, May 25, 1979

While the instrumental witnesses to a will must be shown to have the qualifications under Art. 820 of the Civil Code and none of the disqualifications under Art. 821, it is presumed that they are trustworthy and reliable, unless the contrary is established.

Art. 822. If the witnesses attesting the execution of a will are competent at the time of attesting, their becoming subsequently incompetent shall not prevent the allowance of the will. (n)

COMMENT:

Effect of Subsequent Incapacity

(a) Observe that subsequent incapacity is immaterial. Of course, if the witness is incapacitated to testify at the time of probate, he cannot *testify as a witness*. This does not mean, however, that the validity of the will is impaired by such fact.

(b) Note also that capacity as a *witness to a will* is different from capacity as a *witness in court*. To be a witness in court, it is sufficient that a person be "possessed of organs of perception, and perceiving can make known what he has perceived." Hence, a 15-year-old person, for example, may be a witness in court.

Art. 823. If a person attests the execution of a will, to whom or to whose spouse, or parent, or child, a devise or legacy is given by such will, such devise or legacy shall, so far only as concerns such person, or spouse, or parent, or child of such person, or any one claiming under such person or spouse, or parent, or child, be void, unless there are three other competent witnesses to such will. However, such person so attesting shall be admitted as a witness as if such devise or legacy had not been made or given. (n)

COMMENT:

(1) Witnesses Cannot Inherit

(a) Observe that the persons named in the Article are *incapacitated to inherit,* but not incapacitated as witnesses. Hence, only the part appertaining to them should be considered void.

Example: T made a notarial will with *A, B,* and *C* as witnesses. In the will, *A* was given a piece of land as a devise. There were of course other testamentary provisions. Is the will valid?

ANS.: The will is valid, since there were three credible witnesses, *A* being one of them. However, while *A is capacitated* as a witness, he is *incapacitated* to receive the devise, hence, the provision regarding said devise should be *disregarded,* the rest of the will being valid.

(b) If in the example given above, there were three witnesses *other than A, A* would be entitled to get the land.

(c) The disqualification extends to —

1) the witness
2) the *spouse* of the witness
3) the *parent* of the witness
4) the *child* of the witness
5) *anyone* claiming the right of said witness, spouse, parent, or child. *(Example:* the creditor of the witness if said creditor has not been paid his credit.*)*

[NOTE: Other relatives of the witness, like his brother or sister, to whom a devise or legacy has been given, can get the inheritance.*]*.

(2) Effect if Witness is a Compulsory Heir

If the witness, spouse, parent or child (of the witness) is a *compulsory heir* (as when the witness is the *child of the testator*), said heir is still entitled to the LEGITIME, otherwise this would be an easy way to sort of disinherit him without any justifiable cause. *(See Art. 915).* The purpose of the law being to prevent undue influence, it is understood that the prohibition refers only to the free portion.

[NOTE: While the law says only *devise* or *legacy,* it should be understood to refer also to the institution of an heir (voluntary), and or even of *compulsory heirs* also, but only insofar as he has been given the free portion or an excess of his legitime. (See also Art. 1027, par. 4 which does *not* distinguish between heirs on the one hand, and devisees or legatees on the other hand.)*]*.

Art. 824. A mere charge on the estate of the testator for the payment of debts due at the time of the testator's death does not prevent his creditors from being competent witnesses to his will. (n)

COMMENT:

Creditors as Witnesses

(a) The charge referred to here is a *debt* of the estate or of the testator.

(b) While a creditor who acts as a witness is *disqualified* to inherit, he is qualified to receive his credit, which after all cannot be considered a gift.

Subsection 5. — CODICILS AND INCORPORATION BY REFERENCE

Art. 825. A codicil is a supplement or addition to a will, made after the execution of a will and annexed to be taken as

a part thereof, by which any disposition made in the original will is explained, added to, or altered. (n)

COMMENT:

(1) 'Codicil' Defined

"Codicil" is derived from the Latin *"codex"* and literally means a *little code* or a *little will* (although, of course, physically it may be larger or longer than a will). *(See Cyc. Law Dic. 179).*

(2) Time When Codicil is Made

A codicil, since it refers to a will, *cannot* be made before a will; it is always made after.

(Of course, even the codicil may later on be revoked by another will or codicil.)

(3) Rule in Case of Conflict Between Will and Codicil

In case of conflict between a will and a codicil, it is understood that the latter should prevail, it being the later expression of the testator's wishes. *(See 57 Am. Jur. Wills, Sec. 608).*

Art. 826. In order that a codicil may be effective, it shall be executed as in the case of a will. (n)

COMMENT:

Formalities of Codicils

As in the case of wills, there can be:

(a) notarial or ordinary codicils

(b) holographic codicils

NOTE: A *notarial* will may be revoked by either a *notarial* or *holographic* codicil; similarly, *a holographic* will may be revoked by a *holographic* or *notarial* codicil.

NOTE further:

(a) If a codicil is not executed with the formalities of a will, said codicil is *void*.

(b) A valid will can never be revoked, expressly or impliedly, by an invalid codicil.

Art. 827. If a will, executed as required by this Code, incorporates into itself by reference any document or paper, such document or paper shall not be considered a part of the will unless the following requisites are present:

(1) The document or paper referred to in the will must be in existence at the time of the execution of the will;

(2) The will must clearly describe and identify the same, stating among other things the number of pages thereof;

(3) It must be identified by clear and satisfactory proof as the document or paper referred to therein; and

(4) It must be signed by the testator and the witnesses on each and every page, except in case of voluminous books of account or inventories. (n)

COMMENT:

(1) Incorporation by Reference

(a) The purpose of the Article is to provide for those cases when a testator wishes to incorporate to his will only by *reference* (*i.e.*, *without* copying the whole thing) certain documents or papers, especially inventories and books of accounts. *(Report of the Code Commission, p. 108).* Thereby, the testator is able to save time and energy.

(b) Said documents or inventories, when referred to in a notarial will, do not need any attestation clause, because the attestation clause of the will itself is sufficient. *(Unson v. Abella, 43 Phil. 494).*

(2) Requisites for Validity of Documents Incorporated by Reference

(a) The document or paper referred to in the will must be in *existence* at the time of the execution of the *will.*

[Therefore:

1) Reference to *future* papers will render the incorporation void. *(See In Re Goods of Pied, 38 LJ, [NS] P and M 1).* (However, the will itself remains valid.)

2) The will must refer to the papers as *having been already made;* it is not enough that in truth it was already in existence.*].*

(b) The will must *clearly describe and identify* (locations, general appearance) the same, stating among other things, the *number of pages thereof.* (This is *true* even in the case of voluminous books of account or inventories.)

(c) It must be *identified* by clear and *satisfactory proof* as the document or paper referred to therein *(parol evidence or evidence aliunde* is needed here of course*).*

(d) It must be signed by the *testator* and the (same instrumental) witnesses on *each and every page,* except in case of voluminous books of account or inventories.

[NOTES:

1) Observe that even the *number of pages* of voluminous accounts or inventories must be stated. *(Art. 827, par. 2).*

2) The exception refers only to the *signing* of *all* pages; and even here, while not every page has to be signed, still it is believed that there must be a signature on at least several pages thereof for the purpose of identifying same as the documents really referred to.*].*

(3) Incorporation Can Generally be Done Only in Notarial Wills

From the fact that Art. 827(4) speaks of "witnesses," it is reasonable to believe that as a rule, only *notarial* wills can have this incorporation by reference. However, it is submitted that:

(a) If a holographic will happen to have at least three credible and qualified witnesses, there can be a proper incorporation by reference.

(b) Moreover, if a holographic will (with NO witnesses) refers to a document entirely written, dated, and signed in the handwriting of the testator, there can also be a proper incorporation by reference.

Subsection 6. — REVOCATION OF WILLS AND TESTAMENTARY DISPOSITIONS

Art. 828. A will may be revoked by the testator at any time before his death. Any waiver or restriction of this right is void. (737a)

COMMENT:

Revocability of a Will

(a) Until the death of the testator, a will is *ambulatory* and *revocable,* since after all, the will concerns a disposition of properties and rights effective after death. *(See 57 Am. Jur. Wills, Sec. 15).*

(b) The heirs do not acquire any vested right to the disposition in a will until after the testator's death. *(Ibid.).*

(c) Provisions in a will which are ordered to be effected immediately, even during the testator's lifetime, are all right, provided the proper formalities and requisities are present, but they are not really testamentary disposition. *(Ibid.).*

Macam v. Gatmaitan
60 Phil. 358

FACTS: A will was presented for probate, and no objection was presented. After the judgment had become final and executory, a codicil made after the execution of the will was presented for probate. May the codicil be still probated?

HELD: Yes, since the codicil may have revoked expressly or impliedly the will, and it is well-known that a will is essentially revocable. It is not indeed essential for both the will and the codicil to have been presented for probate at the same

time. Moreover, opposition to the probate of the codicil may still be allowed, even if the oppositor had not objected to the will itself. This is because, in the opinion of the oppositor, the codicil may be defective.

Art. 829. A revocation done outside the Philippines, by a person who does not have his domicile in this country, is valid when it is done according to the law of the place where the will was made, or according to the law of the place in which the testator had his domicile at the time; and if the revocation takes place in this country, when it is in accordance with the provisions of this Code. (n)

COMMENT:

(1) Conflicts Rules for Revocation of Wills

(a) For revocation OUTSIDE the Philippines.

1) If *not domiciled* in the Philippines —

a) follow law of place where will was MADE

b) or follow law of place where testator was DOMICILED at the time.

2) If *domiciled* in the Philippines (not provided for in the law) —

a) follow law of the Philippines (since his domicile is here) —

b) or follow the general rule of *lex loci celebrationis* of the REVOCATION. *(Art. 17).*

(b) If revocation is IN the Philippines, follow Philippine law. *(Civil Code).*

[NOTE: This is true whether or not the domicile is in the Philippines.*].*

(2) Observation

It is curious that in the case of a revocation *outside* the Philippines by a person not domiciled in the Philippines, the

law speaks of the law of the place of the MAKING, not the REVOCATION. This apparently disregards the rule of *lex loci celebrationis*.

Art. 830. No will shall be revoked except in the following cases:

(1) By implication of law; or

(2) By some will, codicil, or other writing executed as provided in case of wills; or

(3) By burning, tearing, cancelling, or obliterating the will with the intention of revoking it, by the testator himself, or by some other person in his presence, and by his express direction. If burned, torn, cancelled, or obliterated by some other person, without the express direction of the testator, the will may still be established, and the estate distributed in accordance therewith, if its contents, and due execution, and the fact of its unauthorized destruction, cancellation, or obliteration are established according to the Rules of Court. (n)

COMMENT:

(1) Local or Domestic Ways of Revocation

The Civil Code speaks of revocation in *three* ways:

(a) by *implication or operation of law* (totally or partially)

(b) by virtue of an *overt act* (like burning, tearing, cancelling, or obliterating totally or partially in some instances)

(c) by virtue of a *revoking will or codicil* (totally or partially, or expressly or impliedly). (This is discussed last, and also under *Art. 831*.)

(2) Revocation by Implication of Law

(a) *Meaning* — the kind of revocation produced by OPERATION of LAW when certain acts or events take place after

a will has been made, rendering void or useless either the whole will or certain testamentary dispositions therein. [Note, however, that the revocation of a legacy does not operate to revoke the entire will. Only total and absolute revocation of the entire will prevent the probate of the revoked testament. *(Dionisio Fernandez, et al. v. Ismaela Dimagiba, L-23638, Oct. 12, 1967)*.].

(b) *Reason for allowing revocation by implication of law:* There may be certain *changes* in the *family* or *domestic relations* or in the *status* of his property, such that the law presumes a change of mind on the part of the testator. *(See 57 Am. Jur. Wills)*.

(c) *Some instances of revocation by implication of law:*

1) When after the testator has made a will, he sells, or donates the legacy or devise. *(See Art. 957)*.

Example: T gave *A* a legacy of *T's Volvo* car in his will. A year later, *T* sold the car to *B* for P2M. On *T's* death, will *A* get the car, the P2M, or nothing?

ANS.: A gets nothing, because by provision of law, *T's* alienation of the car revoked the legacy automatically and by operation of law.

2) Provisions in a will in favor of a spouse who has given cause for legal separation shall be revoked by operation of law the moment a decree of legal separation is granted. *(See Art. 106, No. 4)*.

3) When an heir, legatee, or devisee commits an act of unworthiness under Art. 1032.

4) When a credit that had been given as a legacy is *judicially* demanded by the testator. *(Art. 936)*.

5) When one, some or all of the *compulsory* heirs have been preterited or omitted, the institution of heir is void. *(See Art. 854)*.

(d) We know that revocation by implication of law exists because we presume a change of mind on the part of the testator. Now then, suppose the testator never intended to

change his mind (for example — suppose in the problem about the car legacy that was sold, the testator nevertheless intended to give the cash equivalent to *A*), should there still be revocation by implication of law?

ANS.: Generally, yes. What the testator should do in a case like this is to manifest his *unchanged* mind by executing a new will or codicil. *American Jurisprudence* provides: "Where the revocation of a will is presumed by law from a change in the testator's circumstances, evidence is generally *not admissible* to rebut the presumption, at least not evidence of subsequent unexecuted intentions of the testator." *(57 Am. Jur., Wills, Sec. 521).* In some cases though, if the subsequent intention has been executed or manifested by a new will, for instance, said new will must prevail.

(3) Revocation by an Overt Act

(a) *Requisites*:

1) There must be an overt act specified by the law.

2) There must be a completion at least of the *subjective phase* of the overt act. *(See Perkes v. Perkes, Costigan, p. 231).*

3) There must be *animus revocandi* or intent to revoke.

4) The testator at the time of *revoking* must have capacity to make a will.

(Example: He must be of *sound* mind, otherwise there is no real revocation. *[See Rich v. Gilkey, 73 Ne. 595].)*.

5) The revocation must be done by the testator *himself,* or by some other person in his *presence* and by his *express direction*. *(Ratification* of an *unauthorized destruction* is however permissible provided sufficient proof of this is presented.). *(See Steele v. Price, 5 B. Mon. [44 Ky.] 56).*

(b) *The overt act of BURNING*

1) It is sufficient even if a *small* part of the *instrument* itself be burned even though the *entire writing itself* be left untouched. *(57 Am. Jur., Wills, Sec. 501).*

2) If thrown into the fire with intent to revoke, and it was burned in three places without scorching the writing, there is already a revocation even if, *unknown* to the testator, somebody was able to snatch it from the fire and thus saved it. *(See White v. Casten, 59 Am. Dec. 585).*

3) *CASE: A* wanted to revoke his will, so he threw it into a stove so that it would be burned later on when a fire would be lighted in the stove. However, the will was later removed by another person from the stove BEFORE the stove was lighted.

HELD: There was NO revocation here, for while there was intent to revoke, there never was the overt act of burning. *(75 Am. Jur., Wills, Sec. 501).* However, the person who prevented the revocation, if he be an heir or a legatee or devisee, will still NOT inherit, *not* because of revocation by means of an overt act (for indeed there was NO overt act) but because of *revocation* by *implication of law,* said person being *incapacitated* to inherit by reason of UNWORTHINESS. *(See Art. 1032).*

Testate Estate of the Late Adriana Maloto, et al. v. CA, et al.
L-76464, Feb. 29, 1988

It is clear that the physical act of destruction of a will, like burning in this case, does not *per se* constitute an effective revocation, unless the destruction is coupled with *animus revocandi* on the part of the testator. It is not imperative that the physical destruction be done by the testator himself. It may be performed by another person but under the express *direction* and in the *presence* of the testator. Of course, it goes without saying that the document destroyed must be the will itself.

4) If a will is burned *accidentally,* there is no revocation in view of the lack of intention.

5) If the envelope containing a will is burned, but the will itself is untouched, there is NO revocation even if there be intent to revoke. Why? There was no overt act of *burning* the will, as distinguished from the envelope. *(See Reed v. Harris, Costigan, p. 306).*

(c) *The overt act of TEARING*

1) Even a *slight tear* is sufficient.

2) Of course, the greater the degree of tearing the greater is the evidence of *animo revocandi.* Tearing into three pieces is sufficient. When all the other requisites are present. As a matter of fact tearing into two is even enough *(57 Am. Jur., Wills, Sec. 500),* as long as the subjective phase is passed, that is, as long as the testator considers the will already revoked.

Perkes v. Perkes
3 B. and Ald. 489, Costigan, p. 312

FACTS: In a fit of anger, a testator tore his will twice and was continuing to so tear when somebody held his arms and persuaded him to refrain from tearing the will. He was prevailed upon. He then placed the torn pieces in his pocket and said, "Nothing significant has after all been torn." Later, the testator died, and the torn will was found. Was there a revocation here?

HELD: The will was NOT revoked for the act of tearing was subjectively not yet complete, inasmuch as he had intended to tear up the will some more.

3) "*Tearing*" *includes* "cutting." A clause may be revoked by "cutting" same from the will. *(57 Am. Jur., Wills, Sec. 500).*

[NOTE: The mere act of "crumpling" or the removal of the "fastener" binding the pages of a will, does NOT constitute a revocation, even though there be *animo revocandi*. *(See 67 Am. Jur., Wills, Sec. 500).*

The reason is that "crumpling" is not one of the overt acts provided for by the law. However, in the Philippine case of *Roxas v. Roxas, 48 O.G. 2177,* the court impliedly allowed "crumpling" as one of the overt acts, provided there is *animo revocandi.].*

4) Tearing off even the signature alone constitutes revocation provided the other requisites are present. This is because the signature goes to the very heart of the will.

(d) *The overt act of OBLITERATING or CANCELLING*

1) *Obliteration* — renders the word illegible; *cancellation* — is the drawing of lines across a text, but the words remain legible.

2) Either of the two revokes a will, *totally* or *partially*.

3) If all parts are cancelled or obliterated, or if the signature is cancelled or obliterated, the whole will is revoked, the reason in the case of the signature being that the act strikes at the existence of the whole instrument. *(See 57 Am. Jur. Wills, Sec. 505).*

[NOTE: Cancellation of the signature of witnesses to a *holographic* will leaves the will valid, since no witnesses are after all required.*].*

4) Cancellation or obliteration of non-vital part leaves the other parts in force. *(See Thompson on Wills, p. 412).*

(e) If a will is *mutilated* by error, there being no *animo revocandi,* there is no revocation. *(Santos v. Santos, L-2396, Dec. 11, 1950).*

Steele v. Price
5 B. Mon (44 Ky.) 58

FACTS: T made a will which was later discovered same to be missing. He then informed his relatives he would make another will. But he never did so. On his death, the missing will was found. Can it be considered revoked?

HELD: No, because actually there has not been any of the overt acts mentioned under the law. And even if the will was never found, still parol evidence may be introduced to prove its contents, for we may presume here that the destruction, if indeed there was any, was not *authorized.*

[NOTE: The case would have been different had the testator ready access to his will, and never told anyone he had lost the same. In such a case we can presume that the will, having been last seen in the possession of the testator, has been destroyed intentionally, with intent to revoke, by the testator. *(See Gayo v. Mamuyac, 49 Phil. 902).].*

(4) Revocation by the Execution of Another Will or Codicil

(a) Revocation in this manner may be *express* or *implied.* (Implied revocations consists in *complete inconsistency between the two wills*.).

(b) A will may be revoked by a subsequent will or codicil, either notarial or holographic.

(c) It is essential however, that the revoking will be itself a *valid will* (validly executed as to form), otherwise there is no revocation. *(Samson v. Naval, 41 Phil. 838; Molo v. Molo, L-2538, Sep. 21, 1951).*

(d) The revocation made in the subsequent will must indeed be a *definite one.* A mere declaration that sometime in the future, the first would be revoked, is not enough. However, there is nothing wrong in making the revocation conditional, that is, the revocation takes place only if the condition is fulfilled (doctrine of "conditional revocation," also called "dependent relative revocation"). *(See Bradish v. McClellan, 100 Pa. St. 607; see also Molo v. Molo, L-2538, Sep. 21, 1951).*

(e) *Problem*:

Testator made will No. (1). After one week, he wanted to revoke same, so he executed will No. (2), expressly revoking will No. (1). In the belief that he had already

accomplished what he wanted, he then tore into two pieces will No. (1). On his death, it was discovered that will No. (2) had *not* been validly executed.

Question: Can we consider will No. (1) as having been revoked, or should it still be given effect?

ANS.: In one case, if was held that while it is true that revocation was not produced by the execution of an *invalid will,* revocation was made thru an *overt act* — the act of tearing or destruction — with *animo revocandi.* Hence, the court concluded that will No. (1) had indeed been revoked. *(Diaz v. De Leon, 43 Phil. 413).* However, in a subsequent case, it was ruled that there was no revocation either by subsequent will (for same was invalid) or an *overt* act (since the act of destruction or tearing the first will was prompted by the *false belief* that the second will had been *validly executed*). *(See Art. 833,* which provides that a revocation of a will based on a false cause or illegal *cause* is *null and void).* To put it in another way, the *doctrine of dependent relative revocation* — the revocation by destruction or overt act was good only if this condition is fulfilled, namely, that the revoking will was valid. The condition was not fulfilled; therefore, the revocation by overt act did not really materialize. *(De Molo v. Molo, et al., L-2538, Sep. 21, 1951, citing 68 CJ 799, Gardner, pp. 232-233; 1 Alexander, p. 751).*

(f) A second will referred to by the testator as his "last will" revokes completely the first will, particularly if the provision of the two, as to who were being instituted as heirs, are inconsistent. *(Bustamante v. Arevalo, 73 Phil. 635).*

(5) Probate of Lost or Destroyed Notarial Wills

If a notarial will has been lost or destroyed without intent to revoke, its contents may nevertheless still be proved by:

(a) oral or parol evidence

(b) carbon copies *(Borromeo v. Casquijo, L-26063)* — This is because a carbon copy signed by all concerned is just as good as the original. *(Lugay v. Llamas, C.A., 40 O.G. [Sup. 11] p. 160).* As a matter

of fact, it is error to dismiss a probate proceeding on the mere ground that the copy presented is only a carbon copy. *(Lipana v. Lipana, 40 O.G. 198).* After all, a "duplicate original" (a signed carbon copy or duplicate executed at the same time as the original) is as GOOD as the original, and may be introduced in evidence without accounting for the non-production of the other copies. *(See Maria Malilum, et al. v. Court of Appeals, L-17970, June 30, 1966). The production and admission of a carbon duplicate without* a new publication does *not* affect the jurisdiction of the probate court, already conferred by the original publication of the petition for probate, unless substantial rights are adversely affected. *(Celso Icasiano v. Natividad Icasiano, et al., L-18979, June 30, 1964).* Incidentally, if the original presented is defective and invalid, there is in law no other will but the duly signed carbon duplicate, which is probatable. *(Ibid.).*

[NOTE: Holographic wills, which have been lost or destroyed without intent to revoke, *cannot* be probated. *(See comment No. 2 under Art. 811, see also Gan v. Yap, 104 Phil. 509).].* However —

In the Matter of the Petition to Approve the Will of Ricardo B. Bonilla, deceased; Bodellar v. Aranza, et al. L-58509, Dec. 7, 1982

May a lost or destroyed holographic will be proved by means of a photostatic or xerox copy thereof?

YES, because the authenticity of the handwriting of the deceased can be determined by the probate court.

Art. 831. Subsequent wills which do not revoke the previous ones in an express manner, annul only such dispositions in the prior wills as are inconsistent with or contrary to those contained in the later wills. (n)

COMMENT:

Implied Revocation Thru Wills

(a) This Article speaks of implied revocation, and this may be total or partial. (*Partial* — if there is inconsistency only in certain provisions.)

(b) The law does not favor revocation by implication, and therefore efforts to reconcile must be made.

Art. 832. A revocation made in a subsequent will shall take effect, even if the new will should become inoperative by reason of the incapacity of the heirs, devisees or legatees designated therein, or by their renunciation. (740a)

COMMENT:

Effect on Revocation if New Will is Inoperative

(a) There is a difference between an *invalid will,* and a valid but *ineffective will.*

(b) We already know that an *invalid* revoking will cannot revoke. But a *valid though ineffective* will *can revoke.*

(c) *Example: T* made a will making *X* his heir. Later, *T* expressly revoked his first will by executing a second will containing a revocatory clause. *T* made *Y* his heir. The second will was validly made, but on *T's death, Y refused* to accept the inheritance. Is the first will still revoked?

ANS.: Yes. *(Art. 832).* Therefore, *T* will be considered to have died intestate, and *X* cannot inherit, except, if he be also one of the intestate heirs.

(d) If the revoking will is both *invalid* and *ineffective,* it is clear that there can be no revocation.

Art. 833. A revocation of a will based on a false cause or an illegal cause is null and void. (n)

COMMENT:

Revocation Based on False or Illegal Cause

(a) As already discussed under Art. 830, this Article 833 is one of the aspects of "dependent relative revocation," or more properly, at least for the purpose of this Article, "a revocation made under a mistake."

(b) *Example: T* made a will making *A* his heir. *T* then learned that *A* was dead, so he made another will instituting *B* as heir. If *A* turns out to be still alive, who inherits?

ANS.: A inherits, because the revocation was based on a false cause.

(c) The fact that the cause for the revocation was a false belief or a mistake must be found on the face of the will or codicil itself *(57 Am. Jur., Wills, Sec. 519), i.e.*, if the revocation is through a will or codicil.

(d) If the testator states in his second will: "I am not sure whether *A* is dead or still alive. However, I hereby revoke the legacy to him which I made in my first will." Is there a revocation of the legacy?

ANS.: Yes. For here, he cannot be said to be proceeding upon an error. *(See 57 Am. Jur., Wills, Sec. 519).*

Art. 834. The recognition of an illegitimate child does not lose its legal effect, even though the will wherein it was made should be revoked. (741)

COMMENT:

Effect of Revocation on the Recognition of an Illegitimate Child

(a) According to Art. 278, voluntary recognition of an illegitimate child may be done:

(1) in a record of birth

(2) will

(3) statement before a court of record

(4) any authentic writing

Now then, if the will in which recognition had been made is subsequently revoked, the recognition still remains valid.

(b) *Reason for Art. 834:* While a will is essentially revocable, recognition is *irrevocable* (unless there be vitiated consent).

Moreover —

(1) recognition is not really a testamentary disposition;

(2) recognition does not wait for the testator's death to become effective. *(See 1 Manresa 592).*

[NOTE: Art. 834 applies only if the recognizing will is extrinsically valid — otherwise there would be no recognition that can be revoked.*].*

Subsection 7. — REPUBLICATION AND REVIVAL OF WILLS

Art. 835. The testator cannot republish, without reproducing in a subsequent will, the dispositions contained in a previous one which is void as to its form. (n)

COMMENT:

(1) 'Republication' Defined

It is the process of *re-establishing a will,* which *has* become *useless* because it was *void,* or had been *revoked.*

(2) How Made

Republication may be made by:

(a) *re-execution* of the original will (the original provisions are COPIED)

(b) *execution of a codicil* (also known as *implied republication*). *(See Art. 836).*

(3) Instance Where Publication of the Settlement Does Not Constitute 'Constructive Notice' to the Heirs

Cua v. Vargas
506 SCRA 374
(2006)

FACTS: A notice *via* publication of the settlement was made. However, the heirs had no knowledge of the publication ever been made.

ISSUE: Did the publication of the settlement constitute "constructive notice" to the heirs who had no knowledge of it?

HELD: It did not constitute *constructive notice* to the heirs who had no knowledge *or* did not take part in it "because the same," in the words of the Supreme Court, "is notice after the fact of execution."

[*NOTE:* In the abovementioned case *(Cua v. Vargas, supra),* "[t]he heirs who actually participated in the execution of the extrajudicial settlement, which included the sale to a third person of their *pro indiviso* shares in the property, are bound by the same while the co-heirs who did not participate are given the right to redeem their shares pursuant to Art. 1088 of the new Civil Code. The procedure outlined in Sec. 1 of Rule 74 of the Rules of Court is an *ex parte* proceeding — persons who do not participate or had no notice of an extrajudicial settlement will not be bound thereby."].

Art. 836. The execution of a codicil referring to a previous will has the effect of republishing the will as modified by the codicil. (n)

COMMENT:

(1) Requisites and Limitations of Republication

(a) To republish a will *void as to its FORM,* all the dispositions must be *reproduced or copied* in the new or subsequent will.

Example: T made a notarial will in 2002 with only 2 attesting witnesses. This will is *void* as to its form and is therefore useless. If he desires to give life to the will, say in 2004, what he should do is to republish it. How? By executing a new will in 2001, copying all the provisions in the old will, but this time, he must use *three* attesting witnesses. The effect is as if he made the will not in 2002 but in 2004. In other words, the will is a reestablished act, and therefore the will governs property he had acquired up to 1997.

Example of this effect: If in 2002, he gave "all his automobiles" to *X,* and at that time, *T* had 5 *automobiles,* but in 2004, he republished the will, and by that time he already had *eight* automobiles, how many should *X* get?

ANS.: X gets all the 8 automobiles.

[NOTE: Please observe that under Art. 793, had the original will been valid, and no republication been made, *X* would get only 5 automobiles, even if by the time of *T's* death, *T* already had 8 automobiles, unless of course, there was an express contrary provision in the will.*]*.

(b) To republish a will valid as to its form but *already revoked,* the execution of a *codicil* which makes *reference* to the revoked will is sufficient. (Here, mere *reference* is enough: there is no *necessity of reproducing* all the previous dispositions). (Of course, in this case there would be nothing wrong with a RE-EXECUTION.)

Example: The Case of In Re Engles' Estate (Or.) 276 p. 270 — T made a will in Feb. 1921, which he revoked later in August 1921. In June 1925, he made a codicil to the will of Feb. 1921 (not August), describing the will, giving its date, with a formal statement that he was declaring it to be his last will and testament. The codicil merely *referred* to the will, *without reproducing same.* Is there sufficient republication?

HELD: Yes, and, therefore, the will of Feb. 1921 should be given effect. There was no necessity here of reproducing.

(2) Effects of Republication by Virtue of a Codicil

(a) The codicil *revives* the previous will.

(b) The old will is republished as of the date of the codicil — makes it speak, as it were, from the new and later date.

[NOTE: See "example of this effect" under Comment No. 1(a)*.]*.

[NOTE: In case some parts of the will are revoked by the codicil, those still remaining speak as of the date of the codicil. *(See 57 Am. Jur., Wills, Sec. 427).].*

(c) A will republished by a codicil is *governed* by a statute enacted *subsequent* to the execution of the will, but which was operative when the codicil was executed. *(57 Am. Jur., Wills, Sec. 626).*

Example: At the time a notarial will was executed with two witnesses, the law required *three*. Suppose later on, the law changed the required number to two, and suppose this time a *codicil referring* to the will is made with two (as required) witnesses, is the old will republished?

ANS.: While it is true that generally a *void* will (as to its form) cannot be republished merely by reference in a later valid codicil, and while it is true that according to Art. 795, the validity of a will as to its form depends upon the observance of the law in force at the time it is made, still it is submitted that in this particular case, there was a valid republication because of the fact that here, the defect has been cured. *(See 57 Am. Jur., Wills, Sec. 626).* Moreover, from one viewpoint, it may be said that republication is still part of the process of making, referred to in Art. 795.

HOWEVER, the general rule may be illustrated thus: if at the time the codicil was made, the law still requires *three witnesses,* then the codicil, even if it has by itself three witnesses, cannot by mere reference, republish the old void will, which had only two witnesses. The way to republish such void will is to execute another will (or even

a codicil) which would REPRODUCE all the previous dispositions. *(See Art. 835).*

(3) Some Problems on Republication

(a) In 2002, *T* made a notarial will, without an attestation clause. Later on, he made a private instrument to the effect that he was ratifying said will. Is there a republication here?

ANS.: No, since there would be a *reproduction* of all the provisions. Of course, even a *holographic* will would be sufficient, but even here, reproduction is required.

[NOTE: The answer would be the same even if the "ratification" had been made in a public instrument.*].*

(b) A testator revoked his will by cutting out his signature in the will, with *animo revocandi.* Later, he changed his mind, and pasted back his signature in its previous position. Does the revocation remain or has there been a republication?

ANS.: The will remains revoked, the attempted republication not having complied with legal requirements for republication. *(57 Am. Jur., Wills, Sec. 616).*

(4) Query

Can a will, invalid because of fraud or force or undue influence or because the testator was under 18 or was insane, be republished by *mere reference* in a codicil?

ANS.: It is submitted that the answer is yes, because this is not a case when the will is void as to its FORM. (Form — in this Article, it is believed, refers to such things as those covered by Art. 805, *et seq.,* like defect in the number of witnesses, lack of or fatal defect in the attestation, lack of acknowledgment, etc.). But not to *vitiated consent* or to *lack* of testamentary capacity, although of course these are included in the phrase *"extrinsic validity,"* as distinguished from *"intrinsic validity."*

Art. 837. If after making a will, the testator makes a second will expressly revoking the first, the revocation of

the second will does not revive the first will, which can be revived only by another will or codicil. (739a)

COMMENT:

(1) Use of Republication and Revival

As has already been intimated, a void will or a *revoked* one is a nullity, devoid of any effect, and is useless. And the only ways of giving effect to it are:

(a) *republication* (this *includes both re-execution* and *reference by a codicil* — already discussed)

(b) *revival*

(2) Distinctions Between Republication and Revival

(a) Republication is an act of the TESTATOR.

(b) Revival is one that takes place by OPERATION of LAW. ("Revival" has been defined as the restoration or reestablishment of revoked will or revoked provisions thereof, to effectiveness, by virtue of legal provisions.)

[NOTE: Aside from republication and revival, there is no other way of restoring effectiveness. Thus, it has been held that piecing together a torn and revoked will cannot restore its effectiveness. *(Brock's Estate, 247 Pa. 365).].*

(3) Examples of Revival

(a) While omission of a compulsory heir in the institution of heirs annuls the institution, still if the omitted heir *dies ahead* of the testator, the institution is revived, without prejudice to the right of representation. *(See Art. 856).*

(b) If after making a will, the testator makes a second will *impliedly* revoking the first, the revocation of the second will revives the first will. *(Implication from Art. 837).*

(4) Three Problems on Revival

(a) I made 3 wills. Will No. 2 expressly revoked Will No. 1. Will No. 3 revoked Will No. 2. Is Will No. 1 *revived*?

ANS.: No, by express provision of Art. 837. The rule is based on the principle that the revocatory clause of the second will took effect *immediately* or at the instant the revoking will was made. (This is the principle of IN-STANTER — thus, we say, the clause revoked the first will that contains said clause.) In other words, the theory is that death does not have to come before giving effect to a revocatory clause. Stated otherwise, while a will is a disposition *mortis causa,* a revocation takes effect, *inter vivos. (See 57 Am. Jur., Wills, Sec. 622).*

(b) *T* made 3 wills. Will No. 2 is completely inconsistent with, and therefore, impliedly repeals Will No. 1. Later Will No. 3 revokes Will No. 2. Is Will No. 1 revived?

ANS.: Yes. This is a clear inference from Art. 837. Since the Article uses the word "expressly," it follows a *sensu contrario* (contrariwise) that in case of an "implied" revocation by the second will, an automatic revival of the first occurs. Apparently, the reason is the fact that an "implied revocation" is *ambulatory,* the inconsistency being truly and actually apparent only *mortis causa,* when the properties are distributed.

(c) *A* made Will No. 1, then Will No. 2 expressly revoking the first. Then he destroyed Will No. 2, and orally expressed his desire that his first will be followed. Should this be allowed?

ANS.: No, the oral expression of the desire to revive cannot be given effect. He should have made a new will or codicil. *(Art. 837, see also 65 Am. Jur., Wills, Sec. 621).*

Subsection 8. — ALLOWANCE AND DISALLOWANCE OF WILLS (PROBATE)

Art. 838. No will shall pass either real or personal property unless it is proved and allowed in accordance with the Rules of Court.

The testator himself may, during his lifetime, petition the court having jurisdiction for the allowance of his will. In such

case, the pertinent provisions of the Rules of Court for the allowance of wills after the testator's death shall govern.

The Supreme Court shall formulate such additional Rules of Court as may be necessary for the allowance of wills on petition of the testator.

Subject to the right of appeal, the allowance of the will, either during the lifetime of the testator or after his death, shall be conclusive as to its due execution. (n)

COMMENT:

(1) 'Probate' Defined

Probate is the act of *proving* before a competent court the due execution of a will by a person possessed of testamentary capacity, as well as *approval* thereof by said court.

Probate is one thing; the validity of the testamentary provisions is another. The first decides the execution of the document and the testamentary capacity of the testator; the second deals with descent and distribution. *(Sumilang v. Ramagosa, L-23135, Dec. 26, 1967).*

Dorotheo v. CA
320 SCRA 12
(1999)

A final judgment on probated will, albeit erroneous, is binding on the whole world.

(2) Two Kinds of Probate

(a) Probate during the testator's lifetime (this does *not* prevent the testator from revoking his probated will or from making another one). *(See Comment of the Code Commission).* [Thus, in *Palacios v. Catimbang Palacios, L-12207 (Dec. 24, 1959),* the Supreme Court held that after a will has been probated during the lifetime of a testator, it does *not* necessarily mean that he cannot alter or revoke the same before his death. Should he make a new will, it would also be allowable on his petition, and if he should

die before he has had a chance to present such petition, the ordinary probate proceedings after the testator's death would be in order.].

(b) Probate after the testator's death.

(3) Need for a Probate

(a) It is essential because under the law "no will shall pass either real or personal property unless it is *proved* and allowed in accordance with the Rules of Court." *(Art. 838, first paragraph)*. Even if only one heir has been instituted, there must still be the judicial order of adjudication. *(Lopez v. Gonzaga, et al., L-18788, Jan. 31, 1964)*.

Thus in probate proceedings, the court —

1) orders the probate proper of the will

2) grants letters testamentary or letters with a will annexed

3) hears and approves claims against the estate

4) orders the payment of the lawful debts

5) authorizes the sale, mortgage, or any other encumbrance of real estate

6) and directs the delivery of the estate or properties to those who are entitled thereto. *(Timbol v. Cano, L-15445, Apr. 29, 1961)*.

Pastor, Jr. v. Court of Appeals
GR 56340, June 24, 1983

If the deceased was survived by his wife (a Spanish national) and his children, there is need, aside from liquidating the conjugal partnership, to set apart the share of the surviving spouse in the conjugal property, preparatory to the administration and liquidation of the estate of the deceased.

Reyes v. Barretto Datu
L-17818, Jan. 25, 1967

FACTS: The judgment of the CFI (now RTC) distributed the estate of the deceased *erroneously,* but the decision was not appealed. It consequently became final. What can be done about the erroneous distribution of the estate?

HELD: The distribution remains, for the judgment has become final, and therefore can no longer be attacked except for lack of jurisdiction or extrinsic fraud.

(b) So essential is probate that a provision in a will stating that "the will shall not be presented before the courts" is a void provision, for a person cannot by his actuations deprive a competent court of its jurisdiction. *(Mendoza v. Pilapil, 72 Phil. 546).*

(c) However, the heirs concerned may *extrajudicially* agree to partition the property among them, even though such partition is not in accordance with the provisions of the will. *(Manalo v. Paredes, 47 Phil. 938).* In this case, ownership is acquired not only by testamentary succession, but by legal succession. If any heir not included in the partition feels aggrieved, his remedy would of course be to ask for the probate of the will. [NOTE, however, that no judicial approval can be given to an extrajudicial partition based on a will unless the will is first probated. Neither may an unprobated will be presented as evidence of an act of partition among the co-heirs. *(Guevara v. Guevara, 74 Phil. 479).*]. Even if there are NO DEBTS, if the heirs desire that transmission of the property to them be *by virtue of the will,* the will must first be *probated,* and the provisions in the will must *not be disregarded* unless said provisions are contrary to law. The probate is essential *firstly*, because the law expressly requires it; *secondly*, probate is a proceeding *in rem* (requiring *publication,* among other things) and, therefore, cannot be dispensed with or substituted by any other proceeding, judicial or extrajudicial without offending public policy; *thirdly*, the right of a

person to dispose of his property by virtue of a will may be rendered nugatory; and *fourthly*, because *absent* legatees, and devisees, or such of them as may have no knowledge of the will could be CHEATED of their inheritance thru the collusion of some of the heirs who might agree to the partition of the estate among themselves to the exclusion of others. *(Ventura v. Ventura, et al., L-11609, Sep. 24, 1959).* It is to be observed that the ruling in this *Ventura* case tends to modify, if not completely reverse the *dictum* in the case of *Manalo v. Paredes (47 Phil. 938).*

Chua v. Court of First Instance
78 SCRA 412

Even if a will is never probated, property may be transmitted if a partition agreement is entered into, the provisions of which are based on the will.

(d) It should also be noted that even a void will, or one that has been refused probate (approval by the court) may in certain cases give rise to a natural obligation. Hence, Art. 1430 says "when a will is declared void because it has not been executed in accordance with the formalities required by law, but one of the intestate heirs, after the settlement of the debts of the deceased, pays a legacy in compliance with a clause in the defective will, the payment is effective and irrevocable."

[NOTE: In such a case however, the paying intestate heir must have known of the defect in the will, or of its being void, otherwise there will be no natural obligation but a case of *solutio indebiti* — undue payment — in which event, recovery may be had.*]*.

Vera v. Navarro (En Banc)
L-27743, Oct. 18, 1977

FACTS: The Commissioner of Internal Revenue garnished the properties of a decedent while the death taxes (*e.g.*, estate tax) had not yet been paid. But the trial judge ordered a partial distribution of the estate among the heirs on the supposition that the estate still

had enough assets with which to pay the taxes. And so it lifted the writ of garnishment. Was this proper for the Court to do?

HELD: The actuation of the judge was improper and is considered a grave abuse of discretion. The distributive shares cannot be given unless the state tax is first paid, or unless there be a sufficient bond given for the payment of the tax.

Sebial v. Sebial
64 SCRA 385

A probate court still has jurisdiction to approve the inventory of the estate of the deceased, even after the lapse of the 3-month period mentioned in Section 1, Rule 83 of the Rules of Court.

Heirs of the Late Jesus Fran v. Salas
210 SCRA 303
(1992)

Where part of estate is not distributed yet, recourse is not to reopen probate proceedings, but a motion for execution or an action for reconveyance. A probate judgment long closed cannot be attacked by a mere motion for reconsideration.

Failure to attack the original of the will to the petition is not critical where the will itself was adduced in evidence. Otherwise stated, it is not necessary to attack the original will to the petition for probate.

Intestate Estate of the late Don Mariano San Pedro y Esteban, represented by its Heir-Judicial Administrator Engracio F. San Pedro v. CA, Aurelio Ocampo, Dominador D. Buhain, and Teresa C. Dela Cruz
GR 103727, Dec. 18, 1996
77 SCAD 481

A probate court's jurisdiction is not limited to the determination of who the heirs are and what shares are

due them as regards the estate of a deceased person. Neither is it confined to the issue of the validity of wills.

Parenthetically, questions of title pertaining to the determination *prima facie* of whether certain properties ought to be included or excluded from the inventory and accounting of the estate subject of a petition for letters of administration, may be resolved by the probate court.

Nufable v. Nufable
309 SCRA 692
(1999)

As a general rule, courts in probate proceedings are limited only to passing upon the extrinsic validity of the will sought to be probated and the compliance with the requisites or solemnities prescribed by law.

Well-entrenched is the rule that a co-owner can only alienate his *pro indiviso* share in the co-owned property.

(4) Other Names for Probate

Probate may also be called "probation," "legalization," "protocolization," and "authentication." *(Manahan v. Manahan, 58 Phil. 448).*

(5) Procedure and Reason for 'Ante Mortem' Probate

(a) Testator himself petitions the competent court for the probate of his will.

(b) He then follows the procedure for the *post mortem* of ordinary probate, except insofar as the Supreme Court may impose additional rules for *ante mortem* probates *(Art. 838, second and third pars).*

[NOTE: Up to the time of writing, no additional rules have been formulated.*].*

(c) Reason for allowing this kind of probate — to prevent or minimize fraud, intimidation, and undue influence; also to enable the testator to correct at once failure to observe legal requirements. *(Report of the Code Com., pp. 53-54).*

In *Longcop v. Turla, et al., C.A. L-26913-R, June 11, 1963,* it was held that even when the testatrix herself has brought the probate proceedings, whenever the will falls short of the required formalities, the remedy would be to correct the will immediately and not to proceed with the probate of the defective will.

(6) Salient Points in Procedures of the Post-Mortem Probate

[NOTE: There are two (2) parts of Post-Mortem Probate:

I. The probate proper (this deals with EXTRINSIC VALIDITY)

Dorotheo v. CA
320 SCRA 12
(1999)

Probate proceedings deals generally with the extrinsic validity of the will sought to be probated.

II. The inquiry into INTRINSIC VALIDITY and the DISTRIBUTION itself of the property.*]*.

(a) At any time after the testator dies, the will may be presented for probate by any executor, devisee, legatee, or interested person. *(Rule 76, Sec. 1, Rules of Court). The court* can *motu proprio* set the time and place for proving the will delivered to it. *(Mirasol and Mirasol v. Mesa Magsuci, et al., L-12166, Apr. 29, 1959).*

(b) This is true whether or not the petitioner (proponent) has the will in his possession, or it is in somebody else's possession, or has been lost or destroyed, as long as there was *no animo revocandi. (Ibid.).*

[NOTE: An expressly revoked will is of course not admissible to probate. *(Trillana v. Crisostomo, L-3378, Aug. 22, 1951).* However, a revoked will may of course be admitted to probate, if the *subsequent* will that had allegedly revoked it is proved to be *void* and is therefore *disallowed. (Ibid.)].*

(c) Even if a will has already been probated, if later on a subsequent will is discovered, the latter may still be presented for a probate. *(Arancillo v. Peñaflorida, C.A., 54 O.G. 2914).*

[NOTE: Even if the discovered will had been made earlier than the probated will, it can still be probated as long as the two wills can be reconciled, or if there are portions in the first which have not been revoked in the second. *(Ibid.).].*

(d) The petition for probate must among other things state:

1) The fact that the testator is dead, and the place and time of said death;

2) The fact that the deceased left a will, copy of which has to be attached to the petition;

3) The fact that the will was executed in accordance with legal requirements;

4) Names, ages, addresses of the executor and all interested parties or heirs;

5) The probable value and character of the property of the estate;

6) The name of the individual whose appointment as executor is being asked for;

7) If the will has not been delivered to the court, the name of the person who is supposed to have the will in his custody. *(See Salazar v. Court of First Instance, 64 Phil. 785; Rule 76, Sec. 2, Rules of Court).*

Pastor v. Court of Appeals
GR 56340, June 24, 1983

The issue in the probate of a will is restricted to that kind of validity of the will which for example determines whether or not the testator was possessed of a sound mind, whether or not he freely executed the will, and whether or not the will had been executed in accordance with legal formalities.

(e) In court, there must be proof of death (actual or presumed), publication of the notice of hearing, and the compliance of all the formalities required by law.

(f) The necessary witnesses must be produced if available, and their absence must be satisfactorily explained. *(Aldanese v. Salutillo, 47 Phil. 548; Unson v. Abella, 43 Phil. 495).* Even if an attesting witness does not remember attesting *(Rule 76, Sec. 11)* or even if he testifies or all the witnesses testify against the validity and due execution of the will, there is still a chance for the court to allow the will, if it believes that all the legal requirements have been complied with. *(Testate Estate of Reymundo, O.G., Mar. 18, 1941, p. 788; Cuyugan v. Baron, 69 Phil. 538; Barrera v. Rampoco, et al., L-5263, 1954).* It is error to deny allowance just because of contradictions among the witnesses. *(Fernandez v. Tantoco, 49 Phil. 380).* After all, such inconsistencies are not necessarily fatal to the validity of the will. *(Tolentino v. Francisco, 57 Phil. 742).* However, as a rule, the testimony of the attesting witnesses should prevail over expert evidence. *(Roxas v. Roxas, et al., L-2393).*

(g) A lost or destroyed notarial will, destroyed without *animo revocandi,* may still be probated as long as it is clearly proved that once upon a time, a will had been validly executed, that the will had been lost or destroyed without *animo revocandi.* Two credible witnesses must then testify as to its contents.

[NOTE: These things must still be proved by the proponent even if there is NO opposition to the probate of the lost or destroyed will. *(Re Testate of Suntay, L-3080, Nov. 5, 1964).* The provisions of the will are then supposed to be certified to by the judge under the seal of the court. Said certificate must then be filed and recorded as in the case of other wills. *(Sec. 6, Rule 76, Rules of Court).].*

(h) If the probate of a will is dismissed because the proponent or his counsel failed to appear, a subsequent petition for probate may still be entertained. After all, the first dismissal was NOT an adjudication on the merits. Besides,

the rights of other persons must be protected. *(Arroyo v. Abay, et al., L-15814, Feb. 28, 1962).*

(i) It is well-settled that for a person to be able to intervene in an administration proceeding, it is necessary for him to be interested in the estate to be administered. An interested party has been defined as one who would be benefited by the estate, such as an heir, or one who has a certain claim against the estate, such as a creditor. *(Ngo The Hua v. Chung Kiat Kung, L-17091, Sep. 30, 1963; see also Sumilang v. Ramagosa, L-23135, Dec. 26, 1967).* Thus, one who has or can have no interest in succeeding a decedent cannot oppose the probate of his alleged will. *(Butiong v. Surigao Consolidated Mining Co., Inc., L-13938, July 31, 1968).*

(7) Effect of Probate Proper (EXTRINSIC VALIDITY)

As long as there has been FINAL JUDGMENT by a court of COMPETENT JURISDICTION, and the period for filing a petition for relief *(Rule 38, Secs. 2 and 3, Rules of Court) has expired* without such petition having been submitted, the PROBATE PROPER (or allowance) of the will is binding upon the WHOLE WORLD (being a proceeding *in rem*) insofar as TESTAMENTARY CAPACITY (at least 18; sound mind) and DUE EXECUTION (including all *formalities a*nd absence of *any* ground for disallowance) are concerned. *(See Art. 838, last paragraph).* In fact, the order allowing probate of the will *is not interlocutory* and is, therefore, immediately appealable. *(Dionisio Fernandez, et al. v. Ismaela Dimagiba, L-23638, Oct. 12, 1967).* An order determining the distributive share of the estate to which a person is entitled is, of course, appealable, before final judgment. *(Claro Santillon v. Perfecta Miranda, et al., L-19281, June 30, 1965).* In no case is the judgment conclusive on matters such as ownership of property. *(Castañeda v. Alemany, 3 Phil. 427; Macam v. Gatmaitan, 60 Phil. 385; Ongsingco v. Judge Tan, et al., L-7635, July 25, 1955; Padilla v. Matela, L-07479, Oct. 14, 1955; see also Mercado v. Santos, 66 Phil. 215).* However, persons who are neither compulsory heirs, voluntary heirs, legatees, or devisees cannot question anymore the validity of the order of distribution that has long become

final. *(Rufino Coloma, et al. v. Atanacio Coloma, L-19399, July 31, 1965).*

[NOTE: The proceeding for *distribution* of the properties is NOT *in rem,* and cannot affect those who were not PERSONALLY served with summons.*].*

[NOTE: Distribution is defined as the division, by order of the court having authority, among those entitled thereto, of the estate of a person, after the payment of debts and charges. *(See Carson Petroleum Co. v. Moorcraft, C.A.A. Ill., 12 F. 2d. 572).].*

(8) Illustrative Questions and Cases Regarding Effect of Probate

(a) To be conclusive, the probate must have been conducted by a *competent court* with full jurisdiction. What is that court?

ANS.: The Regional Trial Court of the province —

1) where he has real estate (in case of NON-RESIDENT testator).

2) where he *resided* at the time of his *death* (in case of a RESIDENT testator). *[NOTE,* however, that *all* Courts of First Instance (now RTC) *have jurisdiction*. The residence or domicile of the testator affects only the VENUE, but NOT the JURISDICTION of the Court. The rule grants jurisdiction to the Court where jurisdiction is first INVOKED, *without* taking VENUE into account. *(Angela Rodriguez, et al. v. Hon. Juan de Borja, L-21993, June 21, 1966).].*

Moreover, it is essential that:

a) it be proved before the court that he died after having *executed* a will (in case of *post mortem* probate)

b) and that the will has already been *delivered* to the Court. *(See Salazar v. Court of First Instance, 64 Phil. 785). (See also Sec. 1, Rule 73, Rules of Court).*

Garcia Fule v. Court of Appeals
L-40502 and L-42670
Nov. 29, 1976

FACTS: Although the deceased (a member of the Constitutional Convention) was domiciled in Calamba, Laguna, his actual place of residence when he died was in Carmel Subdivision, Quezon City. What is the proper venue of his estate proceedings — Laguna or Quezon City?

HELD: Quezon City because the term "resides" in Sec. 1, Rule 73 of the Rules of Court, should be viewed in its popular sense (physical presence in a place where a person actually stays) and not in the legal sense which is domicile.

Rosa Cayetano Cuenco v.
Court of Appeals, et al.
L-24742, Oct. 26, 1973

FACTS: On the death of Senator Mariano Jesus Cuenco, he was survived by his children of the first marriage, AND by his second wife and two minor sons. One of the children of the first marriage (Lourdes Cuenco) alleged in the Cebu CFI (now RTC) that the father died *intestate;* she therefore asked that she be appointed administratrix. One week later, the widow filed with the Quezon City CFI (RTC) a petition for the *probate* of the deceased's last will and testament and for her to act as executrix. Lourdes Cuenco opposed the petition in the Quezon City Court, alleging the pendency of the intestate proceeding in Cebu. The Quezon City Court denied the motion to dismiss filed by Lourdes, heard the case, and eventually admitted the will to probate, allowed the widow to act as executrix. The Quezon City Court also ruled that the residence of Cuenco at the time of his death was at 69 Pio y Margal, Sta. Mesa Heights, Quezon City. *Issue:* Were the rulings of the Quezon City Court proper?

HELD: Yes, the Quezon City Court acted regularly within its jurisdiction in admitting the will to probate and

in naming the widow as executrix thereof. The Supreme Court is not inclined to annul proceedings regularly had in a lower court (even if the latter is not the proper venue therefor), *if the net result would be to have the same proceedings repeated in some other court of similar jurisdiction.*

[NOTE: Any other court's decree cannot have the *res judicata* effect of a probate, except of course that of the Appellate Court affirming the judgment of the proper court.*].*

[NOTE: The withdrawal from the case of one who filed the petition for probate does NOT affect the jurisdiction of the court over the proceedings and over all the other persons therein, for it is a well-established principle that the proceeding for the probate of a will is *in rem,* and the court acquires jurisdiction over all the persons interested in the estate of a deceased person, whether or not he filed the petition for the probate of the will. *(Mirasol and Mirasol v. Mesa Magsuci, et al., L-12166, Apr. 29, 1959).].*

[NOTE: To determine appellate jurisdiction of the Supreme Court or of the Intermediate Appellate Court, as the case may be, the amount or value involved or in controversy is that of the entire estate. *(Suntay v. Suntay, L-3087, July 31, 1964, 50 O.G. 5321; Fernandez v. Maravilla, L-18799, Mar. 31, 1964).].*

(b) The CFI (RTC) *allowed* a will, stating among other things that testator was of sound mind. The case was appealed to the Supreme Court. May the Supreme Court disallow the will and reverse the CFI (RTC), or is the decision of the CFI (RTC) binding insofar as testamentary capacity and due execution are concerned?

ANS.: The Supreme Court can of course reverse the CFI (RTC), and disallow the will, because after all, there was no final judgment yet. The law speaks of a conclusive judgment, "subject to the right of appeal." *(Art. 838, last paragraph).*

[NOTE: Had there been no appeal, and no petition for relief, or if the periods for said remedies have already expired, no court, not even the Supreme Court, can reverse the ruling of the probate court regarding testamentary capacity and due execution.*]*.

(c) As has been noted, the *final* judgment on a probate may be set aside by a petition for relief brought within the *legal period*. Under Rule 38, Sec. 1 of the Rules of Court, when a judgment or order is entered against a party in the Court of First Instance (now Regional Trial Court) thru FAME (fraud, accident, mistake, or excusable negligence), he may file a petition in the same court and in the same cause, asking that the judgment, order, or proceeds be *set aside*.

PERIODS — the petition has to be filed:

1) within sixty (60) days after the petitioner *learns* of the judgment or order to be set aside;

2) *and* within six (6) *months* after such order or judgment was entered. *(In Re Estate of Johnson, 39 Phil. 156; Rivera v. Palmaroli, 40 Phil. 105).* Should the period lapse, the judgment now really becomes FINALLY FINAL.

Mercado v. Santos
66 Phil. 215

FACTS: 16 months after final judgment on the probate and approval of a will, the proponent was prosecuted for allegedly having presented a forged will. He was thus accused of forgery. May he be convicted, granting that he really had forged the duly probated will?

HELD: No more, since the probate of the will rendered *conclusive* its due execution and therefore conclusive as to the fact that the will was *genuine and not a forgery*.

(d) In the settlement of estates, what are usually done?

ANS.:

1) First, proof of testamentary capacity and due ex-

ecution are presented, and the court then issues an order allowing or disallowing the will.

2) After this is done, the distribution of the estate may be done, after all questions on *intrinsic validity* are disposed of.

[NOTE: The first part is really different from the second part. The first is concerned only with testamentary capacity and due execution. Other matters are generally irrelevant. After the probate order is made, same may be appealed within the proper period.*]*.

Castañeda v. Alemany
3 Phil. 426

FACTS: In a will, a husband appointed his wife guardian of his children's properties. In the probate order, may the Judge pass upon the validity of the appointment?

HELD: No, for this does not concern the extrinsic validity of the will.

[NOTE: Not even the Supreme Court, during the appeal of the probate order, should pass upon the validity of the appointment of guardian, except of course to say that no pronouncement on said point should have been made.*]*.

Nacar v. Nistal
L-33006, Dec. 8, 1982

J. Conrado Vasquez (concurring in the result):

The creditor of a deceased person (if the credit is because of a contract) must file the claim in the settlement or administration proceedings of the estate of the deceased, not sue in a separate action against the administrator.

(e) The following points, among others, should NOT be included in the probate order, since they affect *intrinsic validity:*

1) exclusion of the widow from the inheritance. *(Sahagun v. Gorostiza, 7 Phil. 347).*

2) disinheritance of a daughter. *(Limjuco v. Canara, 11 Phil. 394).*

3) impairment of the legitime. *(In Re Estate of Johnson, 39 Phil. 156).*

4) declaring a certain woman to be the true wife of the testator. *(Alkuino Lim Pang v. Uy Pian Ng Shun, 52 Phil. 571).*

5) partitioning of conjugal properties. *(Reynoso v. Tolentino, O.G. Supp. Aug. 2, 1951, p. 5).*

6) right of a widow to the inheritance. *(Barredo v. Vencer, 56 Phil 806).*

7) titles to property, and annulment of alleged fraudulent sales. (According to the court, one reason for avoiding this in summary proceedings particularly is to *minimize expenses,* so much that even the appointment of an administrator in summary proceedings is dispensed with). *(Padilla v. Matela, L-7479, Oct. 24, 1955).*

[NOTE: These matters may be brought in different or later proceedings, but not in the probate (proper) proceedings, and even if passed upon thereon, cannot be *res judicata. (See Montano v. Suesa, 14 Phil. 676; Castañeda v. Alemany, 3 Phil. 427; See also Angela, et al. v. Hon. Juan de Borja, L-21993, June 21, 1966* where the court held that ORDINARILY, while the *probate* is going on, *intestate proceedings* may *not* proceed. However, in the case of *Remedios Nuguid v. Felix Nuguid and Paz Salonga Nuguid, L-23445, June 30, 1966,* the Court held that while it is true that the probate should deal only with EXTRINSIC VALIDITY, and NEVER with INTRINSIC VALIDITY, still if it is alleged that the will is VOID because of PRETERITION (which is a matter of *intrinsic validity*), a probate would be useless, if indeed there was a *preterition,* and *no* legacies or devises are involved. Indeed, the authentication or probate of the will decides no other questions than such as touch upon the *capacity*

of the testator, and the *compliance* with those requisites or solemnities which the law prescribes for the validity of a will. It does not determine nor even by implication prejudice the validity or efficacy of the provisions; that may be impugned as being vicious or null, notwithstanding its authentication. The questions relating to those points remain entirely unaffected, and may be raised even after the will has been authenticated. *(Palacios v. Catimbang Palacios, L-12207, Dec. 24, 1959).* Similarly, it has been held that a deed of partition approved in the course of settlement of estate proceedings CANNOT BAR on the ground of *res judicata* an *accion reivindicatoria* over the properties involved. *(Bacani, et al. v. Galura, et al., L-16066, Apr. 25, 1962).].*

[NOTE: As a general rule, questions as to title to property cannot be passed upon in testate or intestate proceedings, except where one of the parties prays merely for the inclusion or exclusion from the inventory of the property, in which case the probate court may pass provisionally upon the question without prejudice to its final determination in a separate action. The probate court can decide only provisionally questions of title for the purpose of inclusion into, or exclusion from, the inventory, without prejudice to a final determination of the question in a separate action. *(Honesto Alvarez, et al. v. Pedro K. Espiritu, L-18833, Aug. 14, 1965).* However, when the parties interested are all heirs of the deceased, it is optional to them to submit to the probate court any question as to title to property, and when so submitted, said probate court may definitely pass judgment thereon; and that with the consent of the parties, matters affecting property under judicial administration may be taken cognizance of by the court in the course of the intestate proceedings, provided interests of third persons are not prejudiced. In the case at bar, the matter in controversy is the question of ownership of certain properties whether they belong to the conjugal partnership or to the husband alone. This is a matter properly within the jurisdiction of the probate court which necessarily has to liquidate the conjugal partnership in order to determine the estate of the decedent to be distributed among the heirs

who are all parties to the proceedings, including the widow, now substituted by her heirs. *(Bernardo, et al. v. Court of Appeals, et al., L-18148, Feb. 28, 1963).* Upon the other hand, it is permissible to annul a judgment in a probate case, within the statutory period of prescription, on the ground of extrinsic fraud, especially so, if the subsequent case contests the title to the property adjudicated in the probate proceedings, and the adjudication took place without the participation of the aggrieved party. *(Paciencia Lim Vda. de Serrano v. the Court of Appeals, et al., L-28332, June 30, 1970, 33 SCRA 863).].*

Pedro Ermac, et al. v. Cenon Medelo, etc.
L-32281, June 19, 1975

FACTS: In a probate proceeding, a third person sought to prevent distribution of the estate on the ground that certain properties did not belong to the estate but to him. Should the settlement proceeding go on?

HELD: The settlement proceeding must go on, and not be delayed. The probate court is not the best forum for the resolution of adverse claims of ownership of any property ostensibly belonging to the decedent's estate. While there are settled exceptions to this rule, it is not proper to delay the summary settlement of deceased person's estate just because an heir or a third person claims that certain properties do not belong to the estate but to him. Adverse claims of ownership must be ventilated in an independent action. For the protection of the claimant, the appropriate step is to have the proper annotation of *lis pendens.*

Ongsingco v. Judge Tan, et al.
L-1635, July 25, 1955

FACTS: One court issued an injunction concerning certain properties. A probate court having before it a will involving said properties dissolved the writ of injunction issued by the first court. Was this proper?

HELD: No, for to do this, the probate court, has to delve into the question of ownership, and it is well-known

that property ownership should be determined in an *ordinary* action as distinguished from probate proceedings. *(See also Franco v. O'Brien, 13 Phil. 359; Pascual v. Pascual, 73 Phil. 661).*

[NOTE: Had there been no pending litigation over the same property, it is believed that in *the meantime,* the probate court, acting as an *estate settlement court* could have delved into the issue of ownership, *only for the purpose of settling in the meantime the inheritance proceedings,* without of course making the decision on ownership *res judicata,* since the same question of ownership can be raised again.*].*

Recto v. De la Rosa
L-42799, Mar. 16, 1976

FACTS: In a dispute between an estate and one of the heirs concerning the ownership of a piece of estate, can the probate court decide the question of ownership?

HELD: No, for this would be outside its jurisdiction. Another litigation would be needed to ultimately decide this issue.

Bolisay v. Alcid
L-45494, Aug. 31, 1978

Lots registered with Torrens Title under the names of certain heirs should be excluded from the estate of the deceased. The presumptive conclusiveness of the Torrens Title must be accorded great weight. This is particularly so when the registered owners are also the possessors of the lots.

Magallanes v. Kayanan
L-31048, Jan. 20, 1976

FACTS: Generally, a probate court has no jurisdiction to decide questions of ownership. Are there exceptions?

HELD: Yes, there are exceptions:

(a) as when the parties *voluntarily* submit this matter to the court; or

(b) as when *provisionally,* the ownership is passed upon to determine whether or not the property involved is part of the estate.

Sebial v. Sebial
64 SCRA 385

While ordinarily a probate court cannot pass upon questions of title to property, still this is allowed where the parties are all heirs and they voluntarily submit said questions before the probate court.

Coca v. Pizarras Vda. de Pangilinan
L-27082 and L-29545
Jan. 31, 1978

While the intestate court should ordinarily not pass on questions of title, it may *provisionally* pass upon the question of inclusion or exclusion in having the inventory of the estate made. Moreover, as an exception to the general rule, the question of title may be decided in the same settlement proceeding if the only interested parties have already appeared in the proceeding. This is particularly so when the claimants belong to the poor stratum of society. Instead of being compelled to file a separate action, they should be allowed in the settlement proceeding to just file a motion that will be in the form of a complaint.

Lachenal v. Salas
L-42257, June 14, 1976

FACTS: In the probate proceedings, there was a hearing before the court-appointed commissioner on the ownership of a certain fishing boat alleged to be part of the estate. After the claimant had presented his evidence, the executor, instead of presenting his own evidence, filed a separate civil action against the claimant of the fishing boat. Is this separate action proper?

HELD: Yes, the separate action is proper because the probate court cannot decide matters of ownership. Justice

Barredo in his concurring opinion believes that no estoppel is involved because the hearing in the probate court was conducted not before the judge, but before a commissioner; moreover, the hearing had not yet terminated, the executor not having presented his evidence as yet.

Rafols v. Barba
L-28446, Dec. 18, 1982

If a probate court gives authority to sell property of the deceased, the heirs should be given notice of such authority. If there is no document presented that indeed the required notice had not been given, this does not mean that no notice had in fact been given. There is a presumption that official duty has been regularly performed.

Pastor, Jr. v. Court of Appeals
GR 56340, June 24, 1983

The question of ownership is an extraneous matter which the probate court cannot resolve with finality. The said court may only provisionally pass upon titles of properties to be included in the inventory of estate properties, subject to final decision in a separate action to resolve the question of ownership.

Ermao v. Madelo
64 SCRA 358

If a parcel of land included in the inventory of the estate of a deceased individual is claimed by one of the parties in the proceedings and said party is able preliminarily to prove that the land is not a part of the estate but is really his, a project of partition on this point may be approved by the probate court (later however, a separate action may conclusively decide the ownership of the lot).

Valero Vda. de Rodriguez v.
Court of Appeals
L-39532, July 20, 1979

FACTS: The probate court ordered certain properties, alleged to be part of the deceased's estate, excluded from the inventory. May this exclusion be appealed?

HELD: No, there can be no appeal here, because the exclusion is merely interlocutory (as distinguished from final). The issue can be taken up later when the entire case is elevated on appeal.

Barreto, Reyes and Reyes v. Barreto
L-5830, Jan. 31, 1956

FACTS: Two wills were executed by the testatrix. Will No. 1 instituted her *legitimate* child and *another person,* who had been extrajudicially adopted, although in said will, the second child was referred to, *not* as an adopted child, but as one of the children. Will No. 2, executed later, named as heir only the legitimate child. Then she died. Later, both the legitimate child and the "adopted" child died. The heirs of both children presented the conflicting wills for probate. The trial court passed upon the filiation of the "adopted" child, declared him not to be a lawful child, and approved will No. 2. On appeal, the heir of the "adopted" child contended that probate proceedings cannot determine or inquire into the filiation of a child, for all that said proceedings could do would be to ascertain the extrinsic validity of the will.

HELD: While as a general rule, probate proceedings should be limited to the question as to whether a will was duly executed in accordance with the formalities required by law, and whether or not the testator was in a condition to make such a will, still said general rule cannot be applied in this case. For here, two successive inconsistent wills were presented for probate, and the issue of filiation was squarely raised by the pleadings, and had to be decided in order to determine whether or not the testator intended to revoke the first will. When the issue involved is revocation, it is the function of the court to examine the words of the will. *(See 57 Am. Jur., Wills, Sec. 776, p. 530).*

(f) *Question:* In probate proceedings, in what instances, if any, may proof of filiation be allowed and for what purposes?

ANS.:

1) As has been held in the case of *Barreto v. Barreto, L-5830, Jan. 31, 1956, proof* of filiation may be given if it is essential to establish which of the two wills has been revoked.

2) Moreover, it can be given to prove *prima facie* whether or not an oppositor or intervenor who claims to be *related* to the testator, can be allowed to *intervene* in the probate proceedings for the purpose of protecting his rights. *(Reyes v. Ysip, 51, O.G. 2357; Severino v. Severino, 44 Phil. 343; Hilado v. Ponce de Leon, CA, 50 O.G. 222). However,* and this is important, the *final* decision on the matter of relationship can be threshed out either in *another* case, or even in the later stages of the settlement proceedings, the stage when the declaration of heirship is made, and only after the probate order has been made. As a matter of fact, it is not really wrong for the court to postpone the presentation of evidence on filiation until *later on* in the distribution proceedings, as distinguished from the probate proceedings. *(Reyes v. Ysip, et al., 51 O.G. 2357).* This is true even if it is a principle of law that a person intervening in the proceedings should be required to show interest in the will or the property affected thereby. *(Paras v. Narciso, 35 Phil. 144; In Re Cabigting, 41 Phil. 453).*

Uriarte v. Uriarte, et al.
L-21938-39, May 29, 1970

The Court held that there are two alternatives for an acknowledged natural child to prove his status and interest in the estate of his deceased parent:

(a) to intervene in the probate (or intestate) proceeding if it is *still open;*

(b) to ask for its *reopening* if it has already been closed (if for instance extrinsic fraud, as in the omission of heirs, has been made in the judicial partition even if said partition had been

approved by the court. *(See Vda. de Marbella v. Kilayko, et al., 104 Phil. 41, citing Lajom v. Viola, 73 Phil. 563).*

Emma Velez y Bato and Antonio Bato v. Roberto Velez and Eduardo Bunuan
L-28873, July 31, 1973

FACTS: An alleged illegitimate child Emma Velez filed an action to recover possession of certain properties belonging to the deceased Nicolas Velez alleging that she is the heiress of Nicolas and therefore entitled to the latter's properties upon his death in 1965. But there was no allegation in the complaint that she had been recognized by Nicolas. May the CFI (RTC) dismiss the complaint for lack of cause of action?

HELD: Yes, the complaint may, on motion, be dismissed on the ground that there is no cause of action. Emma should have alleged recognition by the alleged putative father. As held in *Paulino v. Paulino (L-16091, Dec. 28, 1961)*, and thereafter applied in other cases, it is necessary to allege in her claim for inheritance her having been recognized as such child. It is recognition of filiation that is important, not filiation itself. There is no cause of action here because the action becomes one of compelling recognition, an action that generally cannot be brought after the death of the putative father.

Intestate Estate of the Late Emilio T. Lopez
L-23915, Sep. 28, 1970

The Court held that intestate heirs omitted in the partition presented by the judicial administratrix and already approved by the court *a quo* are NOT BOUND thereby. (In this case, the Supreme Court remanded the case to the court of origin for further proceedings.)

(9) No Prescriptive Period for Instituting Probate Proceedings

In one case, a will was presented for probate *twelve* years after the death of the testator. It was claimed that the right to institute the proceedings had already prescribed.

HELD: The will may still be probated, since prescription is not applicable. The Statute of Limitations fixes time limits for the filing of "civil actions" but *not* for "special proceedings" of which a probate is admittedly one. The distinction is not merely verbal or a matter of terminology, for there are differences between the two. Probate proceedings are not exclusively established in the interest of the surviving heirs but primarily for the *protection of the testator's expressed wishes that are entitled to respect as an effect of ownership and of the right of disposition*. If the probate of validly executed wills is required by public policy, the State could *not* have intended the Statute of Limitations to defeat that policy. Hence, the will may still be admitted to probate. *(Guevara v. Guevara, et al., 98 Phil. 249).*

(10) Estoppel Not Applicable to Probate Proceedings

The rule of estoppel does not apply to probate proceedings for they are invested with public interest, and if estoppel would be applied, the ascertainment of the truth may be blocked. This should be avoided for the primary purpose of a probate is not the protection of the interest of living persons. *(Obispo v. Obispo, C.A. 50 O.G. 514; Guevara v. Guevara, 98 Phil. 249).*

Alsua-Betts, et al. v. Court of Appeals, et al.
L-46430-31, July 30, 1979

Estoppel has no application in probate proceedings insofar as the testamentary capacity of the testator is concerned. (Thus, even if there is no opposition on a particular qualification, the court may still pass on the decedent's testamentary capacity.) *[NOTE:* While in ordinary civil actions, the issues are fixed by the parties in their pleadings, in probate, the issues are fixed by the law.*].*

(11) Some Rules of Pleadings not Applicable to Probate Proceedings Because the Issues Are Fixed by Law and Not By the Parties

Vano v. Garces, et al.
L-6303, June 30, 1964, 50 O.G. 3044

FACTS: A will was presented for probate. Oppositor in the pleadings questioned the *capacity* of the testator, but did

not question the genuineness of the signature. During the trial, the signature was claimed to be a forgery. Can this be done, although ordinarily, questioning the capacity of the testator is an implied admission of the signature?

HELD: Yes, this can still be done. True, the general rule is that the pleadings are fixed from the issues, and no evidence can be introduced in support of allegations not found in the pleadings. But in the instant case, it is the law that fixes the issues (which are the *grounds for disallowance*), and therefore every ground of attack on the validity of a will may be used.

(12) Requirements Before Distribution of Properties

(a) First, there must be a decree of partition allocating property to each heir.

(b) Then, payment of the estate tax is required.

(c) Finally, the distributive shares may be delivered. *(Chunaco, et al. v. Quicho, et al., L-13774, Jan. 30, 1959).*

[NOTE: It is important to note that according to the Supreme Court — a project of partition, although made and subscribed by all the heirs, and so, ordinarily binding on them, even when approved by the probate court, does NOT mean that said court is thereafter divested of jurisdiction over the same. If later, especially within a reasonable time after the approval of said partition, it is proved that in obtaining approval, fraud had been practiced, the probate court may still modify or even set aside the order approving the partition. *(Yusay v. Yusay Gonzales, L-11378, Aug. 21, 1959).].*

[NOTE: Even if there be only one heir instituted, there must still be a judicial order of adjudication. The order is the judicial recognition that in appointing the heir, the deceased did not contravene the law, and that the heir was in no way disqualified to inherit; just as a final order admitting a will to probate excludes all and sundry from thereafter contending that the statutory formal requisites have not been observed in executing the testament. *(Romulo Lopez, et al. v. Luis Gonzaga, et al., L-18788, Jan. 31, 1964).].*

(13) Rule When the Deceased was a Defendant in a Money Claim

Dy v. Lopez Enage
L-35351, Mar. 17, 1976

FACTS: While a money claim was pending against him in court (there was also a counter-claim filed by him), the defendant died. What should be done with the case?

HELD: The case should be dismissed, and then refiled with the probate court. The counter-claim will also be decided by the probate court. (Had the claim been one that survives, *e.g.*, a tort action, the same must be CONTINUED in the ordinary court, not in the probate court.)

(14) Termination of Probate Proceedings

Probate proceedings are considered terminated upon the approval by the probate court of the project of partition, the granting of the petition to close the proceedings, and the consequent issuance of the order of distribution directing the delivery of the properties to the heirs in accordance with the adjudication made in the *will. (Santiesteban v. Santiesteban, 63 Phil. 307; Tagle et al. v. Manalo, et al., L-12657, July 14, 1959).* The failure to file with the Register of Deeds a certified copy of the letters of administration and of the will, and to record the attested copies of the will, and the allowance thereof by the court, does NOT NEGATE the validity of the judgment or decree of probate or the rights of the heirs and devisees under the will. *(See Lopez v. Gonzaga, et al., L-18788, Jan. 31, 1964).*

(15) Role of Juvenile and Domestic Relations Court (now in a Regional Trial Court) While Competency Proceedings Are Pending in the Probate Court

Vda. de Baluyot v. Luciano
L-42215, July 13, 1976

FACTS: While a probate court was determining whether an administratrix was mentally competent or not, guardianship

proceedings were instituted in the Quezon City Juvenile and Domestic Relations Court to have the administratrix declared incompetent. Can this be properly done?

HELD: No, this cannot be done under Sec. 29-A of the Quezon City Charter because the matter in issue is already pending before the ordinary courts. The purpose of the prohibition is to avoid rulings that would conflict with each other. In the meantime, the guardianship case must be suspended.

(16) The Case of Adelia C. Mendoza

Adelia C. Mendoza, for herself and as Administratrix of the Intestate Estate of the late Norberto B. Mendoza v. Hon. Angelita C. Teh, et al. GR 122646, Mar. 14, 1997 80 SCAD 679

FACTS: On Oct. 28, 1994, petitioner "for herself and as administratrix of the intestate estate" of her deceased husband Norberto Mendoza, filed before the Regional Trial Court (RTC) of Batangas a complaint for "reconveyance of title (involving parcels of lot in Batangas) and damages with petition for preliminary injunction" docketed as Civil Case R-94-009. Paragraphs 2 and 3 of said complaint states:

> "2. That Adelia C. Mendoza likewise represents her co-plaintiff, the Intestate Estate of the late Norberto B. Mendoza in her capacity as the surviving wife of the deceased Norberto B. Mendoza who died on Dec. 29, 1993;
>
> "3. That Adelia C. Mendoza should be appointed by this Honorable Court as the judicial administratrix of her co-plaintiff for purposes of this case."

Private respondents filed on Jan. 21, 1995 their "answer with motion to dismiss" alleging among others that the complaint states no cause of action and that petitioner's demand had already been paid. On Feb. 17, 1995, private respondents filed another pleading entitled "motion to dismiss" invoking, this time, lack of jurisdiction, lack of cause of action, estoppel, laches and prescription. In support of their argument of lack of

jurisdiction, private respondents contend that a special proceedings case for appointment of administratrix of an estate cannot be incorporated in the ordinary action for reconveyance. In her opposition to the motions, petitioner asserts among others, that the allegation seeking appointment as administratrix is only an incidental matter which is not even prayed for in the complaint. Replying to the opposition, private respondents argued that since petitioner's husband resided in Quezon City at the time of his death, the appointment of the estate administratrix should be filed in the RTC of that place in accordance with Section 1, Rule 73 of the Rules of Court. Accordingly, it is their argument that the RTC of Batangas has no jurisdiction over the case.

In a Resolution dated June 14, 1995, the RTC of Batangas thru respondent Judge Teh "dismissed without prejudice" the complaint for lack of jurisdiction "on the ground that the rules governing an ordinary civil action and a special proceeding are different." Accordingly, the lower court found it unnecessary to discuss the other grounds raised in the motion to dismiss. Upon denial of petitioner's motion for reconsideration, he filed this petition under Rule 45 on pure questions of law. The Court thereafter gave due course to the petition.

ISSUE: Whether or not in an action for reconveyance, an allegation seeking appointment as administratrix of an estate, would oust the RTC of its jurisdiction over the whole case.

HELD: We rule in the negative. *First*, Section 19 of BP 129 as amended by RA 7691 provides: "*Jurisdiction in Civil Cases*. — Regional Trial Courts shall exercise exclusive original jurisdiction:

(1) In all civil actions in which the subject of the litigation is *incapable of pecuniary estimation;*

(2) In all civil actions which involve the *title* to, or possession of, real property, or any interest therein, where the assessed value of property involved exceeds Twenty thousand pesos (P20,000.00) …" x x x x x x x x x (4) In all matters of probate, both testate and intestate …"

Likewise, Section 33 of the same law provides that: Metropolitan Trial Courts shall exercise: (1) Exclusive original

jurisdiction over civil actions and probate proceedings, testate and intestate …"

The above law is clear. An action for reconveyance, which involves title to property worth millions of pesos, such as the lots subject of this case, is cognizable by the RTC. Likewise, falling within its jurisdiction are actions "incapable of pecuniary estimation," such as the appointment of an administratrix for an estate. Even the Rules on venue of estate proceedings (Section 1 of Rule 73) impliedly recognizes the jurisdiction of the RTC over petitions for granting of letters of administration. Upon the other hand, *probate proceedings for the settlement of estate* are within the ambit of either the RTC or MTC depending on the net worth of the estate. By arguing that the allegation seeking such appointment as administratrix ousted the RTC of its jurisdiction, both public and private respondents confuse jurisdiction with venue. Section 2 of Rule 4 as revised by Circular 13-95 provides that actions involving title to property shall be tried in the province where the property is located, in this case — Batangas. The mere fact that petitioner's deceased husband resides in Quezon City at the time of his death affects only the venue but not the jurisdiction of the Court.

Private respondents invoked before the lower court the case of *Guzman v. Anog, 37 Phil. 61 (1917), Ongsingco v. Tan, 97 Phil. 330 (1955), Tagle v. Manalo, 105 Phil. 1124 (unrep. 1959)*. These cases, however, involved settlement of an estate and not appointment of an administrator nor does it involve actions for reconveyance. The cases of *Buermann v. Casas, 10 Phil. 386 (1908),* cited in their comment involves liquidation of business. The other cases cited are *Manalo v. Manalo, 65 Phil. 534 (1938), Recto v. Dela Rosa, 75 SCRA 226 (1977)* and *Morales v. CFI of Cavite, 146 SCRA 373 (1986)*, which pertains to settlement of estates. The case of *Ferraris v. Rodas*, 65 Phil. 732 (1938), pertains to the power of an administrator to lease estate properties.

Second, the cases cited by private respondents are not at point as they involve *settlement of estate* where the probate court was asked to resolve questions of ownership of certain properties. In the present suit, no settlement of estate is involved, but merely an allegation seeking appointment as estate

administratrix which does not necessarily involve settlement of estate that would have invited the exercise of the limited jurisdiction of a probate court. The above allegation is not even a jurisdictional fact which must be stated in an action for reconveyance. The Court, therefore, should have at least, proceeded with the reconveyance suit rather than dismiss the entire case.

Third, jurisprudential rulings that a probate court cannot generally decide questions of ownership or title to property cannot be made applicable in this case, because there is no settlement of estate involved and the RTC of Batangas was not acting as a probate court. It should be clarified that whether a particular matter should be resolved by the RTC in the exercise of its general jurisdiction or its limited probate jurisdiction, is not a jurisdictional issue but a mere question of procedure. Moreover, the instant action for reconveyance does not even invoke the limited jurisdiction of a probate court. Considering that the RTC has jurisdiction, whether it be on the reconveyance suit or as to the appointment of an administratrix, it was improper for respondent judge to dismiss the whole complaint for alleged lack of jurisdiction.

Finally, judges should not dismiss with precipitate haste, complaints or petitions filed before them, just so they can comply with their administrative duty to dispose cases within 90 days at the expense of their judicial responsibility.

(17) A 'Will' Is Essentially Ambulatory

Cañiza v. CA
79 SCAD 863
(1997)

A *will* is essentially ambulatory; at any time prior to the testator's death, it may be changed or revoked; and until admitted to probate, it has no effect whatever and no right can be claimed thereunder, the law being quite explicit: "No will shall pass either real or personal property unless it is proved and allowed in accordance with the Rules of Court." *(Art. 838, par. 1).*

(18) The Case of Pilar S. Vda. De Manalo

Pilar S. Vda. De Manalo, et al. v. CA, et al.
GR 129242, Jan. 16, 2001

It is our view that herein petitioners may not be allowed to defeat the purpose of the essentially valid petition for the settlement of the estate of the late Troadio Manalo by raising matters that are irrelevant and immaterial to the said petition.

It must be emphasized that the trial court, sitting as a probate court, has limited and special jurisdiction *(Guzman v. Anog, 37 Phil. 61 [1917]; Borja v. Borja, et al., 101 Phil. 911 [1957])* and cannot hear and dispose of collateral matters and issues which may be properly threshed out only in an ordinary civil action.

In addition, the rule has always been to the effect that the jurisdiction of a court, as well as the concomitant nature of an action, is determined by the averments in the complaint and not by the defenses contained in the answer. If it were otherwise, it would not be too difficult to have a case either thrown out of court or its proceedings unduly delayed by simple stratagem. *(Chico v. CA, 284 SCRA 33 [1998]).* So, it should be in the instant petition for settlement of estate.

The petitioners therein (private respondents herein) merely seek to establish the fact of death of their father and subsequently to be duly recognized as among the heirs of the said deceased so that they can validly exercise their right to participate in the settlement and liquidation of the estate of the decedent consistent with the limited and special jurisdiction of the probate court.

The oppositors (therein petitioners) are NOT BEING SUED IN SP. PROC. 92-63626 for any cause of action as in fact no defendant was impleaded therein. The Petition for Issuance of Letters of Administration, Settlement and Distribution of Estate in SP. PROC. 93626 is a special proceeding and, as such, it is a remedy whereby the petitioners therein seek to establish a status, a right, or a particular fact.

It is clear from the term "suit" that it refers to an action by one person or persons against another or others in a court

of justice in which the plaintiff pursues the remedy which that law affords him for the redress of an injury or the enforcement of a right, whether at law or in equity. *(Kohl v. U.S., 91 U.S. 367 [23 L. Ed. 449]; Weston v. Charleston, 27 U.S. [2 Pet.] 449 [7 L. Ed. 481]; Syracuse Plaster Co. v. Agostini Bros. Bldg. Corp., 169 Misc. 564 [7 N.Y.S. 2d 897]).* A *civil action* is one filed in a court of justice, whereby a party sues another for the enforcement of a right, or the prevention or redress of a wrong. *(Rule 1, Sec. 3[a], Rules of Court).*

Besides, an excerpt from the Report of the Code Commission unmistakably reveals the intention of said Commission to make that legal provision applicable only to civil actions which are essentially adversarial and involve members of the same family, thus: "It is difficult to imagine a sadder and more tragic spectacle than a litigation between members of the same family. It is necessary that every effort should be made toward a compromise before a litigation is allowed to breed hate and passion in the family. It is known that lawsuit between close relatives generates deeper bitterness than [that involving] strangers." *(Report of the Code Commission).*

(19) Matters that Should be Brought up Before the Probate Court

Arbolario v. CA
401 SCRA 360
(2003)

These are:

1. determination of heirs;
2. proof of filiation;
3. determination of estate of decedent; and
4. claims thereto.

(20) Case

Heirs of Miguel Franco v. CA
418 SCRA 60
(2003)

While the intestate court does not have the authority to rule with finality on questions of ownership over the property

of the decedent, it is *not precluded* from making a provisional determination over such questions for purposes relevant to the settlement of the estate, such as ruling whether or not to include properties in the inventory of the estate.

The order of an intestate court is a provisional determination of ownership over a certain property. Yet conformably to ordinary experience, any prudent claimant is expected to *dispute* such an order which *rejects* his claim of ownership.

(21) Comment of the Code Commission

The fact remains that the members of the Code Commission saw fit to prescribe substantially the same formal requisites enumerated in Sec. 618 of the Code of Civil Procedure, convinced that these remained effective safeguards against forgery, or intercalation of notarial wills. The transcendent legislative intent, even as expressed in the comments of the Code Commission, is for the fruition of the testator's incontestable desires, and not for indulgent admission of wills to probate. *(Azuela v. CA, 487 SCRA 119 [2006]).*

(22) Query

In the exercise of its limited jurisdiction, what matters fall within the exclusive province of the probate court?

ANS.: These are those which involve settlement and distribution of the estate of the decedent. *(Rodriguez v. Lim, 509 SCRA 113 [2006]).*

(23) Case

Heirs of Rosendo Lasam v. Umungan
510 SCRA 496
(2006)

FACTS: Conveyances were made by the children of Isabel Cuntapay by her first marriage of their respective *pro indiviso* shares in the subject lot to respondent. Here,the law recognizes the substantive right of heirs to dispose of their ideal share in the co-heirship and co-ownership. Moreso, the purported last

will and testament of Isabel Cuntapay could not be properly relied upon to establish petitioner's right to possess the subject lot.

ISSUE: Without having been probated, could the said last will and testament be the source of any right?

HELD: Absent any probate proceeding. No. Be it noted that a will is essentially ambulatory — at any time prior to the testator's death, it may be changed or revoked — and until admitted to probate, it has no effect whatsoever and no right can be claimed thereunder. The presentation of the will for probate is mandatory and is a matter of public policy.

Art. 839. The will shall be disallowed in any of the following cases:

(1) If the formalities required by law have not been complied with;

(2) If the testator was insane, or otherwise mentally incapable of making a will, at the time of its execution;

(3) If it was executed through force or under duress, or the influence of fear, or threats;

(4) If it was procured by undue and improper pressure and influence, on the part of the beneficiary or of some other person;

(5) If the signature of the testator was procured by fraud;

(6) If the testator acted by mistake or did not intend that the instrument he signed should be his will at the time of affixing his signature thereto. (n)

COMMENT:

(1) Grounds for Disallowance of a Will

The grounds given in Art. 839 are *exclusive, thus,* no other ground can serve to disallow a will. *(Pecson v. Coronel, 45 Phil. 216).*

NOTE: Grounds of (1) formalities and (2) insanity, have been discussed on the subject of testamentary capacity and formalities required.

[NOTE: If the signature of the supposed testator has been firmly written in a practically straight line, and the testator is an 82-year-old cripple with the entire left half of his body paralyzed, the chances are the alleged signatures are not really his. *(Junquera v. Borromeo, L-18498, Mar. 30, 1967, 19 SCRA 666).].*

(2) The Ground of Force, Duress, Fear or Threat

(a) These grounds connote the idea of coercion, mental or physical. *(1 Page on Wills, p. 393).*

(b) While their presence in a contract renders it *voidable* (and therefore susceptible of ratification), their presence in a will renders the will VOID.

(3) The Ground of Undue and Improper Pressure and Influence

(a) *Undue influence* connotes the idea of coercion by virtue of which the judgment of the testator is *displaced,* and he is induced to do that which he otherwise would not have done. *(Gardner, p. 154).* It is present when he does something because of fear or a desire for peace or from any other feeling which he is unable to resist. *(Torres v. Lopez, 48 Phil. 772).* The Civil Code says that "there is undue influence when a person takes improper advantage of his power over the will of another, depriving the latter of a reasonable freedom of choice. The following circumstances shall be considered. The *confidential, family, spiritual* and *other relations* between the parties, or the fact that the person alleged to have been unduly influenced was suffering from *mental weakness,* or was *ignorant,* or in *financial distress." (Art. 1337).*

(b) He who alleges undue influence must prove the same. *(Macapinlac v. Alimurong, 16 Phil. 41).*

(c) There is *no undue influence* just because a testator has made his mistress, or his illegitimate child by her, the

heir to the *entire free portion.* Mere affection, even if illegitimate, is not undue influence, as long as the giving was voluntary. *(Coso v. Fernandez Deza, 42 Phil. 596).*

[NOTE: Though such a will may be admitted to probate because of the absence of undue influence, still *under the law,* a mistress is incapacitated to inherit. *(See Art. 1028 in relation to Art. 739).].*

(d) Mere inequality, no matter how great, in distributing the estate is not evidence of undue influence. *(In Re Storer's Will, Costigan, p. 46).* Mere presence of favored relatives at the time of the execution of the will does not necessarily mean undue influence. *(Cuyugan v. Baron, 69 Phil. 638).* The fact that some heirs are more favored than others is proof of neither fraud or undue influence. Diversity of apportionment is the usual reason for making a testament; otherwise, the decedent might as well die intestate. *(Icasiano v. Icasiano, L-18979, June 30, 1964).* Neither is undue influence present just because blood relatives, other than compulsory heirs, have been omitted, for while blood ties are strong in the Philippines, it is the testator's *right to disregard* non-compulsory heirs. *(Pecson v. Coronel, 45 Phil. 216).* Neither is undue influence present when a daughter tries by earnest persuasion and entreaty to make her mother make a new will. *(Barreto v. Reyes, L-5830, 5831, Jan. 31, 1950).* Testamentary disposition that the heirs should not inquire into other property, and that they should respect the distribution made in the will, under penalty of forfeiture of their shares in the free disposal, do not suffice to prove undue influence or fraud. Said dispositions appear motivated by the desire to prevent prolonged litigation which, as shown by ordinary experience, often results in a sizeable portion of the estate being diverted into the hands of non-heirs and speculators. Whether these clauses are valid or not is a matter to be litigated upon on another occasion. *(Icasiano v. Icasiano, L-18979, June 30, 1964).* But if there are other facts which explain the disparity of a distribution, a *prima facie* case of undue influence may be shown, in which event, the proponent of the will has to prove the non-existence of

the undue influence. *(In Re Turner's Estate, Costigan, p. 48).*

(e) Suppose after the exercise of alleged undue influence, the testator has opportunity to revoke or change his will, but he does not do it, can the will be allowed?

ANS.: According to Justice Villareal's dissenting opinion in *(Cuyugan v. Baron, 62 Phil. 869 and according to 28 RCL 151),* the will can be allowed, as the effect of the undue influence has been destroyed. However, in several American cases, it has been held that ratification cannot cure the defect. *(See Chaddick v. Haley, 81 Tex. 617; Haines v. Hayden, 95 Mich. 332, etc.).* In one case however, our Court of Appeals has held that failure to revoke when there was opportunity to do so, is proof that indeed there was really no undue influence. *(Carrascoso v. Robles, C.A. 44 O.G. 2780).*

(f) If undue influence has vitiated only some of the dispositions, the rest should be considered valid. *(Harrison's Appeal, 48 Conn. 202).*

In Re Turner's Estate
Costigan, p. 48

FACTS: In the husband's will, the husband gave the bulk of the estate to his wife, and very insignificant portions to the children ($2.50 for each child; $4,500 and all lands to the wife). The following facts were proved: that she was the 2nd wife, that she immediately disliked the children, that she sent them away from the farm, that she took measures to prevent their attending their father's funeral, that she henpecked her illiterate and weak husband, that the husband relied solely on the judgment of his wife, that the children would not get any of the land, that after the will had been made she again boasted that she had her way.

HELD: The facts reveal *prima facie* the presence of undue influence. If the wife cannot disprove the same, the will has to be disallowed on said ground.

Bugnao v. Ubag
14 Phil. 163

FACTS: T made a will giving all his property to his widow, and leaving nothing to his brothers and sisters. *T* had no parents or children. The brothers and sisters opposed the will on the ground of lack of testamentary intent as well as undue influence for it was inherently improbable that a man would make so unnatural and so unreasonable a will. It was proved however that they had a bitter religious quarrel with the testator, so bitter that they did not even attend the funeral of the deceased, despite the fact that they were full grown men and women.

HELD: There was NO undue influence. As a matter of fact, the quarrel gives the reason for their being excluded from the inheritance.

Deck v. Deck
82 N.W. 293

FACTS: T was influenced thru reason by a man of friendly persuasion into making a will in favor of the latter. Later, *T* repented having executed the will, but did nothing about it.

HELD: The will can be admitted to probate, there being no undue influence before, at, or after the making of the will. Subsequent repentance is not one of the grounds given by the law.

Pascual v. de la Cruz
L-24819, May 30, 1969

FACTS: A will was drafted by a lawyer, who is the nephew of *X,* the beneficiary in a will executed by *Y*. Is there a presumption here of undue influence?

HELD: No. The presumption that undue influence exists from the fact that the beneficiary participates in the drafting or execution of the will favoring him, is of no consequence.

(4) The Ground of Fraud

(a) Fraud is the use of insidious machinations to convince a person to do what ordinarily he would not have done. For fraud to vitiate a will, there must be intent to defraud. This intent, and the nature of the fraud, must be proved of course. *(Pecson v. Coronel, 45 Phil. 216).*

(b) Fraud in a contract renders it voidable; in a will, same is cause for disallowance because the will is void.

(c) It should be noted that when a beneficiary is the person who prepared or drafted the will, a suspicion is created that fraud or undue influence was exercised. *(Buenaventura v. Bautista, C.A., 60 O.G. 3670; Felisario v. Diangson, C.A., 49 O.G. 1481).* It should be observed, however, that such suspicion can be thrown aside, if the court is fully convinced that the document expresses the true will of the testator. *(Magpantay v. Gonzales, C.A., 49 O.G. 4928).*

(d) Fraud and undue influence are mutually repugnant and exclude each other; their joining as grounds for opposing probate shows the absence of definite evidence against the validity of the will. *(Icasiano v. Icasiano, L-18979, June 30, 1964; Sideco v. Sideco, 45 O.G. 168).*

(5) The Ground of Mistake or Lack of Testamentary Intent Insofar as the Document Is Concerned

Example: A man signed a document not believing it to be a will. This mistake is a ground for disallowance.

(6) Distinctions Between Revocation and Disallowance or Nullity

Revocation is a voluntary act of the testator, while disallowance is given by judicial order. Revocation is *with or without cause;* disallowance must always be for a legal cause. Revocation may be partial or total, while disallowance as a rule is always total (except when the ground of fraud or undue influence for example affects only certain portions of the will). *(See Lyons v. Lampbell, 88 Ala. 462).*

(7) Allowance of Wills Proved Outside of the Philippines (See Rule 77, Revised Rules of Court)

(a) *Will proved outside the Philippines may be allowed here.* — Wills proved and allowed in a foreign country, according to the laws of such country, may be allowed, filed and recorded by the proper Court of First Instance (now Regional Trial Court) in the Philippines. *(Rule 77, Sec. 1, Rules of Court).*

Notice of hearing for allowance. — When a copy of such will and of the order or decree of the allowance thereof, both duly authenticated, are filed with a petition for allowance in the Philippines, by the executor or other person interested, in the court having jurisdiction, such court shall fix a time and place for the hearing, and cause notice thereof to be given as in case of an original will presented for allowance. *(Rule 77, Sec. 2, Rules of Court).*

When will allowed, and effect thereof. — If it appears at the hearing that the will should be allowed in the Philippines, the court shall so allow it, and a certificate of its allowance, signed by the judge, and attested by the seal of the court, to which shall be attached a copy of the will, shall be filed and recorded by the clerk, and the will shall have the same effect as if originally proved and allowed in such court. *(Rule 77, Sec. 3, Rules of Court).*

(b) *As has been said before* —

1) If a foreign will has already been probated in a foreign country, all that is needed is to prove the *fact* that there has *already* been a *foreign* probate of a will allowable in the Philippines and that the deceased left property in a place other than the Philippines. Of course, there will be a hearing on whether or not there was such a probate. *(Pluemer v. Hix, 54 Phil. 610).* In a sense, therefore, before the foreign-probated will can have effect in our country, it must be proved and allowed before our Philippine courts in much the same manner as wills originally presented for allowance here. *(Collector of Internal*

Revenue v. Fisher, et al., L-11622 and L-11668, Jan. 28, 1961).

2) If no *such foreign probate* has been *made,* the ordinary probate procedure is required. Moreover, it must be shown that the foreign will has been validly executed. It has been held in this connection that an alleged foreign probate *cannot be deemed* one unless it is shown that the court was a duly authorized probate court and that the entire probate procedure there had been complied with. *(In Re Testate Estate of Jose B. Suntay, 50 O.G. 5321).*

Section 2

INSTITUTION OF HEIR

Art. 840. Institution of heir is an act by virtue of which a testator designates in his will the person or persons who are to succeed him in his property and transmissible rights and obligations. (n)

COMMENT:

(1) 'Institution of Heir' Defined

Art. 840 defines *institution of an heir*.

(a) Institution being a voluntary act, cannot be allowed to affect the legitime.

(b) In general, the provisions on "institution" are applicable to devises and legacies.

(c) There can be an instituted heir only in testamentary succession (for the heir in intestate succession is called legal or intestate heir).

(d) A conceived child may be instituted, if the conditions in Arts. 40 and 41 are present. *(Art. 1025).*

(2) Requisites for a VALID Institution

(a) The will must be EXTRINSICALLY VALID. (Hence, the testator must be *capacitated,* the *formalities* must be ob-

served, there must be *no vitiated consent,* the will must have been *duly probated,* the will must have been the personal act of the *testator*.)

(b) The institution must be valid INTRINSICALLY. (The legitime must not be impaired, the heir must be certain or ascertainable; there should be no preterition).

(c) The institution must be EFFECTIVE (no predecease, no repudiation by the heir, no incapacity of the heir).

[NOTE: In the proper case, there can be institution in a marriage settlement. *(See Art. 130).].*

(3) When Is Adjudication By An Heir of the Decedent's Entire Estate to Himself By Means of an Affidavit Allowed?

Only if he is the sole heir of the estate. *(Delgado Vda. de Dela Rosa v. Heirs of Marciana Vda. de Damian, 480 SCRA 334 [2006]).*

(4) Query

QUERY

Are the heirs who actually participated in the execution of the extrajudicial settlement, which included the sale to a third person of their *pro indiviso* shares in the property, bound by the same?

ANS.: Yes, while the co-heirs who did not participate are given the right to redeem their shares pursuant to Art. 1088 of the new Civil Code. *(Cruz v. Cristobal, 498 SCRA 37 [2006]).*

Art. 841. A will shall be valid even though it should not contain an institution of an heir, or such institution should not comprise the entire estate, and even though the person so instituted should not accept the inheritance or should be incapacitated to succeed.

In such cases the testamentary dispositions made in accordance with law shall be complied with and the remainder of the estate shall pass to the legal heirs. (764)

COMMENT:

(1) Non-Necessity of Institution of Heir

A will, unless otherwise defective, is valid, even if:

(a) there is no institution of heir (This was needed before because somebody had to take care of the debts of the decedent, even beyond the value of the inheritance).

(b) the instituted heir is given only a portion of the estate *(Reason:* Mixed succession is allowed). *(Escuin v. Escuin, 11 Phil. 839).*

(c) the heir instituted should repudiate or be incapacitated to inherit (because the law has provided particular provisions for said cases). *(See Art. 184).*

(2) Illustrative Examples

(a) *T* died, giving nothing in his will to his brother *B,* and instituting his friend *F.* If *F* refuses to accept, or is disqualified to inherit, *B* as sole legal heir gets the estate without prejudice to the remaining effective provisions of the will.

(b) A will can be given effect even if the only provision therein is for the appointment of an executor, or the disinheritance of a compulsory heir.

(3) Historical Note

In Roman Law and in Spain up to the 15th century, the institution of heir was so important so that it was considered the "root" or "head" of the will, without which the whole will was considered void. In the 15th century, however, the *"Ordenamiento de Alcala"* laid down the maxim that institution was no longer vital, and that mixed succession was possible.

Art. 842. One who has no compulsory heirs may dispose by will of all his estate or any part of it in favor of any person having capacity to succeed.

One who has compulsory heirs may dispose of his estate provided he does not contravene the provisions of this Code with regard to the legitime of said heirs. (763a)

COMMENT:

(1) Rules for Freedom of Disposition of Estate

(a) If one has no compulsory heirs:

1) He can give his estate or any portion thereof to anybody qualified to inherit from him (his corpse cannot be given except for scientific or educational purposes).

2) BUT he must respect the restrictions imposed by special laws. (*Example:* If an applicant or grantee of a homestead dies before the issuance of the patent, his rights thereto can be given only to his surviving spouse). *(See Sec. 105, Com. Act No. 141, see also Arayata v. Joya, 51 Phil. 654,* which held that a particular law prevails over a general law.*).*

(b) If one *has* compulsory heirs (those who cannot be deprived of their legitimes, like a legitimate child, or an acknowledged natural child) —

1) he must respect the legitimes (unless there be a valid cause for an express disinheritance);

2) the free portion can, however, be given to anybody (including of course the compulsory heirs), provided always that restrictions of special laws are complied with.

(2) Examples

A person is allowed to make one niece the only heir, even if there be other nieces and nephews, as long as there are no compulsory heirs. *(Abutan v. Fernandez, 44 O.G. 1849, C.A., June 1948).* All nieces may even be disregarded in favor of the husband of one of them. *(Pecson v. Coronel, 45 Phil. 216).* In the *Pecson case,* the Court ruled that while ties of relationship are very strong in the Philippines, still there have been many

instances when blood relatives (not compulsory heirs) have been deliberately omitted from the will. Moreover, the liberty to dispose of one's estate by will, if there are *no* compulsory heirs, is granted expressly by the Civil Code.

Heirs of the Late Matilde Montinola-Sanson v. CA and Eduardo F. Hernandez L-76648, Feb. 26, 1988

While ties of relationship in the Philippines are very strong, cases of preterition of relatives from inheritance are not rare. The liberty to dispose of one's estate by will when there are no forced heirs is rendered sacred by the Civil Code in force in the Philippines since 1889. For that matter, it is within the right of the testatrix not to include her only sister who is not a compulsory heir in her will. Art. 842 of the Civil Code provides that one who has no compulsory heirs may dispose by will all of his estate or any part of it in favor of any person having capacity to succeed.

Just because blood relatives, other than compulsory heirs have been omitted, does not mean that undue influence had been present. Diversity of apportionment is the usual reason for making a testament, otherwise, the decedent might as well die intestate. The contention that the will was obtained by undue influence or improper pressure exerted by the beneficiaries of the will cannot be sustained on mere conjecture or suspicion. It is not enough that there was opportunity to exercise undue influence or possibility that it may have been exercised. The exercise of improper pressure and undue influence must be supported by substantial evidence that it was actually exercised.

(3) Necessity of Adjudication

Even if only one heir is instituted, there must still be a judicial order of adjudication. The order of adjudication is the judicial recognition that in instituting the heir, the deceased did not contravene the law, and that the heir was in no way disqualified to inherit. *(Lopez v. Gonzaga, et al., L-18788, Jan. 31, 1964).*

Art. 843. The testator shall designate the heir by his name and surname, and when there are two persons having the same names, he shall indicate some circumstance by which the instituted heir may be known.

Even though the testator may have omitted the name of the heir, should he designate him in such manner that there can be no doubt as to who has been instituted, the institution shall be valid. (772)

COMMENT:

(1) How Designation of Heir is Made

Allowable institutions:

(a) to "Edgie Boy Paras"

(b) to *"Adobo"* or "Pacitos" (if this be the nickname of the heir intended, and the testator knows him by such name). *(See TS, Dec. 7, 1899, June 1918).*

(c) to "my friend, Liwayway"

(d) to "my brother" (if there be only one)

(e) to "the children of my friend Guitarist Chet Atkins" (this is all right, even if the names of the children be omitted)

(2) Effect of Doubt

In the following cases, no one inherits because there is a *doubt* as to who is being instituted:

(a) "to my classmate in IV-A, Jose" (if there be two Joses)

(b) "to my brother-in-law who is studying Criminology" (if there be two such brothers-in-law)

[Query: Why not give each of them half?

ANS.: This is wrong because only one was intended by the testator. To divide would be to frustrate his intention, moreover, we would be giving one-half to a person to whom the testator intended to give nothing. *(See 6 Sanchez Roman 602).].*

[NOTE: Had the provision been phrased "to my brothers-in-law who are studying Criminology," it is clear that both were intended and therefore, each is entitled to one-half. *(See TS, Mar. 26, 1888).].*

Art. 844. An error in the name, surname, or circumstances of the heir shall not vitiate the institution when it is possible, in any other manner, to know with certainty the person instituted.

If among persons having the same names and surnames, there is a similarity of circumstances in such a way that, even with the use of other proof, the person instituted cannot be identified, none of them shall be an heir. (773a)

COMMENT:

(1) Effect of Error

Mere error in designation of *name* or *circumstances* is NOT important as long as the intent is *clear,* and there is *positive* identification.

Examples:

(a) "My brother, *Eduardo"* will mean "my brother, *Edgardo"* if there is no brother named Eduardo, and *one* brother named Edgardo.

(b) "Enrique, Gloria and Ramon del Rosario, natural children of Don Clemente del Rosario" — here, Enrique and Ramon *will* inherit, even if they are not natural children, for this latter circumstance is merely an *additional* description of persons already *well-identified. (Del Rosario v. Del Rosario, 2 Phil. 321).*

(2) Effect of Misdescription

Misdescription may be corrected *even by extrinsic* evidence ("any other manner") *(See 6 Sanchez Roman 601)* but NOT by oral declarations of the testator. *(Art. 789).*

(3) Example of Second Paragraph of the Article

"My stout cousin, Jorge." If there be three stout cousins named Jorge, the impossibility of identification renders the institution *void;* hence, no one will get.

[NOTE: If there are no other legal heirs but the 3 cousins, they may still all get, not as instituted heirs, but as *legal heirs,* provided they are within the 5th degree of relationship.*].*

Art. 845. Every disposition in favor of an unknown person shall be void, unless by some event or circumstance his identity becomes certain. However, a disposition in favor of a definite class or group of persons shall be valid. (750a)

COMMENT:

(1) Examples of Dispositions in Favor of an Unknown Person

(a) *A* instituted "my friend." If *A* has many friends, the disposition is void, for lack of certainty.

(b) *A* instituted "my student in IV-A who will get the highest grade in Civil Law among his classmates in the bar of 2004." This is valid because of the determining circumstance.

(2) 'Unknown Person' Defined

"Unknown person" means one who cannot be identified from the will; not one who is a stranger to the testator. *(13 Scaevola 216-217).*

The determining event or circumstance may occur *before* or *after* the testator's death. This is so, since the law does not distinguish. Moreover, a contrary doctrine would frustrate the testator's will.

NOTE: In some cases, the institution is VOID even if an identifying event or circumstance will occur.

(a) "the 2003 C.P.A. exams topnotcher" — if said topnotcher be incapacitated to inherit.

(b) "the first child of my sister Susan" — if at the testator's death, said child had not even been conceived yet. *(See Art. 1025).*

(c) "the person whom my wife will designate a week after my death." *(See Art. 785).*

(d) "the 2003 bar topnotcher provided that my wife agrees." *(See Art. 786).*

(3) Example of Class Institution

"All the Ateneo fourth year law students for the school year 2003-2004." This is valid provided all are capacitated: those incapacitated will naturally *not* inherit.

(4) Special Kinds of Class Institutions

(a) of the poor in general. *(Art. 1030).*

(b) relatives of the testator. *(Art. 959).*

(c) a person and his children. *(Art. 849).*

(d) brothers and sisters of the full and half-blood. *(Art. 848).*

(e) the institution of descendants or relatives of a legatee. (The rule of "nearest excludes the farther" will NOT apply here. Therefore, all the descendants and relatives will inherit *per capita. [Belen v. Bank of the P.I., L-14474, Oct. 31, 1960].*).

NOTE: Remember that "the testator may entrust to *a third person* the distribution of *specific property* or *sums of money* that he may leave in general *to specified classes or causes*, and also the designation of the persons, institutions, or establishments to which such property or sums of money are to be given or applied." *(Art. 786).*

Art. 846. Heirs instituted without designation of shares shall inherit in equal parts. (765)

COMMENT:

(1) Institution Without Designation of Shares

Example of Rule —

T instituted *A* and *B* as his heirs. *T* has no compulsory heirs. How much will *A* and *B* inherit?

ANS.: They will inherit equally, that is, 50-50. *Reason for the law:* The law merely expresses what it presumes to have been the testator's intention, for had he desired otherwise, he should have been more specific. *(See 6 Manresa 92).*

NOTE: The term *"issues"* or *"descendants,"* unexplained by anything in the context of the instrument, means ALL persons descending lineally from another, to the remotest degree, and includes persons so descended, even though their own parents are still living; and such descendants take *per capita* (per person) and NOT *per stirpes* (by groups). *(Wyeth, et al. v. Crane, 174 N.E. 871; Belen v. Bank of the Philippine Islands, et al., L-14474, Oct. 31, 1960).*

Onesima De Belen v. Bank of the Philippine Islands, et al.
L-14474, Oct. 31, 1960

FACTS: In the codicil of Benigno Diaz, he gave a trust — legacy to Filomena Diaz *or* her *legitimate descendants*. Benigno died on Nov. 7, 1944. Filomena died on Feb. 8, 1954 leaving 2 children, one of whom had 7 children of her own, while the other did not have any. The issue is: who will get Filomena's legacy — her 2 children only OR the 2 children together with the 7 grandchildren since the latter are also "descendants"?

HELD: The 2 children together with the 7 grandchildren will get the legacy, each one inheriting *per capita* since they are the substitutes in a simple or vulgar substitution. Hence, the legacy will be divided into 9 equal parts, applying Art. 846. We cannot apply Art. 959 which limits the distribution to those nearest in degree (the 2 children only) because Art. 959 speaks of the *relatives of the testator*, not those of the legatee.

[OBSERVATION: Since Filomena died AFTER the testator, she was able to inherit from *him*. Therefore, why should the legacy be considered still part of Benigno's estate? It is submitted that the legacy already belonged to Filomena and in the absence of a will, it should be given to her intestate heirs, namely, only the two children. Of course, it should be noted that in this case there was a *trust,* and therefore the decision could be considered correct BUT ONLY if the substitution here would be considered a "fideicommissary substitution" (where upon the death of the testator the property goes to a *first* heir, and upon the *subsequent* death of said first heir, the property goes to a *second* heir) instead of a "vulgar substitution" (where, in case of the *predecease,* incapacity, or repudiation of the original heir, the second heir or substitute inherits)*.]*

(2) Exception to Rule

It is believed that the rule in Art. 846 *cannot* be applied *absolutely* in case one of those instituted is a *compulsory heir,* inasmuch as institution in general refers merely to the *free portion* (free disposal). Hence, the legitime must first be removed and what remains will be divided equally. *(See 6 Manresa 92-93).*

[NOTE:

(a) Institution of a compulsory heir to the legitime is VALID but SUPERFLUOUS (unnecessary since by law, he is entitled to it).

(b) Institution of a voluntary heir (not compulsory heir) to the legitime is of course VOID.*]*

Example:

T instituted *A* (his son), *B*, and *C,* to an estate of P300,000. *A* gets as legitime 1/2 of the estate or P150,000. The remaining P150,000 will be divided equally among *A, B,* and *C*. Thus, *A* gets a total of P200,000 – P150,000 as legitime, P50,000 as instituted heir.

[NOTE: Had *T* expressly stated that *A* would get only his legitime of P150,000, the answer would have been

different, since here, his intention is clear. *(See 6 Manresa 98-99).].*

(3) Special Cases

(a) All are voluntary heirs, but the shares of some are designated, while the shares of the others are not.

Example:

A, B, C, and *D* are instituted, but *A* is given specifically a share of 1/10 only. What should be done with the remaining 9/10?

ANS.: The remainder will be divided equally among the remaining three *(B, C,* and *D). (See 13 Scaevola 377-378).*

(b) All are voluntary heirs but *specific properties* of the estate have been given to them as part of their share.

Example:

*A, B, a*nd *C* were instituted heirs to an estate *totally* valued at P300,000 but it was specifically provided that the piano (in the estate) worth P10,000 should go to *A,* and a diamond ring (also in the estate) worth P30,000 must go to *B*. How will the entire estate be divided?

ANS.: Each will receive a total of P100,000.

Hence:

A gets the P10,000 piano PLUS P90,000

B gets the P30,000 ring PLUS P70,000

C gets P100,000

TOTAL = P300,000

[NOTE: It would have been different had the testator stated that "the car should go to *A,* the ring to *B,* and the *REST* would be divided EQUALLY among *A, B,* and *C."* It is obvious here that *C* would get only 1/3 of the remaining P260,000. *(See 13 Scaevola 387).].*

Art. 847. When the testator institutes some heirs individually and others collectively as when he says, "I designate as my heirs A and B, and the children of C," those collectively designated shall be considered as individually instituted, unless it clearly appears that the intention of the testator was otherwise. (769a)

COMMENT:

Combination of Individual and Collective Institution

Example: "I institute as my heirs *A, B,* and the three children of *C* to my estate of P100,000." How much will each of the three children get?

ANS.: P20,000 each. *Reason:* Although collectively designated, they shall be considered individually instituted (estate to be divided into 5), unless it clearly appears that the testator's intention was otherwise. *(See 6 Manresa 102).*

[NOTE: If the testator had stated "I institute *A, B*, and my three children, to an estate of P300,000," how much would each child get?

ANS.: We apply here the rule of first giving the children their legitimes and dividing the balance into 5. Hence, P150,000 as legitime goes to the children (each getting P50,000), while the remaining P150,000 will be divided among the 5 heirs instituted.*]*.

[NOTE: In the case of *Nable Jose v. Uson, 27 Phil. 73,* it was held that when the sisters and the *nieces* of the testator were instituted, *each niece* should get as much as *each* sister.*]*.

Art. 848. If the testator should institute his brothers and sisters, and he has some of full blood and others of half blood, the inheritance shall be distributed equally, unless a different intention appears. (770a)

COMMENT:

(1) Institution of Brothers and Sisters

(a) Compared with the old Civil Code

1) Old Code — In TESTAMENTARY succession, the brother of the full blood gets DOUBLE the share of brother of the half blood. (*Reason:* The affection for him is presumed to be double the affection for the latter.)

2) New Civil Code — In TESTAMENTARY succession, the shares are the SAME, unless a different intention appears. (*Reason:* If indeed the affection is double, the testator should have given expressly a double share to the full-blood brother.)

Example: "I institute *my full-brother and my half-brother* to my estate of P100,000." Each gets P50,000.

(b) Compared with intestate succession

In intestate succession (OLD and NEW Civil Codes), the brother of the full-blood gets DOUBLE the share of the brother of the half-blood. *(Art. 1006, new Civil Code; Art. 949, old Civil Code).*

(2) Problem

I *instituted* the following as my heirs:

A — *my full*-brother

B — *my half*-brother

C — *my step*-brother

D — my brother-in-law

E — my illegitimate brother (illegitimate child of my father).

How *much will* each get if the estate is P100,000?

ANS.: Each gets P20,000 (same share). While the law mentions only the full and the half-brother, it is evident that the others may be considered in the same category as strangers, making Art. 846 applicable.

[NOTE: Had this been a case of legal succession, only the *full* and the *half* brothers would inherit (the others *not* being legal heirs) hence, the full brother gets P66,666 plus, and half-brother gets P33,333 plus.*]*.

(3) Bar Question

If the testator should institute all his brothers or sisters as his heirs, and he has *some* of the full blood and others of the half-blood on the side of the father or mother only, how is the inheritance to be distributed among them?

ANS.: Equally, by express provision of the law. *(Art. 808).*

Art. 849. When the testator calls to the succession a person and his children, they are all deemed to have been instituted simultaneously and not successively. (771)

COMMENT:

(1) Institution of a Person and His Children

(a) "His children" refers not to the children of the testator, but to the children of the person instituted also as an heir.

(b) *T* instituted *A* and *A's* two children to an estate of P30,000. Each of the three heirs gets P10,000 all at the same time.

[NOTE: Had the institution been successive, *A* would get all in the meantime, the children getting nothing during *A's lifetime.].*

(2) Meaning of 'Deemed'

"Deemed" here means *presumed,* hence, if a contrary intention is present (that is, to institute them *successively*), said intention must prevail, for the testator's will, if not illegal, must be followed. *(See 6 Sanchez Roman 603).*

Art. 850. The statement of a false cause for the institution of an heir shall be considered as not written, unless it appears from the will that the testator would not have made such institution if he had known the falsity of such cause. (767a)

COMMENT:

(1) Effect of Statements of a False Cause for Institution

The effect is stated in Art. 850.

Example:

"I hereby institute my student *X* as my heir for having topped the bar examinations of 2003." If *X* was not the topnotcher, would he still inherit?

ANS.: Yes, because the false cause or reason is considered as *not written*.

*[NOTE: W*hat is disregarded is the false cause, not the institution.*]*.

Reason for the law: The real cause is the testator's liberality, the mention of the bar topping being merely incidental, for even had *X* topped the bar, the testator would *not* have been bound to reward him, were it not for the provision in the will.

NOTE: If the institution had read this way:

"I was about to institute *A,* my friend, as my heir, but because I adore bar topnotchers, I hereby institute *X,* a stranger, as my heir because he topped the bar of 2003," the answer would be different, in case *X* really *failed to top* the bar. Here it is evident, *from the will itself, that* the testator would not have made such institution of *X* if he had known of the falsity of the cause. It is obvious, too, that the cause was not mere generosity.

[NOTE: In the problem presented, would *A* then inherit?

ANS.: No, for he was NEVER instituted; or was he ever made a substitute.*]*.

[NOTE: If children who are *invalidly adopted* are instituted as heirs, the institution should remain valid. As much as possible, intestacy ought to be avoided, and the testator's wishes should be given effect. The allegation that the institution should be void because it was based on a false cause, the

testator thinking that they had to be instituted because of the adoption, is of no merit because there is nothing in the will to indicate that had the testator known of the invalidity of the adoption, the institution of the children would not have been made. *(Austria v. Reyes, 31 SCRA 754).].*

(2) Evidence of Intent Must Appear in the Will

The fact that the testator would not have made the institution if he had known of the falsity of the cause, must appear in the will itself *(See Art. 850; 6 Manresa 99),* hence, proof outside the will *is not admissible* in proving such intent.

(3) Effect of Institution Because of an Illegal Cause

(a) Under the old Civil Code *(Art. 767),* the illegal cause, like the false cause, was also *disregarded,* for the reason that the testator is presumed not to have *sincerely* ordered that which was contrary to law, and therefore void and without effect. Thus, the institution was considered valid. *(See 6 Manresa 107-108).*

(b) The new Civil Code is, however, *silent* on the point, obviously "because of its immoral and dangerous implications." *(II Capistrano, Civil Code, 332).*

[NOTE: If this is the reason, why is a similar provision found in Art. 873 of the new Code, regarding *illegal conditions?].*

(c) Under the present law, it is believed that a distinction must be made.

1) If the real motive was *illegal,* the institution should be *void.*

Example: "I hereby institute *X* because I want him to kill *Y,* a college professor." (To countenance such an institution would indeed be to encourage immorality.)

2) If the real motive is generosity, liberality, or affection and the illegal cause is *only incidental,* the institution should be considered *valid.*

Example: "I hereby institute my cousin *X* because during the last elections, he was a flying voter." (Here, it is evident that the cause is the testator's affection for his cousin.)

(4) Effect of 'Estrangement'

Mere estrangement is not a legal ground for the disqualification of a surviving spouse as an heir of the deceased spouse. *(Capotle v. Elbambuena, 509 SCRA 444 [2006]).*

Art. 851. If the testator has instituted only one heir, and the institution is limited to an aliquot part of the inheritance, legal succession takes place with respect to the remainder of the estate.

The same rule applies, if the testator has instituted several heirs each being limited to an aliquot part, and all the parts do not cover the whole inheritance. (n)

COMMENT:

(1) Effect of Institution to a Part of the Estate

Art. 851 applies when there is a remainder or balance and there is NO INTENT to give all to the instituted heir or heirs. If there is such INTENT, the remainder should be divided proportionately, applying Art. 852.

(2) Examples

(a) *One heir instituted*

If the heir is given 3/4, the remaining 1/4 should go to the legal heirs.

(b) *Several heirs instituted*

T instituted *A* to 1/3, and *B* to 1/4 of the inheritance 1/3 plus 1/4 = 7/12). The remaining 5/12 will go to the legal heirs by way of intestate succession.

NOTE: Intestate succession *will not* apply to the remainder if the same has been disposed of by way of legacies or devises.

Art. 852. If it was the intention of the testator that the instituted heirs should become sole heirs to the whole estate, or the whole free portion, as the case may be, and each of them has been instituted to an aliquot part of the inheritance and their aliquot parts together do not cover the whole inheritance, or the whole free portion, each part shall be increased proportionately. (n)

COMMENT:

(1) Rule If Intent is to Give Entire Estate

Art. 852 applies only if the *intent* is to give all only to those instituted, otherwise legal succession takes place as to the remainder, unless said remainder has been completely disposed of by way of legacies or devises. In other words, while Art. 851 provides the general rule, Art. 852 states the exception.

(2) Example

"I hereby institute as my only heirs *A, B,* and *C*, each one to get 1/4 of my estate." The 1/4 still undistributed should clearly be divided *proportionately* in this particular case, *equally* among *A, B,* and *C,* since this is the evident intention of the testator.

Art. 853. If each of the instituted heirs has been given an aliquot part of the inheritance, and the parts together exceed the whole inheritance, or the whole free portion, as the case may be, each part shall be reduced proportionally. (n)

COMMENT:

Effect if Institution Exceeds Estate

This is the counterpart of Art. 852. In case of excess, the share of each must be reduced proportionately.

Art. 854. The preterition or omission of one, some, or all of the compulsory heirs in the direct line, whether living at the time of the execution of the will or born after the death

of the testator, shall annul the institution of heir; but the devises and legacies shall be valid insofar as they are not inofficious.

If the omitted compulsory heirs should die before the testator, the institution shall be effectual, without prejudice to the right of representation. (814a)

COMMENT:

(1) 'Preterition' Defined

Preterition or *pretermission* is the omission, whether *intentional or not, of a compulsory heir* in the inheritance of a person.

Example: If a testator has three legitimate children, and he institutes only *two* of them, there is preterition.

(2) Requisites for Preterition Enumerated

(a) there is a TOTAL omission in the inheritance

(b) the omission must be of a COMPULSORY heir

(c) the compulsory heir omitted must be in the DIRECT line

(3) Requisites for Preterition Discussed

(a) There is a TOTAL omission in the *inheritance*. (HENCE, if a compulsory heir is named in the will, but he is not given any share, although there is no *express disinheritance,* there is *preterition;* if a compulsory heir is given a *share* in the inheritance no matter how small, there is *no* preterition, for here, under another article *(Art. 906),* he is entitled only to the *completion* of his *legitime;* if a compulsory heir is not given anything in the will, but he has already received a *donation* from the testator, there is *NO preterition* because after all, a donation to a compulsory heir is considered an *advance* of the inheritance or legitime). *(Art. 1073). (See 6 Manresa 381, 389; 6 Sanchez Roman 1133).* If a legitimate daughter gets less than her legitime, this fact would not invalidate the institution

of a stranger as an heir, since this would not be a case of preterition or total omission. *(Reyes v. Barretto-Datu, L-7818, Jan. 25, 1967). (CONTRACTS June 17, 1908).* In the case of *Testate Estate of Edward Christensen, L-23465*, *June 30, 1966,* the Supreme Court held that if an acknowledged natural child is not omitted in the will but is on the contrary given a legacy of some P3,000, this would not be a case of *preterition*. Here, there is NO OMISSION. Of course, if the child, by virtue of the legacy, is given LESS than her legitime, she would be entitled to the COMPLETION of HER LEGITIME, nothing more. It does *not* even matter whether the child was indicated in the will as heir or not; what is significant is that a part of the estate has been given to him or her.

(b) The omission must be of a COMPULSORY heir. [HENCE, we do not speak of the preterition of voluntary heirs or intestate heirs (like brothers) unless they are also compulsory heirs.] (HENCE, also there can be preterition of *legitimate* or *illegitimate* compulsory heirs, of *descendants* or of *ascendants,* in case these *ascendants* happen to be the compulsory heirs in a given case. Thus, the omission of the testator's father, when the testator institutes his own children is NOT preterition; but the omission of one or both parents when there are no legitimate children or descendants constitutes PRETERITION, for in this case, the parents would be compulsory heirs). *(See also TS, June 17, 1908; Feb. 27, 1909).*

(c) The compulsory heir omitted must be in the *direct line (Art. 854).* [HENCE, construed *strictly* and *literally,* there is *no* preterition of a surviving spouse, for though a compulsory heir, she is *not in the direct line*. HOWEVER, three important facts should be brought out:

1) Under the old Civil Code, the preterition of the surviving spouse did *not* annul the institution of heirs *(Art. 814, old Civil Code);* instead she merely retained her rights to the legitime. Under the new Civil Code, the provision referred to has been ELIMINATED, *implying* perhaps that now, under the new Civil Code, the preterition of the surviving spouse

might have the SAME effect as the preterition of other compulsory heirs, namely, the annulment of the institution of heirs; implying *furthermore* that just as a compulsory heir in the direct line can be preterited, *so also can a surviving spouse be preterited — and with the same effect.*

2) While under the old Civil Code, a surviving spouse's preterition did not annul the institution of heirs, this was because her legitime was, after all, merely in *usufruct.* Under the new Civil Code, there is no valid reason why her preterition should not annul the institution of heirs, inasmuch as now, unlike before, her legitime is in the form of COMPLETE OWNERSHIP.

3) Finally, if the preterition of an illegitimate (recognized) child annuls the institution of heirs, with *greater reason* should the preterition of the surviving spouse be placed in the same category as the preterition of other compulsory heirs, that is, when the surviving spouse has been preterited, the institution of heirs should also be annulled.

HOWEVER, the question has apparently been settled in the case of *In Re Will of Leodegaria Julian, L-39247, June 27, 1975,* where the Court ruled that since the surviving spouse is not in the direct line, her omission in the will does *not* constitute preterition.

In Re Will of Leodegaria Julian
L-39247, June 27, 1975

FACTS: In her will, the testatrix divided the estate among her six children and omitted the husband. Is this preterition?

HELD: While it is true that the husband was omitted or preterited, still the institution of heirs is not annulled, for after all, the husband (surviving spouse) is not a compulsory heir in the direct line.

Bahanay, Jr. v. Martinez
64 SCRA 452

If a spouse is preterited in a will; this will not annul the institution of heirs, and it will not be necessarily true that intestacy will follow. This is because a spouse is *not* in the *direct line*.

Sonia Ana T. Solano v. Court of Appeals
L-11971, Nov. 29, 1983

FACTS: Meliton Solano executed a will where he instituted as only heir, Sonia Solano, his acknowledged natural child, but omitted (preterited) two spurious children who were able to obtain compulsory recognition. Meliton also devised certain parcels of land in usufruct in favor of a devisee. How will the 3 compulsory heirs (Sonia and the 2 spurious children) inherit?

HELD (thru *J*. Herrera)*:* The devise is valid BUT the institution of Sonia is *void* because of the *preterition*. However, instead of the 3 heirs sharing in the intestate estate (after removing the devise), said balance or remainder will *all go to Sonia after* subtracting *the legitimes of the other two,* since this was the clear intent of the testator.

[NOTE: It seems this ruling is *not in* conformity with Art. 854 on preterition. What the law wants is to distribute the balance (after the removal of the devise) to the 3 heirs as in intestate succession. For why should the free portion left be all given to Sonia when her institution in the will is VOID.*]*.

Nuguid v. Nuguid
L-23445, June 23, 1966

If parents (the nearest heirs here of the deceased) are omitted in the will, this is a case of "preterition," not "ineffective disinheritance." The institution of another, with the preterition of the parents, will give rise to intestate succession.

Acain v. IAC, et al.
L-72706, Oct. 27, 1987

Preterition consists in the omission in the testator's will of the forced heirs or anyone of them either because they are not mentioned therein, or, though mentioned, they are neither instituted as heirs nor are expressly disinherited.

Insofar as the widow is concerned, Art. 854 of the Civil Code may not apply as she does not ascend or descend from the testator, although she is a compulsory heir. Stated otherwise, even if the surviving spouse is a compulsory heir, there is no preterition even if she is omitted from the inheritance, for she is not in the *direct* line.

Ventura v. Ventura
GR 26306, Apr. 27, 1988

Under Article 854 of the Civil Code, "the preterition or omission of one, some, or all of the compulsory heirs in the direct line, whether living at the time of the execution of the will or born after the death of the testator, shall annul the institution of heir; but the devises and legacies shall be valid insofar as they are not inofficious," and as a result, intestacy follows, thereby rendering the previous appointment of the executrix moot and academic. This would now necessitate the appointment of another administrator under Section 6, Rule 78 of the Rules of Court.

Acain v. IAC, et al.
L-72706, Oct. 27, 1987

FACTS: Nemesio Acain executed a will whereby he gave all his shares in the conjugal property to his brother Segundo. In case Segundo predeceases Nemesio, all his shares were to be given to Segundo's children. Segundo predeceased Nemesio. Thus, Constantino and his brothers and sisters, the children of Segundo, filed a petition for probate claiming the property as Nemesio's heirs. During

the petition for probate, Virginia A. Fernandez, a legally adopted daughter of Nemesio and the latter's widow, Rosa Diongson Vda. de Acain, moved to dismiss on the grounds: (1) Constantino has no legal capacity to institute these proceedings; (2) he is merely a universal heir; and (3) the widow and adopted daughter have been preterited.

The trial judge denied the motion. The Intermediate Appellate Court granted Virginia A. Fernandez's petition and ordered the trial court to dismiss the petition for probate of Nemesio's will.

HELD: The Supreme Court in affirming the Appellate Court's decision held that the universal institution of Constantino together with his brothers and sisters to the entire inheritance of the testator results in totally abrogating the will because the nullification of such institution of universal heirs — without any other testamentary disposition in the will — amounts to a declaration that nothing at all was written. Carefully worded and in clear terms, Article 854 of the Civil Code offers no leeway for inferential interpretation. No legacies or devises having been provided in the will, the whole property of the deceased has been left by universal title to said heirs and his brothers.

The effect of annulling the institution of heirs will be, necessarily, the opening of a total intestacy except that proper legacies and devises must be respected.

J. Ameurfina Melencio-Herrera (concurring):

One must distinguish whether the omission of a forced heir in the will of the testator is by mistake or inadvertence, or voluntary or intentional. If by mistake or inadvertence, there is true preterition and total intestacy results. The reason for this is the "inability to determine how the testator would have distributed his estate if none of the heirs had been omitted or forgotten."

On the other hand, if the omission is intentional, the effect would be a defective disinheritance covered by Article 918 of the Civil Code in which case the institution

of heir is not wholly void but only insofar as it prejudices the legitime of the person disinherited, *i.e.*, the nullity is partial unlike in true preterition where the nullity is total.

Preterition is presumed to be only an involuntary omission, *i.e.*, that if the testator had known of the existence of the compulsory heir at the time of the execution of the will, he would have instituted such heir. On the other hand, if the testator attempts to disinherit a compulsory heir, the presumption of the law is that he wants such heir to receive as little as possible from the estate.

(4) Effects of Preterition

(a) The institution of heirs is annulled (automatically, without need of court action, hence, the proper term should have been "void").

Example: T has three sons *A, B,* and *C*. *T* made a will instituting *A, B,* and a friend *F*. *C* was omitted. If the estate is P90,000, how should same be distributed?

ANS.: Since the institution is annulled, it is as if there was no institution, hence, intestate succession takes place. *A*, *B,* and *C* will each get P30,000. *F,* the friend, gets nothing.

[NOTE: In the problem, it is clear that *F* was not being made a legatee merely, he was indeed instituted as heir. It would be error to consider all bequests in favor of strangers as legacies or devises, otherwise there would have been no need of the distinction, in effect, made in Art. 854. *(See Neri v. Akutin, 74 Phil. 186).].*

[NOTE: If a testator institutes in his holographic will a sister or brother as the only heir, and *fails* to institute his parents, who are still alive, this is a *clear* case of PRETERITION, and the instituted heir should get NOTHING because said institution is *void*, on account of the preterition. The total omission of the parents' names is not to be regarded as a case of ineffective disinheritance, but a case of preterition. *(Remedios Nuguid v. Felix Nuguid, L-23445, June 30, 1966).].*

[NOTE: In a case of preterition, the omitted heir gets his share *not only* of the legitime but also of the free portion. *(Ramos v. Baldovino, CA-GR 20982-R, Sep. 25, 1962)*. This rule differs from a case of *unlawful disinheritance or incomplete legitime. (Ibid.).].*

(b) Although the institution of heirs is indeed annulled, the legacies and devises shall remain valid insofar as they are not *inofficious*. (In other words, they are not voided, but merely *reducible* if the legitime has been impaired).

Examples:

1) *T* has two sons, *A* and *B*. In *T's* will, he gave *F,* a friend, P10,000 as a *legacy* out of an estate of P100,000. *A* and *B* were omitted. How should the estate on *T's* death be distributed?

ANS.: Since the estate is worth P100,000, the free portion is P50,000. Therefore, the legacy of P10,000 is not inofficious, and should remain effective. The remaining P90,000 will be divided equally between the two children. Hence, the estate will be distributed as follows:

A	=	P45,000
B	=	P45,000
F	=	P10,000
		P100,000

2) *T* has two legitimate sons *A* and *B*. In *T's* will, he gave a friend *F* a legacy of P10,000; instituted *A* as heir; and deliberately omitted *B*. If the estate is P100,000, how should the estate be distributed on *T's* death?

ANS.: In view of the preterition, the institution of *A* is not valid, but the legacy is effective, for the legitime has *not* been impaired. Therefore, the remaining P90,000 will be divided intestate.

HENCE:

A	=	P45,000
B	=	P45,000
F	=	P10,000
		P100,000

3) In problem No. 2, if the legacy had been P60,000, and the other facts are the same, how would the estate be distributed?

ANS.: The estate being P100,000, the free portion is only P50,000, hence, the legacy of P60,000 should be reduced by P10,000, leaving the distribution as follows:

A	=	P25,000
B	=	P25,000
F	=	P50,000
		P100,000

Art. 855. The share of a child or descendant omitted in a will must first be taken from the part of the estate not disposed of by the will, if any; if that is not sufficient, so much as may be necessary must be taken proportionally from the shares of the other compulsory heirs. (1080a)

COMMENT:

(1) Where Share of Omitted Heir Must be Taken

(a) This Article can apply both to cases when there is *preterition* and when there is *no preterition.*

(b) Remember that even if a child has been omitted in a will, as long as he has received anything by way, for example, of a donation *inter vivos,* there is NO preterition. *(6 Manresa 381).* This is because the donation is an advance of his legitime. If what he received by way of donation is less than his legitime, there is no preterition. He is entitled not to the annulment of the institution of heir but merely to the completion of his legitime. *(See Art. 906).*

(c) Moreover, even if the child had not received anything by virtue of a *donation,* or by virtue of the will, still if anything is left of the inheritance which he may get by *intestacy,* there is no preterition. Again, if what is left him by intestacy is less than his legitime, he is entitled to its completion. *(See 6 Sanchez Roman 1133).*

(d) Thus, it has been said that it is of the essence of preterition that there be complete forgetfulness, not in the will necessarily, but in the inheritance (testate, intestate, or mixed).

(e) Ordinarily, in a true case of preterition, Art. 855 is *useless,* because the best procedure would be (in the absence of legacies or devises) just to divide the property *intestate.* And if there be allowable legacies or devises, the procedure is almost the same. Just deduct them, and divide the remainder as an intestacy.

(2) Example

T has 3 legitimate children, two of whom he instituted as heirs, and one of whom he preterited. A legacy of P100,000 from an estate of P1,000,000 was given to a friend. How much should the children receive?

ANS.: After deducting the legacy of P100,000 (this is not inofficious), the balance of P900,000 is divided equally among the three heirs, each of whom should get P300,000. Thus, the 2 instituted children will *not* get the intended P450,000 each in view of the preterition.

[NOTE: Observe that the law says *"child* or *descendant."* It is believed that same should apply also to an omitted *compulsory* heir, even though not a child or descendant. As a matter of fact, by applying the different provisions, providing for shares, we can reach the same conclusion.*].*

[NOTE: It should be observed, furthermore, that in case of insufficiency, the law says the necessary amount should be "taken proportionally from the shares of the other compulsory heirs." It is believed that the true intent of the law would be to omit the word "compulsory" between "other" and "heirs" (so as not to discriminate in favor of instituted *voluntary* heirs) and

also to add the phrase "given to such heirs by the provisions of the will" (so as to prevent the possibility that the legitimes would be impaired). Thus, in this way, whatever reduction would be suffered would only be insofar as *institution to the free portion is concerned.].*

Art. 856. A voluntary heir who dies before the testator transmits nothing to his heirs.

A compulsory heir who dies before the testator, a person incapacitated to succeed, and one who renounces the inheritance, shall transmit no right to his own heirs except in cases expressly provided for in this Code. (766a)

COMMENT:

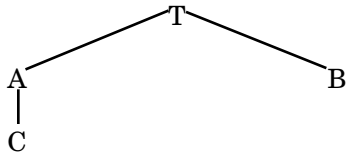
(1) Effect of Predecease

The first paragraph also means that a voluntary heir cannot be represented. *(6 Manresa 103).*

Example: T has a friend *X* whom he instituted as heir to an estate of P100,000. *X* dies before *T* but leaves a son *Y*. Upon *T's* death, will *Y* get anything?

ANS.: No, because *X,* the father of *Y,* was a voluntary heir who predeceased the testator. The estate should therefore go to the intestate heirs of *T*.

(2) Problem Illustrating the Effects of Predeceasing the Testator



A and *B* are legitimate children of *T*. *C* is a legitimate child of *A*. The estate is P100,000. *A* and *B* were instituted heirs.

(a) If *A* dies before *T*, how much, if any, will *C* and *B* get?

ANS.: A was a compulsory heir to the legitime of P25,000. Therefore, *C* will get only P25,000 (the legitime

of *A*) in representation of *A*. The remaining P75,000 will all go to *B*. *(Arts. 972, 856).*

(b) If A is incapacitated, same answer as (a). *(Arts. 972, 698 and 1031).*

(c) If *A* renounces the inheritance, *C* gets nothing since a person who renounces an inheritance cannot be represented. *(Art. 997).* Therefore, everything goes to *B*. *(Art. 968).*

[NOTE: Remember that in testate succession, the right of representation covers only the legitime. *(Arts. 856, 1035).* In intestate succession, it covers the entire share of the person represented. The whole would descend by the rules of intestate succession.*]*.

(3) Applicability to Legatees and Devisees

The first paragraph mentions only "heirs," but the principle applies also to a *legatee or devisee*. Thus, in one case it was held that a legacy of P2,000 to a brother who dies *ahead* of the testator cannot be rightfully claimed by the legatee's heir for there is no transmission of any right. *(Resurreccion v. Javier, 63 Phil. 599).*

(4) Predecease of a Compulsory Heir

Although the first paragraph says "voluntary heir," the principle applies also to a *compulsory heir,* notwithstanding the apparent exception in the second paragraph. Even a *compulsory* heir who predeceases the testator *transmits no right,* although of course there is the *right of representation*. But then, what the law really means is that *instead* of the compulsory heir getting his legitime, same will *be received* by his heir and representative. He does *not transmit,* for to transmit is to imply that he is entitled to it but gives it to his representative. Since he predeceased, he never was entitled, and therefore what he could have received is instead given, not by him *but by the law* to the representative. The same applies to an *incapacitated* compulsory heir. A repudiating compulsory heir does not only receive nothing but his own heirs are denied the right to represent. *(See Observation of Justice J.B.L. Reyes, Lawyer's*

Journal, Nov. 30, 1950; 6 Sanchez Roman 639; Arts. 856, 968, 972, 1031).

[NOTE: It should be remembered that: "The representative (the person inheriting by right of representation) does not succeed the person represented, but the one whom the person represented would have succeeded.*]*.

Section 3

SUBSTITUTION OF HEIRS

Art. 857. Substitution is the appointment of another heir so that he may enter into the inheritance in default of the heir originally instituted. (n)

COMMENT:

(1) 'Substitution' Defined

Substitution otherwise referred to *as a conditional institution* of heir *(6 Manresa 116),* is the appointment of another heir in default of or after the heir originally instituted.

Johnny S. Rabadilla v. CA and Maria Marlena Coscoluella y Belleza Villacarlos GR 113725, June 29, 2000

Substitution is the designation by the testator of a person or persons to take the place of the heir or heirs first instituted.

Under substitutions, in general, the testator may either: (1) provide for the designation of another heir to whom the property shall pass in case the original heir should die before him/her, renounce the inheritance or be incapacitated to inherit, as in a simple substitution *(Art. 859)*; or (2) leave his/her property to one person with the express charge that it be transmitted subsequently to another or others, as in a fideicommissary substitution. *(Art. 863).*

In simple substitution, the second heir takes the inheritance in default of the first heir by reason of incapacity, predecease, or renunciation. *(Art. 859).*

(2) Purpose of Substitution

Substitution was devised in order:

(a) to prevent the property from falling into the ownership of people not desired by the testator. *(6 Manresa 116).*

(b) to prevent the effects of intestate succession. *(6 Manresa 116).*

(c) to allow the testator greater freedom to help or reward those who by reason of services rendered to the testator, are more worthy of his affection and deserving of his bounty than intestate heirs. *(II Capistrano, Civil Code of the Philippines, p. 342).*

(3) Defect of Codal Definition of Substitution

In the definition of substitution under Art. 857, the phrase "in *default* of the heir originally instituted" is defective. This is so because in the *fideicommissary substitution, both* the first and second heirs inherit. (*Simultaneously,* insofar as the right to succeed is concerned; and *successively,* insofar as the enjoyment and possession of the property are concerned.) Thus, a better definition has been suggested by Roguin, a definition which includes the fideicommissary substitution. He says that substitution is a "disposition by virtue of which a third person is called to receive hereditary property in *lieu* of or *after* another person. *(Traite de Droit Civil Compare, Le Successiones, Vol. IV [1912], p. 59).*

NOTE:

(a) As a rule, since substitution is nothing but a secondary *institution,* the articles on institution can *apply,* except insofar as they are modified by the chapter on substitution.

(b) There may also be substitution of legatees and devisees.

(4) Query

May the heirs be allowed to be substituted for the deceased?

ANS.: Yes, without requiring the appointment of an administrator or executor. The pronouncement of the Supreme Court in *Lawas v. CA, 146 SCRA 173 (1986),* is no longer true. *(San Juan, Inc. v. Cruz, 497 SCRA 410 [2006]).*

Art. 858. Substitution of heirs may be:

(1) Simple or common;

(2) Brief or compendious;

(3) Reciprocal; or

(4) Fideicommissary. (n)

COMMENT:

(1) Kinds of Substitution Omitted in the New Civil Code

Under the old Civil Code, there were two other kinds of substitution.

(a) *Sustitucion pupilar* — where the parents and other ascendants appointed substitutes for their descendants of both sexes under 18 years of age in case these descendants should die before attaining this age. *(Art. 776, old Civil Code).*

(b) *Sustitucion ejemplar* — where an ascendant appointed a substitute for his descendant over 18 years of age who has been legally declared to be incapacitated on account of being of an unsound mind. *(Art. 776, old Civil Code).*

Reasons for Sustitucion Pupilar:

This was for the salvation of the young, preventing instigators of murder from reaping any benefits from the crime. *(Manresa).*

Comments of the Code Commission

These two kinds of substitution were abolished because they are out of use and impracticable. There has been no known record that any parent or ascendant in this country has ever made use of these two provisions of the old law. *(Report of the Code Commission, p. 110).*

(2) Substitution Referred to in the New Civil Code

(a) Simple or common substitution [also known as *sustitucion vulgar. (Art. 859).*

(b) Brief or compendious substitution, also known as *sustitucion brevilocua o compendiosa. (Art. 860).*

(c) Reciprocal substitution, also called *sustitucion reciproca. (Art. 861).*

(d) Fideicommissary substitution, also known as *sustitucion fideicomisoria. (Art. 863, etc.).*

(3) Case

Salazar v. CA
GR 121510, Nov. 23, 1995
65 SCAD 705

FACTS: After the ejectment case was filed, but before judgment, the defendant died. His widow testified during trial. The trial court rendered a decision in favor of the plaintiff. The widow claimed that the court did not have jurisdiction over her and the other heirs of her husband because notwithstanding the fact that he had already died, the trial court proceeded to render its decision without effecting the substitution of heirs required by the rules thereby depriving her of her day in court. Is her argument tenable?

HELD: No. Ejectment, which involves recovery of real property, is a real action and as such, is not extinguished by the defendant's death. A judgment in an ejectment case is inclusive between the parties and their successors-in-interest and may be enforced not only against the defendant but also against members of his family or privies who derive their right of possession from him. Furthermore, the widow herself submitted to the trial court's jurisdiction by testifying therein. She is now estopped to deny that she had not been heard in defense of her deceased husband.

Art. 859. The testator may designate one or more persons to substitute the heir or heirs instituted in case such heir or

heirs should die before him, or should not wish, or should be incapacitated to accept the inheritance.

A simple substitution, without a statement of the cases to which it refers, shall comprise the three mentioned in the preceding paragraph, unless the testator has otherwise provided. (774)

COMMENT:

(1) Simple or Common Substitution

(a) This Article is simple or common substitution.

(b) The first paragraph talks of express substitution in case of:

1) predecease
2) renunciation or repudiation
3) incapacity

(c) *Example: A* instituted *B* as *heir,* and stated in his will that in case *B* dies ahead of him *(A),* another person *C* will substitute *B*. (Note that the designation must always be express).

Consolacion Florentino de Crisologo, et al. v. Dr. Manuel Singson
L-13876, Feb. 28, 1962

FACTS: A testatrix instituted as her heir, a grandniece, to 1/2 of her properties. She also provided in her will that should said grandniece die BEFORE or AFTER the testatrix, the inheritance will go to the three brothers of the testatrix or their respective compulsory heirs (in case any of the brothers should predecease the grandniece). Upon the testatrix's death, will the grandniece (still alive) inherit said 1/2 of the property as full owner or as mere usufructuary? In other words, what was contemplated: a vulgar substitution or a fideicommissary substitution?

HELD: It is clear that what the testatrix had in mind was a simple or vulgar substitution (not a fideicommis-

sary substitution). Therefore, the grandniece inherits as OWNER, and not as mere usufructuary.

(2) Problems

(a) *A* instituted *B* and appointed *C* as substitute. *A* did not state the causes for which the substitution may be made. What should these causes be?

ANS.: All or any of the three cases, *UNLESS A* has provided otherwise. In other words, if *B* predeceases *A* or renounces the inheritance, or is incapacitated to receive the inheritance, *C* will be the substitute heir. *(Art. 859, 2nd paragraph).*

(b) In question (a), if *C* enters into the inheritance, does he do so because he succeeds or inherits from *B* or from *A*?

ANS.: From A. The substitute enters the inheritance, not as an heir succeeding the first heir, *but* as an heir of the testator. *(Perez v. Garchitorena, 54 Phil. 431).*

(c) *A* made a will stating that should he die before *B,* his relatives *C* and *D* would inherit certain properties and that should either *C* or *D* die before *A,* the survivor (between *C and D*) would inherit all of said specified properties. However, *B* died before *A.* Would *C* and *D* get anything?

ANS.: No, *C* and *D* would not get anything, because their designation was conditional, namely, that *A* should die before *B,* but such was not the case. Had the condition been followed, and had either *C* or *D* died before *A,* there would have been substitution. *(Machrohon Ong Ham v. Saavedra, 51 Phil. 267).*

(d) The testatrix instituted an heiress and ordered that the children of the heiress would substitute the heiress should said heiress die *after* the testatrix. Is this a case of simple substitution?

ANS.: No, this is not a case of simple substitution. In simple substitution of this nature, the heir or heiress dies *before,* and not after the testator or testatrix. *(G. de Perez v. Garchitorena and Casimiro, 54 Phil. 431; Art. 859, 1st par., Civil Code).*

(3) Supplemental Use of Chapter on Conditional Institutions

We have noticed that a simple substitution (also the other kinds, with the exception of the fideicommissary substitution) is also a kind of *conditional institution* (the condition being the predecease, incapacity, or repudiation by the originally instituted heirs). Therefore, we can supplement the provisions of the chapter on substitution with the provisions of the chapter on conditional institutions. *(See 4 Castan 454).*

(4) Some Instances When the Substitution is Extinguished

(a) when the substitute *predeceases* the testator

(b) when the substitute is *incapacitated*

(c) when the substitute *renounces* the inheritance

(d) when the *institution* of heir is annulled (say by preterition)

(e) when the *institution* or the *substitution* is revoked by the testator

(f) when a will is *void* or *disallowed* or *revoked*

(5) Problems

(a) *T* made a will instituting *X* as heir, and *Y* as substitute. In 1998, *Y* died, leaving *Z*, his child. In 2003, *T* died but *X* is incapacitated to inherit. Is *Z* going to inherit from *T*?

ANS.: No, because *Y* may be considered a voluntary heir, and since he predeceased the testator, he transmits nothing to his own heirs. *(See Art. 856, 1st paragraph).* In the absence of any other provision in the will, legal succession will take place.

(b) *T* made a will instituting *X* as heir, and *Y,* as substitute. *T* died on Jan. 5, 2004. *X* renounced the inheritance on Jan. 7, 2004. *Y* died on Jan. 8, 2004. Can *Z*, the child of *Y* get anything from *T's* estate?

ANS.: Yes, because this is not a case of predecease on the part of *Y,* who after all survived the testator, and

immediately inherited from *T*, subject to the condition of *X's* non-inheritance. Since the condition was fulfilled there is no doubt that *Y* inherited. True, *Y* is now dead, but his son *Z* can share in *T's* estate, not as an heir of *T*, but merely to get the share already inherited by his father *Y*.

Art. 860. Two or more persons may be substituted for one; and one person for two or more heirs. (778)

COMMENT:

(1) Brief or Compendious Substitutions

(a) This Article speaks of the brief or *compendious* substitution, both terms of which may be used synonymously or interchangeably. However, see (b).

(b) Properly, there are two kinds of substitution here:

1) the brief substitution — when two or more take the place of one

2) the compendious substitution — when one takes the place of two or more

(2) Examples

(a) *Brief* — *A* is an instituted heir, and *B* and *C* are his substitutes.

(b) *Compendious* — *A* and *B* are instituted heirs, and *C* is the substitute.

[NOTE: The brief or compendious substitution is really a variation, either of the simple or the fideicommissary substitution. Hence, an example (a), in case of predecease, repudiation, or incapacity of *A,* the other two will take his place. Here, we have an example of the variation of the simple substitution.*]*.

Art. 861. If heirs instituted in unequal shares should be reciprocally substituted, the substitute shall acquire the share of the heir who dies, renounces, or is incapacitated,

unless it clearly appears that the intention of the testator was otherwise. If there are more than one substitute, they shall have the same share in the substitution as in the institution. (779a)

COMMENT:

(1) Reciprocal Substitution

This Article speaks of the reciprocal substitution, the essence of which is that the instituted heirs are also made the substitutes of each other.

(2) Example of First Sentence

T instituted *A* to 2/3 and *B* to 1/3. If *A* predeceases, is incapacitated, or renounces, his share of 2/3 goes to *B*. If *B* predeceases, is incapacitated, or renounces, his share of 1/3 goes to *A*.

(3) Meaning of Second Sentence

The second sentence says that "if there are more than one substitute, they shall have the *same share* in the substitution as in the institution." This may, if interpreted literally, result in certain cases either in:

(a) partial intestacy

(b) or absurdity

HENCE, the words "same share" should be interpreted to mean "same *proportionate* share."

(4) Example

T institutes *A* to 12/18, *B* to 2/18, and *C* to 4/18. *A* is made the substitute of *B* or *C; B* and *C* are the substitutes of *A*. If *A* predeceases, is incapacitated, or renounces, his share of 12/18 will be given proportionately to *B* and *C*. In other words, *B* and *C* will inherit in the substitution. Since *B* and *C* were instituted in the proportion of 1 is to 2, this will be the proportion in which they will get the 12/18, namely, 4/18 and 8/18, respectively.

Translated into whole figures, if the estate is P180,000, A is really instituted to P120,000; *B* to P20,000; *C* to P40,000. Since *B* and *C* are made substitutes of *A*, if substitution is proper, *B* and *C* will get *A's* P120,000 in the proportion of P20,000 is to P40,000 (or in the proportion of 1 is to 2). Hence, in the substitution, *B* gets P40,000 and *C* gets P80,000.

Summing up:

B gets a total of P60,000

(P20,000 by institution),

(P40,000 by substitution)

C gets a total of P120,000

(P40,000 by institution)

(P80,000 by substitution)

TOTAL INHERITANCE = P180,000.

NOTE: Reason why substitutes inherit in the *substitution* in the *same proportion* as in the institution: The presumption is that the testator wanted it this way, otherwise, if their shares were to be *absolutely* equal, they would not have been instituted unequally. (Of course, if the institution was in the proportion of 1 is to 1, this would be the same proportion in the substitution.)

NOTE: It is believed that Art. 861 applies also to substitutions in legacies and devises.

NOTE: Will Art. 861 apply even if the *institution* was in *equal* shares? (*NOTE* that the law says "*unequal* shares.")

ANS.: Yes. The same principle applies. The law uses "unequal" only to clear up former doubts on the matter in the case the institution was in unequal shares.

(5) Problem

T gave *A* a legacy of P120,000; *B,* P20,000; *C,* P40,000. If *A* predeceases *T*, how much of his shares, if any, will go to *B* and *C*, by way of SUBSTITUTION?

ANS.: None, for no *substitution* was provided for in the will. However, as will be discussed later, they will inherit by ACCRETION, and it is worthwhile to note that those who inherit by *accretion* inherit also in the same proportion as in the institution (or devise or legacy).

[Note the *difference* in these two *statements*:

(a) *X* will be the substitute only if *Y* and *Z* do not inherit.

(b) *X* will be the substitute if either *Y* or *Z* does not inherit.

(The effects are obviously different.).].

Art. 862. The substitute shall be subject to the same charges and conditions imposed upon the instituted heir, unless the testator has expressly provided the contrary, or the charges or conditions are personally applicable only to the heir instituted. (780)

COMMENT:

Effect on the Substitution of Charges and Conditions Imposed in the Institution

(a) *General rule* — If the substitute inherits, he must fulfill the conditions imposed on the original heir. *(See 6 Manresa, 6th, p. 129).*

(Reason: We presume that the testator intended the substitute to stand on the same footing as the original heir.*).*

(b) *Exceptions* —

(1) if the testator has expressly provided the contrary (this must appear in the will)

(2) if the charges or conditions are personally applicable, only to the heir instituted. (This occurs when the personal qualifications of the original heir had been considered by the testator in designating said original heir.) *(See 6 Manresa 137).*

Example:

T instituted *A*, pianist, as heir, provided that *A* would give a piano concert a month after *T's* death. *B* was made substitute. If *A* predeceases *T, B* is not required to give the concert if he is not a pianist himself.

Query:

Suppose in the problem above, *A* died the day after *T* died, will *B* inherit? (The reader will please try to answer this.) *(HINTS:* There was no predecease. Was there incapacity? Was the condition fulfilled? Has the condition become impossible? Is the condition extinguished and will it be disregarded? Is this an impossible condition in a contract or in a will?*)*.

Art. 863. A fideicommissary substitution by virtue of which the fiduciary or first heir instituted is entrusted with the obligation to preserve and to transmit to a second heir the whole or part of the inheritance, shall be valid and shall take effect, provided such substitution does not go beyond one degree from the heir originally instituted, and provided further, that the fiduciary or first heir and the second heir are living at the time of the death of the testator. (781a)

COMMENT:

(1) 'Fideicommissary Substitution' Defined

A *fideicommissary substitution* (indirect substitution) is that by virtue of which a testator institutes a *first heir,* and charges him to *preserve* and transmit the whole or part of the inheritance later on to a *second heir. (See Art. 863; 6 Manresa 131).*

(2) Distinction from Simple Substitution

The most important difference is that while in the simple substitution only ONE of the heirs inherits, in the fideicommissary, BOTH inherit.

Examples illustrating the difference:

(a) *SIMPLE* — *T* institutes *A* as heir, and appoints *B* as substitute if *A* does *not* inherit.

(It is clear here that either *A* or *B will* inherit). *(ALTERNATIVE SUCCESSION)*

(b) *Fideicommissary Substitution* — *T* institutes *A* as first heir. The will states that *A* should preserve and transmit later on the estate to *B,* who is *A's* son. (It is clear here that upon *T's* death, *A* will inherit. Later on, *A* will have to deliver the property to *B* who has also inherited as second heir. In other words, in the fideicommissary substitution, *both* heirs inherit).

[NOTE: In the example above:

1) *A* — is the *first heir,* or fiduciary, or *heredero, fiduciaro,* or *trustee*. (He has the obligation of preserving and transmitting.)

2) *B* — is the *second heir, or fideicommissary* or *fideicomisario* or *beneficiary* or *cestui que trust*. (He eventually receives the property.)

3) *T* — is the *testator* or *decedent* or the *fideicomitente. (See Sanchez Roman).].*

[NOTE ALSO that both the heirs inherit the property or right to it SIMULTANEOUSLY, although the enjoyment and possession are *SUCCESSIVE.].*

(3) Purpose of the Fideicommissary Substitution

"This is necessary for the prosperity and prestige of the family, bearing in mind the lack of intelligence, weakness of character, and vanity and prodigality of the descendants to whom the property may go. It has been contended that the power to appoint a fideicommissary substitute is a complement of the *freedom of disposition* which gives a powerful stimulus to the accumulation of wealth, and thus, maintains the tradition and social standing of the family." *(Report of the Code Commission, p. 110).*

(4) Disadvantages

(a) The free circulation of property is somewhat curtailed, resulting in suspended ownership.

(b) The property may be locked up or entailed in a family for a long period. *(Report of the Code Commission, p. 111).*

(c) It is opposed to the liberty of property and to the principle that the making of a will is a *strictly personal act. (6 Manresa 133).*

(d) The original purpose is feudalistic and is not in accord with the modern concept of ownership which puts the welfare of society over and above that of a particular family.

[This is WHY the Code Commission, while retaining the concept, introduced amendments to prevent prolonged entailment, particularly the amendments requiring TWO essential requisites before this kind of substitution can be made — the requirement on *one degree* and the requirements that *both heirs be living* at the testator's death. *(See Com. Report, p. 111).* Indeed, if the substitute could be a person not even conceived yet at the time of the testator's death, the juridical order would be unduly disturbed, and render extremely difficult the circulation of property. *(6 Manresa 134).*].

(5) Requisites and Limitations of the Fideicommissary Substitution

(a) There must be a FIRST HEIR called primarily or preferentially to the enjoyment of the property.

(b) There must be an obligation clearly *imposed* upon him to *preserve* and *transmit* to a third person the whole or part of the inheritance (part only if the substitution refers *merely to that part*).

(c) A SECOND HEIR. *(6 Manresa 134; Perez v. Garchitorena, 54 Phil. 431).*

(d) The 1st and the 2nd heirs must be only *one degree* apart. *(Art. 863).*

Rabadilla v. CA, et al.
GR 113725, June 29, 2000

Under Art. 863, the second heir or the fideicommissary to whom the property is transmitted must not be beyond one degree from the first heir or the fiduciary.

A fideicommissary substitution is, therefore void, if the first heir is not related by first degree to the second heir.

(e) Both heirs must be alive (or *at least conceived*) *at the time of the testator's death. (Art. 863).*

[NOTE: A conceived child is already considered born for all purposes favorable to it.].

(f) Must be made in an EXPRESS manner *(Art. 867, par. 1).*

(g) Must not burden the legitime. *(Arts. 864, 872, 904).* (This is true for all kinds of substitutions, for after all, the compulsory heirs are entitled to the legitime as of RIGHT.).

(h) Must *not be conditional. (TS, Nov. 18, 1914).*

(6) First Requisite — "First Heir"

(a) The first heir must himself be capacitated, and must accept the inheritance if he wants to enjoy the same.

(b) He is not mere trustee for while he also administers, he carries out *not* another's wishes but his own, insofar as management is concerned. Moreover, he enjoys the use and the fruits, unlike a trustee. Hence, the fideicom-missary substitution is not exactly equivalent to, nor should it be confused with the Anglo-Saxon "trust." *(Perez v. Garchitorena, 64 Phil. 431).*

(c) He is not mere agent or delivery boy who is obliged to do nothing but deliver the property. *(See 6 Manresa 134).*

(d) He is indeed almost like a *usufructuary,* with the right to enjoy the property. Thus, like a usufructuary, he cannot alienate the property. *(TS, Oct. 30, 1917; Dec. 22, 1920).* If however he succeeds, in the case of land for example,

in registering it as unencumbered in the Torrens system of registration, innocent third parties should not be prejudiced. If no such registration is made, the buyer, no matter how innocent, acquires merely the seller's right, hence, he holds it subject to the substitution with the duty himself of preserving and transmitting. *(See Moralejo, et al. v. Maquiniano, C.A. 40 O.G. 227).*

(e) Like a usufructuary, he is implicitly bound to make an inventory to know what properties he must preserve and transmit. *(6 Manresa 54).*

(f) But unlike a usufructuary, he is not required to furnish a bond. *(TS, Jan. 9, 1916).* Unlike a usufructuary also, he is entitled to a refund of useful improvements, at least insofar as an increase in value is concerned *(6 Sanchez Roman 701),* whereas an ordinary usufructuary is not entitled to a reimbursement, but merely to a removal of them in case this can be done without substantial injury to the property.

(7) Second Requisite — To preserve and transmit

(a) The obligation to preserve and transmit must be given *clearly* and *expressly,* either by giving the substitution this name of "fideicommissary substitution," or by imposing upon the first heir the *absolute obligation to deliver* the property to a second heir. *(Art. 867, par. 1).*

(b) If a mere suggestion, advice, or request is made instead of an obligation, there is no fideicommissary substitution. *(6 Manresa 163).* In such a case, there will be a simple *institution* of the first heir, and the second heir gets nothing. This is because the *nullity* of the fidei-commissary substitution does *not* prejudice the validity of the institution of the heirs first designated; the fideicommissary clause shall simply be considered as not written. *(Art. 838).*

(c) If the obligation is *conditional,* there is no fideicommissary substitution.

Example:

T devised land to *X* with authority to sell if *X* has children; or if none, she must deliver it after her death

to *Y*. There is no fideicommissary substitution in view of the condition. *(TS, Nov. 18, 1914).*

(d) *T* instituted *X* as heir, allowed *X* to sell the same after his death, and designated *Y* as heir to whatever property remains after *X's* death. There is *no* fideicommissary substitution here for failure to express *the obligation to preserve*.

(e) *T* asked *X* to deliver certain properties to *Y* after *T's* death. There is no fideicommissary substitution here. *(See 6 Manresa 134).*

(f) *T* made *X* his heir. He provided in the will that *X* would *enjoy* the property *as long as X lived, but* after his death, same should go to *Y*.

HELD: There is no fideicommissary substitution here since there was no obligation to preserve. *(TS, Nov. 8, 1919).*

(8) Third Requisite — Second Heir

(a) He is known as fideicommissary, and is *a sort of naked owner*. Upon transmission to him of the property, full ownership is *consolidated* in him.

(b) Under the old Civil Code, according to Manresa, it was possible that the 2nd heir be a juridical person or a hospital or a class of persons, like the poor. *(6 Manresa 40).* Under the new Civil Code, however, it would seem that this construction is untenable as a rule since "one degree" really refers to a *generation,* and therefore to a natural person. However, there is really nothing intrinsically wrong with making the *second heir* — a juridical person — in which case *one degree should mean one transfer*. *(See discussion of the Fourth Requisite).*

(c) Since the second heir inherits not from the first heir but from the testator, said second heir must be capacitated to succeed not the first heir but the testator. *(See TS, Nov. 18, 1918; see also Art. 866).*

(9) Fourth Requisite — The First and the Second Heirs Must be ONE DEGREE Apart

(a) *Meaning of one degree* — Opinion is divided on this point.

1) According to the Spanish Supreme Court, one degree means *one transfer, one transmission,* or *one substitution,* the purpose being to prevent successive entailments, regardless of relationship. *(TS, June 23, 1940).* (This is also the opinion of Justice J.B.L. Reyes, Justice Ricardo Puno, Justice Eduardo Caguioa, and Prof. Jess Paredes, Jr.).

2) According to others like Manresa and Sanchez Roman, one *"degree"* means one *"generation."* This is because the word "degree" as used in the Civil Code — on intestate succession — refers to "generation." This means that the substitute may be the parent or child of the first heir — no other person can be the fideicommissary. Hence, under this view it would be proper to have the following transfers: 1st heir to his son, then from 1st heir's son to the 1st heir's father to the 1st heir's daughter, etc. Note that the relationship is always counted from the 1st heir, not from the others. This is the opinion also of Senators Arturo Tolentino and Ambrosio Padilla. *(See 4 Castan 466-467; Tolentino, Civil Code, Vol. III, pp. 190-191; Padilla, Civil Code, Vol. II, pp. 643-644).*

3) The author is inclined to agree with Manresa, Tolentino, and Padilla, considering among other things the fact that one purpose of the fideicommissary substitution is to maintain the prosperity and prestige of ONE FAMILY. *(See Report of the Code Commission, pp. 110-111).* However, in case the second heir be a juridical person, there is nothing wrong if we construe "one degree" as "one transfer" or "one transmission."

[NOTE: In the following problems, we shall then consider "one degree" as really "one degree (or generation)."*]*.

(b) *Problems*

1) *T* instituted *A* as first heir, and *B* (*A's* brother), as second heir in what he desired to be a fideicommissary substitution. When *T* died, *A* got the property. Later, *A* died. Who will get the said property, *A's* heir or *B*?

*ANS.: A's h*eir, because the fideicommissary substitution was not valid, *B* being a relative of the 2nd degree of *A*. It does not matter that there was only one transfer here.

2) *T* instituted *A* as first heir; *B* (*A's* son) as 2nd heir; and *C* (*B's* mother) as 3rd heir in a fideicommissary substitution. Is this valid?

ANS.: It is valid insofar as *A will* get and then *B*. But on *B's* death, *C* does not get the property as a result of the fideicommissary substitution because *C* is not one degree apart from *A; C* may not even be related by blood to *A*. (However, there is a chance *C* can get the property, *not as a result of T's will,* but as a result of *B's* will or *B's* intestate succession, for she is after all an heir of B.)

(10) Fifth Requisite — Both the First and the Second Heirs Must Be Alive (or at Least Conceived) at the Time of the Testator's Death (Art. 863)

(a) *Reason for the requirement:* To reduce as much as possible the number of years the property will have to be entailed. For if the second heir were still not even conceived at the time the testator dies, a long time may elapse. Furthermore, the second heir himself inherits from the testator, and one cannot inherit unless he be alive or at least conceived. Thirdly, a non-conceived child has no juridical capacity, and cannot therefore be given any legal right. *(Art. 37).*

(b) *Problem:*

T instituted *A* as first heir, and *A's* third child as second heir. If *A* does not even have any child yet at the

time the testator dies, can the fideicommissary substitution be given any effect?

ANS.: No, for the 2nd heir was not yet living or conceived at the testator's death. This is so even if at the time *A* dies, the 3rd child already exists.

(c) *Problem:*

T institutes *A* as 1st heir, *B* as second heir. *B* dies in 1999; *T* dies in 2012. In 2013, does *A* inherit?

ANS.: Yes, for while the substitution is not valid, the institution remains valid. *(See Art. 868).*

(d) *Problem:*

T institutes *A* as 1st heir, *B* as second heir. *A* dies in 2012; *T* dies in 2013. Will *B* inherit in 2013?

ANS.: It is apparent that the fideicommissary substitution cannot be given effect, for the 1st heir was already dead at the time the testator died. If, therefore, *A* does not inherit, and if the substitution of *B* is not valid, it would seem that the logical answer is that *B* does not inherit. Indeed, the fideicommissary substitution cannot be given effect for it was void. However, liberal construction of the law can permit us, I believe, to consider this not as a fideicommissary substitution but as a SIMPLE one. In such a case, *B* can inherit. This interpretation can indeed give effect to the testator's desire to eventually give the property to the substitute. And certainly by providing for a substitute, the testator has made it clear that as between intestacy and substitution, the latter would be preferred.

G. de Perez v. Garchitorena
54 Phil. 431

FACTS: Ana instituted Carmen as her heir with the following stipulations in her will:

(a) Should Carmen die, the whole estate should pass *unimpaired* to Carmen's children.

(b) The estate should never pass out of the hands of Carmen and her children as long as this was legally possible.

(c) Should Carmen die after Ana while Carmen's children are still minors, the estate would be administered by the executrix.

It should be noted that in the will, no express mention was made of a fideicommissary substitution. Neither was there any statement as to whether Carmen was to die before or after Ana. It was thus alleged that no fideicommissary substitution was made, and so, after Carmen's death, the property belonged to *her estate* and not to the children as *substitutes,* and therefore, creditors could attach the same.

HELD: The properties belonged to the children, and not to Carmen's estate. This is because all the requirements of a fideicommissary substitution are present here, and consequently, the creditors cannot go against the property. The requisites for a fideicommissary substitution are present because the first and second heirs exist, in the proper relationship, and were both alive at the testatrix's death. The phrase "shall pass unimpaired" and the phrase "should never pass out of the hands," show an obligation to preserve and transmit. Finally, the phrase "should Carmen die after Ana" anticipates a situation where a first heir, Carmen, will later die after *having enjoyed* the inheritance.

(11) An Apparent Substitution That Is Actually an Institution

Phil. Com. and Ind. Bank v. Escolin
L-27860, 27936-37, and L-27896
Mar. 29, 1974

FACTS: An American citizen from Texas, Linnie Jane Hodges, died in the Philippines, leaving certain properties, both real and personal, in our country. In her will, she made her husband, Mr. Hodges, her only heir. She likewise stated in the will that upon her husband's demise, the undisposed properties from her estate would be given equally among her own brothers and sisters. Some five years later, Mr. Hodges,

also a citizen of Texas, died. The administrator of the estate of Mr. Hodges, the PCIB, claims that the designation of the brothers and sisters of Mrs. Hodges was an attempted substitution, but cannot be given effect because it is not a simple nor a vulgar nor a fideicommissary substitution, and that under American law, the estate of Mrs. Hodges consists of 1/4 of the total conjugal estate.

Issues: Is the designation of Mrs. Hodges' brothers and sisters valid? If under Texas law, the estate of Mrs. Hodges is less than 1/4, how much must be regarded as her estate?

HELD: The designation of the brothers and sisters of Mrs. Hodges is not a valid substitution (not a simple or vulgar substitution because the will does not say that said relatives would inherit if Mr. Hodges would predecease, be incapacitated, or should repudiate the inheritance; and not a fideicommissary substitution for Mr. Hodges was not obliged to preserve and transmit said properties to the relatives of Mrs. Hodges). But this does not mean that no effect should be given to their designation, for the truth is that they were also *instituted* to said remaining properties. The institution of Mr. Hodges partakes of a *resolutory condition,* this is really a resolutory *term,* because Mr. Hodges would surely die, sooner or later that is, ownership of the inherited properties would end at his death (that is, while he was free, as owner, to dispose of the properties *inter vivos,* he was not free to do so *mortis causa*). The institution of Mrs. Hodges' brothers and sisters is on the other hand an institution subject to a *suspensive condition* (this is really a suspensive term), their inheritance having become *vested* at the time of Mrs. Hodges' death, but only *operative* upon the death of Mr. Hodges. With respect to the second issue, the allegation of the PCIB that Mrs. Hodges' estate is 1/4 of the total mass is a judicial admission of a fact (the existence of the foreign law being a fact), and by the principle of *estoppel,* would prevent the PCIB from alleging that Mrs. Hodges' estate is less than 1/4.

(12) Distinctions Between the Fideicomiso, Sustitucion Fideicomisoria, and Mayorazco

(a) The *fideicomiso* came first, but instead of there being two heirs, there really was only one heir. But between the

testator and the heir was a sort of *middle man* or agent whose function was, in many cases, to intervene only in order that an *incapacitated* person (the heir) could succeed from the testator. Sometimes the real heir was named in the will; sometimes he could be known only thru secret instructions given the middleman who never *really inherited himself.*

(b) The *fideicomisoria* which we are now discussing in this Article 863, was the outgrowth of the *fideicomiso* and the various kinds of simple substitutions. As we have seen, there really are *two heirs, here,* the *first not* being a mere agent.

(c) The *mayorazco* is simply a form of the fideicommissary substitution with this feature — that the property or the greater portion of it was handed down from generation to generation thru the *oldest child* (similar to the custom of *primo geniture*). This resulted however in perpetually entailing the property and was therefore abolished by the Disentailing Law of Spain extended to the Philippines as of Mar. 1, 1864 by the Royal Decree of Oct. 31, 1863. *(See Vda. de Barretto v. Mapa, 37 O.G. 3070).*

Art. 864. A fideicommissary substitution can never burden the legitime. (782a)

COMMENT:

(1) Reason Why the Fideicommissary Substitution Cannot Burden the Legitime

The legitime is expressly reserved for the compulsory heirs. *(Art. 886).* As a matter of fact, no substitution of any kind can be imposed on the legitime.

(2) Example

T had an estate of P1 Million. He gave *F*, a friend, P500,000. On the remaining P500,000 he imposed a fideicommissary substitution with *T's* child as first heir. The son can disregard completely the substitution since it was imposed on his legitime.

Art. 865. Every fideicommissary substitution must be expressly made in order that it may be valid.

The fiduciary shall be obliged to deliver the inheritance to the second heir, without other deductions than those which arise from legitimate expenses, credits and improvements, save in the case where the testator has provided otherwise. (783)

COMMENT:

(1) Fideicommissary Substitution Must Be Made Expressly

First paragraph of the Article — to be express, the words "fideicommissary substitution" need not be given; it is sufficient that there be the absolute obligation of delivering (and therefore of preserving) the property to the second heir. *(Art. 867, No. 1).* Moreover, if the intention is clear from the clauses of the will, same would be sufficient to effect this kind of substitution. *(G. de Perez v. Garchitorena, 54 Phil. 431).* Upon the other hand, just because the words "fideicommissary substitution" were used, it does not necessarily mean that it takes effect for after all, the other essential requisites may be absent.

(2) When the Inheritance Is Supposed to Be Delivered to the Second Heir

In the absence of a period fixed by the testator, the inheritance must be delivered at *death* of the first heir. *(6 Manresa 138).*

(3) Extent of the Inheritance to be Delivered

This depends on the intent of the testator. It may be that he ordered a fideicommissary substitution only on *one third* of the property. Unless specified, it is understood that the whole property received by a *first heir* in a fideicommissary substitution must be delivered.

(4) Effect of Alienation of Reservable Property

One implication from the duty *"to deliver"* is that the first heir must not ordinarily alienate the property to a stranger.

What happens if he does this? To answer this question, let us examine the following case:

Moralejo, et al. v. Maquiniano
CA, 40 O.G. 227

FACTS: Matea, in her will, gave Benvenuto a parcel of land with the condition that he must not alienate it but preserve it instead for his children. Matea then died, and Benvenuto inherited the land. Benvenuto disregarded the will and sold the land to Catalino who did not know of the existence of the condition. Afterwards, Benvenuto died. His children now brought this action to recover the land from Catalino. Will the action prosper?

HELD: Yes, the action will prosper in view of the testamentary reservation in favor of the children. This is true, notwithstanding Catalino's good faith, for he acquired merely Benvenuto's right. Hence, applying the principle of *caveat emptor* (let the buyer beware), we can say that the sale to him was *valid,* but it was subject to the testamentary reservation, namely, that upon Benvenuto's death his children would become full owners of the property.

[NOTE:

(a) While Benvenuto was still alive, it is evident that the children could not get the property for they would be entitled to it only after Benvenuto's death.

(b) If Benvenuto in his lifetime had applied for the registration of the land, the children's duty should have been to enter an opposition thereto, not for the real purpose of opposing, but for the purpose of having their testamentary right recorded in the Torrens Title. If no such annotation is made, then an innocent purchaser for value would take the property free from all liens and encumbrances, with the children not possessed of the right to get the land away from him. This would be true even if the action for recovery is brought after their father's death. Their only right then would be to get from the Assurance Fund of the Torrens System, or to get reimbursement from their father's estate.*]*.

[NOTE: We may thus conclude that alienation or registration may still be made subject to the fideicommissary substitution.*]*.

(5) Deductions To Be Made in Case of Transmittal to Second Heir

(a) *Legitimate expenses* — like necessary repairs for the preservation of the property; and the increase in value occasioned by useful improvements. *[NOTE:* The actual expenses for useful improvements are not reimbursable.*]*. *(6 Sanchez Roman 701)*. Examples of useful improvements are: a house, a fence. Other *legitimate* expenses include those spent to *defend* the property from usurpation by others. Expenses for luxury are of course not to be reimbursed. *(See 13 Scaevola 549)*.

(b) *Legitimate credits*.

(c) *Legitimate improvements*.

[NOTE: Of course, more can be deducted if so provided by the testator. *(Last part of second paragraph, Art. 866).]*.

[NOTE: Deteriorations caused by fiduciary's malice or negligence must of course be shouldered by him.*]*.

[NOTE: If the property is destroyed by a fortuitous event, the obligation to deliver is generally extinguished.*]*.

Art. 866. The second heir shall acquire a right to the succession from the time of the testator's death, even though he should die before the fiduciary. The right of the second heir shall pass to his heirs. (784)

COMMENT:

(1) Rules if Second Heir Predeceases the Fiduciary (not the Testator)

(a) The second heir inherits, not from the first heir, but from the testator. *(Perez v. Garchitorena, 54 Phil. 431)*. Hence, we have Art. 866.

(b) The Article applies only when all the essential requisites for a fideicommissary substitution are present, particularly the requirement that both heirs must be alive when the testator dies. In other words, while it is permissible for the *second* heir to predecease the first heir, neither must predecease the testator.

(2) Problem

T instituted *A* as 1st heir, and *B* as 2nd heir. *T* died in 2003. *B* died in 2004, leaving a son *C*. On *A's* death, will *C* get the property?

ANS.: Yes, on *T's* death *in* 2003, *A* got the property and on *A's* death, same should go to the heirs of *B*. *B* really had already inherited from *T* since he acquired the right from *T's* death; and his right goes to *C*, his heir, even if *B* predeceased the fiduciary *A*. Had *B* predeceased *T, B* would never have acquired any right to the property and would not be able to transmit same to his own heir *C. (Art. 866; Art. 863).*

Art. 867. The following shall not take effect:

(1) Fideicommissary substitutions which are not made in an express manner, either by giving them this name, or imposing upon the fiduciary the absolute obligation to deliver the property to a second heir;

(2) Provisions which contain a perpetual prohibition to alienate, and even a temporary one, beyond the limit fixed in Article 863;

(3) Those which impose upon the heir the charge of paying to various persons successively, beyond the limit prescribed in Article 863, a certain income or pension;

(4) Those which leave to a person the whole or part of the hereditary property in order that he may apply or invest the same according to secret instructions communicated to him by the testator. (785a)

COMMENT:

(1) Testamentary Dispositions Akin to Fideicommissary Substitutions

Purpose of the Article — to prevent conditions which would entail the property for a long time and result in a case worse than the fideicommissary substitution. The paragraphs will now be discussed except the first which has already been explained elsewhere.

(2) Prohibition to Alienate

(a) *Perpetual prohibition to alienate*

*Example: A g*ave a devise of land to *X,* and told him never to alienate the property. Is the stipulation valid?

ANS.: Strictly speaking, the stipulation is of no effect *(Art. 867, No. 2),* but considering Art. 870, it is submitted that same would be valid, but only for the *first twenty years*. Thus, *X* can sell the land after twenty years, but not before.

(b) *Temporary prohibition to alienate*

1) In case there is a fideicommissary substitution, the prohibition to alienate imposed on the fiduciary is allowed even if more than 20 years have elapsed, otherwise, there may be nothing to deliver, and the purpose of the substitution is frustrated.

Example: T instituted *A* as first heir, and *B* as second heir in a *fideicommissary substitution. T* died and *A* got the property. If *A* lives for, say, fifty years more, can *A* sell the property?

ANS.: No, he must preserve the property till his death, then *B* takes the property.

Problem: T instituted *A* as first heir, and *B* as second heir in a fideicommissary substitution. *T* ordered *A* not to sell the property for thirty years, and after said period to deliver the property to *B*. Is this a valid stipulation?

ANS.: Yes, even if the period exceeds twenty years, for after all, at the end of the thirty years, *A* cannot give the property to anybody except *B*. Moreover, if the first heir can be prohibited to alienate as long as he lives in order that same could be delivered to the second heir, why not for a period of thirty years? Of course, even if the thirty years have not yet elapsed, if the first heir has already died, the property should be given to *B* by virtue of the fideicommissary substitution.

2) In case there is NO fideicommissary substitution, the testator can prohibit the heir, and all those who may inherit from the latter, for a total period of twenty years, provided that same prohibition will not go beyond the limits imposed by Art. 863. *Example: T* instituted *A* as his only heir, but prohibited *him and all who may subsequently inherit from him* to dispose of the property for a period of twenty years. *T* then *died*. *A* is bound not to alienate for 20 years. But *A* dies 3 years after *T*. *B,* the son of *A* then inherits the property from *A*. Is *B* still bound to respect the temporary prohibition?

ANS.: Yes, for the next 17 years. Suppose *B* dies after 10 years more, and the property is in turn inherited by *C* who is his son, is *C* bound not to alienate for the remaining 7 years?

ANS.: No more, because although a total of 13 years only has lapsed, still to impose the prohibition for the remaining 7 years on *C* would be beyond the limits of Art. 863, since C is not a *first degree* relative of *A* who originally inherited the property.

[NOTE: Even if we construe one *degree* as one *transfer,* the same conclusion is reached, since here, the *second transferee, C,* should no longer be bound.*]*.

[NOTE: The purpose of the law is to *prevent a case worse than the entailment* in a fideicommissary substitution.*]*.

(3) Payment of Income or Pensions

(a) Attention must be focused on the word "successively."

(b) *Example of the paragraph:*

T instituted *A* as a sole heir, with the obligation of paying a periodical income of P20,000 a month to *B,* and after *B's* death to *C*. This would be proper provided that *B* and *C* are one degree apart and both are living at the testator's death. If the pension would be given to *B* first, then to *C* (son of *B*) upon *B's* death, then to *D* (son of *C*) upon *C's* death, this would be very prejudicial to *A*. Therefore the law, in the problem given, would require him to pension only *B,* then *C* after *B's* death. To require him to pension also *D* would be to go beyond the limits of *Art. 863*.

[NOTE: If those to receive pensions will be *given simultaneously* and *not successively,* it would be permissible to require him to pension as many people as he could, but of course the total amount should not go beyond the value of the inheritance, unless of course the heir consents.*]*.

(4) Effect of Secret Instructions

(a) The law says that dispositions which leave to a person the whole or part of the hereditary property in order that he may apply or invest the same according to secret instructions communicated to him by the testator, are of no effect. *(Art. 867, par. 4).*

(b) *Example:*

T made a will giving *A* P1 million to dispose of in accordance with secret instructions he had given him. If *A* is supposed to act only as a middleman or agent, *both* the secret instructions and the giving him of the money should be disregarded, for both are void. It may happen indeed that this was done only to benefit an unknown *incapacitated* person (remember the *fideicomiso*), or the agent will openly violate the instructions — for he cannot of course be checked — such instructions being secret. *(See 6 Manresa 155;* Manresa says that this provision

of the law is intended to prevent the application of the property for purposes not legally sanctioned*)*. Of course, if *A* was really being instituted or being given a legacy, this should be ascertained from the wordings of the will. He will get the property, and only the secret instructions will be disregarded.

Art. 868. The nullity of the fideicommissary substitution does not prejudice the validity of the institution of the heirs first designated; the fideicommissary clause shall simply be considered as not written. (786)

COMMENT:

Effect of Nullity of the Fideicommissary Substitution

Example:

T instituted *A* as first heir, and *B* as second heir. If *B* predeceases *T*, will *A* still inherit?

ANS.: Yes, as instituted heir, notwithstanding the invalidity of the fideicommissary substitution. The clause on substitution is simply considered as not written.

Art. 869. A provision whereby the testator leaves to a person the whole or part of the inheritance, and to another the usufruct, shall be valid. If he gives the usufruct to various persons, not simultaneously, but successively, the provisions of Article 863 shall apply. (787a)

COMMENT:

(1) Grant of a Usufruct

(a) *A,* in his will, gave to *B* the naked ownership of his *(A's)* house and *C* the usufruct over the same. This is allowed because the naked ownership of the property is really distinct and severable from the use of fruits (the beneficial ownership) thereof.

(b) In example (a), may the usufruct be given *C* and *D*, a stranger, simultaneously?

ANS.: Yes, and in such a case, *C* and *D* would be co-owners of the usufruct and of the usufructuary rights. The law distinctly provides that "usufruct may be constituted on the whole or part of the fruits of the thing, in favor of one or more persons, simultaneously or successively, and in every case, from or to a certain day, purely or conditionally." *(Art. 564, Civil Code).*

(2) Problems

(a) *A* disposed of his house in a will giving the naked ownership of the same to *B;* and to *C* and *D*, successively, the usufruct. This means that *C* first gets the usufruct, and after *C* dies, the usufruct goes to *D*. Is this disposition of the usufruct valid?

ANS.: Yes, provided that —

(1) *D* is a first degree relative of *C;*

(2) and both *C* and *D* are alive at the time *A*, the testator, dies.

This is what is meant when the law states that when usufruct is given to various persons *successively,* the provisions of Art. 863 (or fideicommissary substitutions and their limitations) should be applied. *Reason for the law:* Unless these limitations are observed there is a danger that the property would be entailed for an unreasonably long period of time.

(b) In his will, *T* made *A* the naked owner and *B,* the usufructuary of his properties. Upon *B's* death, the usufruct goes to *A,* who will now be the full owner. It would be wrong to say however that *A* is merely *B's* substitute with reference to the usufruct or that *A* inherited the usufruct from *B*. The reason why full ownership goes to him is the fact that usufruct is ordinarily extinguished by the death of the usufructuary, unless the contrary is provided in the will. *(See 6 Sanchez Roman 702-703).*

(c) In his will, *T* made *A* the naked owner and *B,* the usufructuary for 5 years, starting with *T's* death. *T* also provided in his will that upon *A's* death, the full ownership would go to *C*, who is *A's* father, and in the meantime (from

the time usufruct of *B* ends till *A* dies), *A* is required to preserve the property. Is the provision on fideicommissary substitution valid?

ANS.: Yes, since after all, *A* should be considered a first heir and not a second heir. Inasmuch as all the other requirements are present, the provision in the will regarding the fideicommissary substitution should be considered valid. *(See 6 Sanchez Roman 702-703).*

Art. 870. The dispositions of the testator declaring all or part of the estate inalienable for more than twenty years are void. (n)

COMMENT:

(1) Prohibition to Alienate For More Than 20 Years Void

(a) To give more impetus to the socialization of the ownership of property, and to prevent the perpetuation of large holdings which give rise to agrarian troubles, Art. 870 of the new Civil Code has been formulated. *(Comment of the Code Commission).*

(b) *A* was given his *legitime* in the form of a house. In the will, *A* was prohibited to sell the house within a period of 10 years. Can *A* sell the house even before the expiration of said period?

ANS.: Yes. This prohibition, even if less than 20 years, cannot be applied to the legitime. *(Art. 904, 2nd paragraph).*

(c) Please read in this connection the comments on Art. 867 (No. 2).

(d) If a devise or legacy is given and the recipient is prohibited to alienate, but no period is fixed regarding the length of the prohibition, it is understood that the prohibition is good for twenty years. The same is true if the prohibition is for "forever."

(e) If the devisee or legatee is prohibited to alienate "as long as he lives," then the prohibition is good for twenty years if he lives for said period or longer; if he dies *sooner,* it is

clear that the prohibition is ended, and therefore his own heirs will not be burdened by the prohibition.

(f) Art. 870 does not apply if there is a fideicommissary substitution, for this must be governed by Art. 867(2).

Bahanay, Jr. v. Martinez
64 SCRA 452

FACTS: In her will, a wife:

(1) claimed certain specific parts of the conjugal estate as her own (with the husband's conformity);

(2) ordered that her property be kept *intact* during the husband's lifetime;

(3) ordered the payment of cash (to the children of their legitimes). Are the provisions valid?

HELD:

(1) The claim to specific portions would ordinarily be void because the shares of the spouses are merely undivided or ideal; however, since the husband consented, the defect is cured, and the husband is deemed to have renounced his share. This is, of course, without prejudice to the rights of creditors.

(2) The proviso regarding the non-division of her property is good only for twenty (20) years.

(3) The order to pay the legitimes of her children in cash is void because such order can be allowed only if she has entrusted the management or administration of the property to one or more of the heirs — under Art. 1080 of the Civil Code.

(2) In Default of the Heirs of the Decedent, the State Will Inherit the Share

Adlawan v. Adlawan
479 SCRA 275
(2006)

Additionally, the State will be co-petitioner entitled to possession and enjoyment of the property

Section 4

CONDITIONAL TESTAMENTARY DISPOSITIONS AND TESTAMENTARY DISPOSITIONS WITH A TERM

Art. 871. The institution of an heir may be made conditionally, or for a certain purpose or cause. (790a)

COMMENT:

(1) Various Kinds of Institutions

The institution of heir may be made:

(a) with a condition. *(Arts. 871-877, 883-884).*

(b) with a term. *(Arts. 878, 880, 885).*

(c) for a certain purpose or cause (modal institution). *(Arts. 871, 882 and 883).*

(2) Definitions

(a) *Condition* — future or uncertain event, or a past event unknown to the parties, upon which the performance of an obligation depends *(Art. 1179, Civil Code);* it is "every fact or event which is future or uncertain to whose realization a judicial act is subordinated." *(6 Manresa 167).* According to Viso, a condition is a designation of some future and uncertain event upon which the validity of an accepted obligation or testamentary provision depends. *(3 Viso 368).*

(b) *Term* — the day or time when an obligation either becomes demandable or terminates. *(Art. 1193).* A day certain is understood to be that which must necessarily come, although it may not be known when. *(Art. 1193, 3rd paragraph).* As applied to succession, it is the day or time when the effect of an institution of the heir is to begin or cease. *(Bocobo and Noble, Outlines of the Law on Wills, Descent and Administration, 2nd edition, p. 25).* Under Art. 855 of the Civil Code — "the designation of the *day or time* when the effects of the institution of an heir shall *commence* or *cease,*" is allowed.

(c) *Modal institution* —

1) when the institution of an heir is made, for a certain purpose or cause. *(Art. 871).*

2) *the statement of the object* of the institution or the *application of the property left by the testator or the charge imposed upon him. (Art. 882).*

[NOTE: Such statement shall not be considered a condition unless it appears that such was his intention. *(Art. 882).].*

3) *"modo"* also signifies every onerous disposition by which the obligor imposed upon another and thus limited his promise, such as demanding a loan in exchange for what the other person receive. *(Manresa).*

(3) Example

(a) *Of an institution of heir with a condition* — *A* instituted *B* as heir provided that *B* passes the bar of 2003.

(b) *Of an institution of heir with a term* — *A* instituted *B* as heir, the effects to commence in 2005.

(c) *Of a modal institution* — *A* gave P300,000 so that the same may be spent for the interment of *C,* the late husband of *A. (Chiong Joc-Soy v. Vano, 8 Phil. 119).*

[The condition can be imposed only on the free portion, never on the legitime. *(Art. 904, Civil Code)*.].

Natividad v. Gabino
36 Phil. 663

FACTS: A testator in his will stated: "I bequeath to Doña Basilia Gabino the ownership and dominion of the urban property, consisting of a house and lot situated on Calle Lavezares. If the said legatee (devisee) should die, Lorenzo Salvador shall be obliged to deliver this house, together with the lot on which it stands, to my grandson Emilio Natividad, upon payment by the latter to the former of the sum of four thousand pesos Phil-

ippine currency." When may Lorenzo Salvador get his legacy of P4,000?

HELD: Salvador will get his legacy the moment Gabino dies, because then Salvador will be obliged to deliver the property to Natividad who in turn and in exchange must pay him (Salvador) P4,000. Salvador's legacy is conditional, and as soon as the condition is fulfilled, he acquires it.

Morente v. De la Santa
9 Phil. 387

FACTS: In her will, a wife provided as follows:

"1. I hereby order that all real estate which may belong to me shall pass to my husband, Gumersindo de la Santa;

"2. That my said husband shall not leave my sisters after my death, and that he shall not marry anyone; should my husband have children by anyone, he shall not convey any portion of the property left by me, except the one-third part thereof and the two-thirds remaining shall be and remain for my brother Vicente or his children should he have any;

"3. After my death, I direct my husband to dwell in the *camarin* in which the bakery is located, which is one of the properties belonging to me."

Questions:

(a) If the husband marries again, will he forfeit the devise?

(b) If the husband leaves the sisters of the wife, will he forfeit the devise?

(c) If the husband does not live in the *camarin,* will he forfeit the devise?

(d) if the husband has children by anyone, will he forfeit a part of the devise?

HELD: (a), (b), and (c) — *No. Reason:* The happening of these events should *not be considered* as the fulfillment

of conditions which would annul or revoke the devise. They were *mere orders* and there was no condition or statement that if he should not comply with the wishes of the testatrix he would lose the devise given him. The condition should have been expressly provided. It was not.

(d) In this case, he would lose two-thirds of the devise.

Reason: There was a statement that should he have children by anyone, the forfeiture would take place. Here the condition was expressly provided.

Rigor v. Rigor
L-22036, Apr. 30, 1979

A devise of a parcel of land in favor of the "nearest male relative" of the testator who would study for the priesthood should be given to the nearest male relative living at the time of the testator's death (provided of course that the condition is fulfilled), and not at any indefinite time thereafter.

(4) Conditions Not To Be Presumed

Conditions to affect the disposition must appear in the language of the will, and cannot be presumed. *(Morente v. De la Santa, 9 Phil. 387).* Parol evidence to prove the existence of oral or other conditions cannot be allowed. However, if the condition appears in a document incorporated *by reference into the will, it is proper to consider* said condition.

Art. 872. The testator cannot impose any charge, condition, or substitution whatsoever upon the legitimes prescribed in this Code. Should he do so, the same shall be considered as not imposed. (813a)

COMMENT:

(1) No Charge, Condition, or Substitution on Legitimes

Example: A son was informed in a will by his father that he (the son) would get his legitime only should he (the son)

pass the bar in 1998. The son failed in said bar examination. Is he entitled to his legitime?

ANS.: Yes, because his father had no right to impose any condition on his legitime. The condition here is considered as not imposed.

(2) The Only Prohibition That Is Valid

The testator can validly impose a prohibition against the partition of the legitime, for a period not exceeding twenty years. (This is the only prohibition or *condition* that can affect or burden the legitime). Art. 1083 provides: "Every co-heir has a right to demand the division of the estate, unless the testator should have expressly forbidden its partition, in which case the period of indivision shall not exceed twenty years as provided in Art. 494. This power of the testator to prohibit division applies to the *legitime*. Even though forbidden by the testator, the co-ownership terminates when any of the causes for which partnership is dissolved takes place, or when the court finds for compelling reasons that division should be ordered, upon petition of one of the co-heirs."

Art. 873. Impossible conditions and those contrary to law or good customs shall be considered as not imposed and shall in no manner prejudice the heir, even if the testator should otherwise provide. (792a)

COMMENT:

(1) Effect of Impossible or Illegal Conditions

Here the condition is considered void and unwritten but the institution and testamentary disposition will be considered as valid. A whimsical error on the part of the testator is presumed to have been made. *(6 Sanchez Roman 606).*

(2) Example of a Disposition With An Impossible Condition

A instituted *B* as heir provided that *B* could make a dead man live, otherwise *B* gets nothing. *B* will still be heir. *Reason for the law:* In testamentary dispositions, the condition is not

as important as the generosity and liberality of the testator. The impossible condition will just be disregarded.

[NOTE: In obligations, when the condition is to do an impossible thing, both the *condition* and the *obligation are void. (Art. 1183).* Here, the fulfillment of the condition is the thing that would give rise to the obligation itself. Since the condition can never become effective, it follows that the obligation is *void.].*

(3) Example of a Condition Contrary to Law

A instituted *B* as his heir provided that *B* kills *C*. If *B* does not kill *C, B* inherits notwithstanding any contrary provision in *A's* will. The condition here is contrary to law.

Miciano v. Brimo
50 Phil. 867

FACTS: Joseph G. Brimo's will provided that even if he was a Turk, still he wanted his estate disposed of in accordance with Philippine laws; and that should any of his legatees oppose this intention of his, his or her legacy would be cancelled. Andre Brimo, one of the brothers of the deceased, did not want this disposition in accordance with Philippine laws, and so he opposed practically every move that would divide the estate in accordance with Philippine laws. *Issue:* Does Andre Brimo lose his legacy?

HELD: No, Andre Brimo does not lose his legacy, because the condition, namely, the disposal of the testator's estate in accordance with Philippine law, is *against our laws* which provide that "intestate and testamentary succession, both with respect to the order of succession and to the amount of successional rights and to the intrinsic validity of testamentary provisions, shall be regulated by the *national* law (Turkish law) of the person whose succession is under consideration whatever may be the nature of the property and regardless of the country wherein said property may be found." *(2nd paragraph, Art. 16).* The condition being disregarded, the legacy becomes unconditional, and therefore Andre Brimo is entitled to his legacy.

(4) A Will Cannot Go Against the Law

It may be safely asserted that no respectable authority can be found which holds that the will of the testator may override positive provisions of law and imperative requirements of public policy. *(Page on Wills, Sec. 461, cited in Santos v. Manarang, 27 Phil. 209).*

(5) Vague Wording of Conditions

If a condition is so vaguely worded that even after applying rules on construction and interpretation, it is still meaningless, contradictory, or cannot be understood, the condition will be regarded as an impossible condition and should therefore be disregarded. *(6 Sanchez Roman 607).*

(6) Time to be Considered

The time to be considered in finding out whether a condition is impossible or illegal is the time when the condition is supposed to be fulfilled. *(See 6 Sanchez Roman 607).*

Art. 874. An absolute condition not to contract a first or subsequent marriage shall be considered as not written unless such condition has been imposed on the widow or widower by the deceased spouse, or by the latter's ascendants or descendants.

Nevertheless, the right of usufruct, or an allowance or some personal prestation may be devised or bequeathed to any person for the time during which he or she should remain unmarried or in widowhood. (793a)

COMMENT:

(1) The Condition Not to Marry

Regarding the prohibition to get married, we should consider the following:

(a) absolute *prohibition*

1) to contract a first marriage
2) to remarry

(b) *relative prohibition*

1) to contract a first marriage

2) to remarry

(c) a *stopping* of a *usufruct, allowance,* or *personal prestation* the moment the heir, legatee, or devisee marries or remarries

(2) Absolute Prohibition to Contract a First Marriage

This condition is absolutely void, and may be disregarded or considered not imposed. *Reason for the law:* Such a condition is contrary to good morality and public policy. *(See 6 Sanchez Roman 607).* There is NO exception here.

(3) Absolute Prohibition to Contract a Re-marriage

General Rule — void because it is contrary to morality and public policy.

Exceptions — valid

(a) when imposed on the widow or widower by the *deceased spouse*

(b) when imposed on the widow or widower by the *ascendants* or *descendants* of the deceased spouse (not the ascendants or descendants of the widow or widower)

(Reason: justified because of *sentimental* and *economic reasons.).*

Leonor Villaflor Vda. de Villanueva v.
Delfin N. Juico, etc.
L-15737, Feb. 28, 1962

FACTS: Don Nicolas Villaflor gave, among other things, a legacy to his wife by virtue of which she was given the "use and possession" of a certain piece of property on condition that she would never remarry, OTHERWISE, the legacy would go to a grandniece. The widow NEVER remarried. Upon the widow's death, the grandniece claimed full ownership over the

property, but it was contended by the heirs of the widow, that they (the heirs) should own the property because the widow never remarried.

HELD: The grandniece gets the property, for although the widow never remarried, still she was *never* given the *full ownership* of the property (she had been given merely its *use* and *possession*). If the testator had intended otherwise, why did he have to specify "use and possession."

(4) Relative Prohibition to Contract a First Marriage or to Remarry

This *relative* prohibition (prohibition to marry a particular girl, or at a particular time, or for a number of years) is *valid,* UNLESS it becomes so onerous or burdensome (don't marry for 60 years; don't *marry* in the Philippines or in Asia) that the "relative" prohibition really amounts to an absolute one. *(See 4 Castan 428, 429).*

[NOTE: A stopping of a usufruct, allowance, or personal prestation the moment the heir, devisee, or legatee marries or remarries — is justified since the law allows their giving for the time during which the person remains unmarried or in widowhood. *(Art. 874, second paragraph).].*

(5) Illustrative Problems

(a) *T* instituted his friend *F* as heir on condition that *F* will never marry. Soon after *T's* death, *F* married. Is *F* entitled to the inheritance?

ANS.: Yes, because the immoral condition is considered not imposed. *(Art. 874).*

(b) *H* instituted his wife as *sole heir* (no other compulsory heirs existed) on condition that when she becomes a widow, she must never marry. Two years after *H* died, the widow remarried. Is she entitled to the inheritance?

ANS.: The condition is valid insofar as the free portion is concerned, since this absolute prohibition was imposed by a deceased spouse — but is *not valid* insofar as her *legitime is* concerned. Therefore, her remarriage

makes her *lose* the *free portion,* but not the legitime (for ordinarily, no condition can be imposed on the legitime). *(See Art. 874).*

(c) *A* was married to *B*. Later, *B* died. *C,* the grandfather of *B,* gave *A* a legacy on condition that he *(A)* would never get married again. *C*, then died. Shortly afterwards *A* got married again. Does *A* lose the legacy?

ANS.: Yes, although the prohibition was absolute, it is nevertheless valid because it was imposed by an ascendant of the deceased spouse. *(Art. 874).*

(d) *A* instituted his friend *B* as heir provided that *B* would not get married to *C*. Is this a valid condition?

ANS.: Yes, and must be fulfilled in order to enable *B* to inherit, for if he should get married to *C*, he loses the inheritance.

(e) *A* instituted his friend *B* as heir provided that *B* would never get married in Manila. Is this a valid condition?

ANS.: Yes, because the prohibition here is only relative.

(f) *A* instituted his friend *B* as heir provided that *B* would not get married within four years. Is this a valid condition?

ANS.: Yes, because the prohibition here is only relative.

(g) *A,* in his will, gave his friend *B* the right to get the usufruct over *A's* lands as long as *B* remained unmarried. Is this valid?

ANS.: Yes, this is valid. As long as B stays single, he gets the usufruct, but the moment he marries, he stops receiving such usufruct. This is really a resolutory condition with the effect of a resolutory term, and therefore even if he does marry, he does not have to return whatever he has received. This is especially allowed by the law which says that " . . . the *right of usufruct,* or an *allowance* or some *personal prestation* may be devised or bequeathed to any person for the time during which he or she should remain unmarried or in widowhood." *(Art. 874, par. 2).*

(h) If a wife in her will gave her husband a legacy and ordered him never to marry again, would the husband lose the legacy if he gets married again?

ANS.: No, the husband does not lose the legacy by the mere fact that he disobeyed the order of the wife, because in the problem given, *the order was not made a condition*. Had it been a condition, that is, had the wife intended forfeiture in case of disobedience, this would have been a different matter. It should be noted that CONDITIONS should NOT be PRESUMED; they should be clearly indicated. *(Morente v. De la Santa, 9 Phil. 387).*

(6) Condition to Marry a Particular Person, or at a Particular Place or Time

It is believed that this condition is VALID, by implication, and must be complied with unless impossible or illegal.

Art. 875. Any disposition made upon the condition that the heir shall make some provision in his will in favor of the testator or of any other person shall be void. (794a)

COMMENT:

Disposition Captatoria

(a) This Article speaks of what is known as a *disposition captatoria*.

(b) This is prohibited because it tends to make the making of the will a contractual act. Note that the disposition *itself* (and not merely the condition) *is void*.

(c) *Example: A* gave in his will a legacy of a car to *B* on the condition that *B* in turn, in his own will, would give something to *A*. This disposition is void; in other words, the legacy will *not* be given any effect.

(d) *Another example: A* gave in his will a legacy of a diamond ring to *B* on the condition that *B* in turn, in his own will, would finance the education of *C*. This disposition or legacy is also void.

[NOTE: It is submitted that if the favor to be done by the heir or legatee will NOT be made in a *WILL,* both the *disposition* and the *condition should be considered VALID.].*

Art. 876. Any purely potestative condition imposed upon an heir must be fulfilled by him as soon as he learns of the testator's death.

This rule shall not apply when the condition, already complied with, cannot be fulfilled again. (795a)

COMMENT:

(1) When Potestative Conditions Must Be Fulfilled

(a) A *potestative condition* is one the fulfillment of which depends purely on the heir. He must perform it personally. Nobody else must do it for him. *(6 Sanchez Roman 615).*

(b) *Example: A* instituted *B* as heir on condition that *B* would learn how to dance the *"twist."* This must be fulfilled as soon as possible after *A's* death. Of course, if *B* already knows how to dance the *"twist,"* it is understood that he inherits just the same, unless of course, *A* meant that *B* should dance it better than the way he used to during *A's* lifetime, in which case, he must *improve* his dancing.

(c) Note that the *purely potestative condition* must be complied with AFTER (not before) the testator's death. *Reason:* It is only then that OBEDIENCE can be indicated. *Note* also that in *Art. 877,* performance is either BEFORE or AFTER.

(d) In obligations, when the condition on the part of the debtor is *potestative* and *suspensive,* both the *condition and the obligation* are void. *(Art. 1182).*

Example: A promises to fix the electric guitar of *B,* if *A* himself likes to do so. Here, both the condition and the obligation are null and void. (Evidently, the *reason* for the difference in the rule is that in the *will,* the heir can be considered the CREDITOR, and not the debtor.)

(2) Query About the Condition 'To Marry'

Is the condition to *marry* potestative or not?

ANS.: If it is to marry ANY girl, then it is *potestative;* but if it is to marry a PARTICULAR GIRL, it does not depend purely upon the will of the heir, for the girl may REFUSE. (On the other hand, for all girls in the world to REFUSE is impossible.)

Art. 877. If the condition is casual or mixed, it shall be sufficient if it happened or be fulfilled at any time before or after the death of the testator, unless he has provided otherwise.

Should it have existed or should it have been fulfilled at the time the will was executed and the testator was unaware thereof, it shall be deemed as complied with.

If he had knowledge thereof, the condition shall be considered fulfilled only when it is of such a nature that it can no longer exist or be complied with again. (796)

COMMENT:

(1) 'Casual Condition' Defined

A condition is *casual* if it depends upon chance and/or upon the will of a third person.

(2) 'Mixed Condition' Defined

A condition is *mixed* if it depends partly both upon the will of the heir himself AND upon chance and/or the will of a third person.

(3) Example of Casual Condition

A gives *B* a legacy on condition that *C* wins the lotto.

The fulfillment may be either before or after *A's* death.

(a) If *C* had already won the lotto, and *A* did not know this, the condition is deemed already complied with, and *B* gets the legacy. *(2nd par., Art. 877).*

(b) If *C* had already won the lotto, and *A* knew of this, the condition is deemed fulfilled only if *C* again wins first prize. Unless this happens, *B* cannot get the legacy. *(3rd par., Art. 877).* Evidently, the only *reason* for imposing the condition despite the testator's knowledge of it having been done already is to REQUIRE it to be FULFILLED AGAIN. *(See 6 Manresa 200).*

(4) Example of a Mixed Condition

A gives *B* a legacy on condition that *B* become a *lawyer.* The condition may be fulfilled either *before* or *after* the death of *A.*

(a) If *B* is already a *lawyer,* and *A did not know* this, the condition is deemed complied with and *B* gets the legacy. *(2nd par., Art. 877).*

(b) If *B* is already a lawyer, and *A* knew this, *B* gets the legacy just the same, because the condition is of such a nature that it can no longer be complied with again. *(3rd par., Art. 877).*

(5) Effect of Substantial or Constructive Compliance

Substantial or constructive compliance ("tried his best") is sufficient for *potestative conditions;* it is also sufficient for *mixed conditions* when *non-fulfillment* is caused by a person *interested* in the *non-fulfillment.* In other cases however, there must be *actual,* not merely constructive compliance. *(Sanchez Roman 618-619).*

(6) Rule in Obligations

In obligations, when the condition is casual or mixed, both the condition and the obligation are ordinarily valid. *(Art. 1182).*

Art. 878. A disposition with a suspensive term does not prevent the instituted heir from acquiring his rights and transmitting them to his heirs even before the arrival of the term.

COMMENT:

(1) Effect of Suspensive Term

A *suspensive term* is one that merely suspends the *demandability* of a right. *It is sure to happen*. A suspensive condition however suspends, not merely the demandability, but even the *acquisition itself* of the right.

(2) Distinction Between Term and Condition

The classic distinction between a term and a condition is that a term is sure to happen, while a condition may or may not happen.

(3) Examples

(a) *Example of a suspensive term:* "If Maria dies." The time of death may be uncertain, but it is a sure thing.

(b) *Example of suspensive condition:* "If Maria dies of *cancer*." Maria will die, yes, but not necessarily of cancer. Hence, here the condition may or may not happen.

(4) Historical Note

Under Art. 799, of the old Civil Code, the phrase *suspensive condition* was used for the article under comment. Scaevola, however, had always been of the opinion that the law legally meant a "suspensive term" or a "term with a suspensive effect." Hence, the Code Commission decided to clarify matters by adopting this interpretation by Scaevola.

(5) Example of Disposition With a Suspensive Term

A instituted *B* as heir, the institution to become effective upon *C's* death. *A* later dies in 2003. The effects of the institution of heir will of course have to wait till the death of *C,* because such was the statement in the will, and because "the designation of the day or time *(C's death)* when the effects of the institution of an heir shall commence or cease shall be valid." *(Art. 885). Nevertheless,* even before the actual death of *C,* the heir *B* has already acquired some rights to the inheritance.

This means that although the legal heirs of *A* (and not *B,* the *instituted heir*) enter into the possession of the property, in the meantime (while *C* is still alive) *B* really acquires his rights pending *C's* death, and *B* can *transmit them to his own heirs even before the arrival of the term. (Art. 878).* This is so, because the term is after all, sure to happen. In other words, if *B* should die in Jan. 2003, and *C* should die in Feb. 2003, *B* nevertheless could in *his own will or by intestate succession* give to his own heirs the properties he had inherited from *A.* This is so because *C's* death, even if later than *B's,* was merely a *suspensive term,* and therefore sure to happen.

(6) Another Example

A, who died in 2003, left a brother *X* but instituted *B,* a friend, as his heir, commencing in 2008. If in 2006, *B* dies, his estate would include the properties to be received from the estate of *A.* True, up to 2008, *X,* the legal or intestate heir, is considered called to the succession pending the arrival of the term *(Art. 885),* and can take possession of the properties in the meantime *(Art. 885)* but this does not mean that *B* is prevented from transmitting his rights in the property to his own heirs, even before the arrival of the term *(Art. 878),* because after all, when 2008 arrives, *X* would have to turn over the property to *B's* heir. *(Art. 885).*

[NOTE: There is, therefore, no contradiction between Art. 878 and Art. 885.*].*

(7) Effect of Predeceasing a Suspensive Condition

Suppose an heir instituted under a suspensive *condition* (note that Art. 878 speaks only of a suspensive *term*) dies after the testator but *before* the condition is fulfilled, does he transmit any right to his own heirs insofar as the estate of the testator is concerned?

ANS.: It is submitted that the answer is NO, for he never inherited, being already dead at the time the condition is fulfilled, granting that it is indeed fulfilled. *(See Art. 1034, see also TS, Feb. 1, 1910).*

Art. 879. If the potestative condition imposed upon the heir is negative, or consists in not doing or not giving something, he shall comply by giving a security that he will not do or give that which has been prohibited by the testator, and that in case of contravention he will return whatever he may have received, together with its fruits and interests. (800a)

COMMENT:

(1) 'Caucion Muciana' Defined

The bond or security referred to in Art. 879 is called a *caucion muciana. (6 Manresa, 6th ed., p. 201).* The bond or security should be given in favor of those who would get the property if the condition be not complied with (like the intestate heirs or the substitute, etc.). The favored persons are naturally the ones who can demand the constitution of the security. *(6 Sanchez Roman, p. 616).*

(2) Example of Negative Potestative Condition

A institutes *B* as heir on condition that *B* should not smoke for one whole year. He gets the inheritance right away, but he must first give a security to guarantee he would not smoke for a period, of one year. In case he does smoke again within said period he should return whatever he may have received, together with its fruits and interest. *(Art. 879).*

(Note that Art. 879 does not refer to a term. It refers to a *condition,* and if the condition is unfulfilled, it is as if no rights were ever acquired.*)*

(3) Negative Condition for a Certain Period

A gave *B* a legacy of a monthly allowance of P10,000 with the stipulation that his allowance should continue as long as *B* would not smoke, and that the moment *B* smokes, the allowance would stop. When *B* does smoke, he loses his right to the future allowance but does not have to return whatever he has already received. This is similar to the allowance or usufruct given while one remains unmarried or in widowhood. *(See 2nd*

par. of Art. 874). In this case, it is believed that no security is required. It would be otherwise if the condition were "not to smoke for one year." *(Art. 879).* In this case, security has to be given; otherwise, the estate would in the meantime be placed under administration. *(Art. 880).*

Art. 880. If the heir be instituted under a suspensive condition or term, the estate shall be placed under administration until the condition is fulfilled, or until it becomes certain that it cannot be fulfilled, or until the arrival of the term.

The same shall be done if the heir does not give the security required in the preceding article.

COMMENT:

(1) When Estate Shall In The Meantime Be Placed Under Administration

This Article, as worded, refers both to a suspensive condition and to a suspensive term, although regarding the latter, there is *inconsistency* with Art. 885 which is really the article to be applied in case of a suspensive term. *(See comment of Justice J.B.L. Reyes, Lawyer's Journal, Nov. 30, 1950, p. 558).* In other words, Art. 880 should be applied only to suspensive *conditions,* NOT to suspensive terms. Thus, pending the fulfillment of the suspensive condition, the estate shall be placed under administration.

[NOTE: Art. 880 also applies to a negative potestative condition, or one which consists in not doing or not giving something.*]*.

(2) Example — When There Is a Suspensive Condition

A instituted *B* as heir provided that *B* passes the Bar in 2002. When *A* dies, the estate shall be placed under administration. If *B* passes the Bar in 2002, the administration ceases and *B* will now be entitled to the property, since the condition has been fulfilled. If *B* does not pass the Bar in 2002, then the legal heirs (like *A's* brothers) will take over the property.

(3) When Administration Ceases

If there is a *suspensive condition,* and it "becomes certain that it cannot be fulfilled" then the administration of the estate will also cease, but this time, instead of being given to the instituted heir; it will be given to the legal heirs.

(4) Letter of Administration

Guy v. CA
502 SCRA 151
(2006)

The court before which a petition for letters of administration is not precluded from receiving evidence on a person's filiation — its jurisidiction extends to matters incidental and collateral to the exercise of its recognized powers in handling the settlements of the estate including the determination of the status of each heir.

Two causes of action, one to compel recognition and the other to claim inheritance, my be joined in one complaint.

Art. 881. The appointment of the administrator of the estate mentioned in the preceding article, as well as the manner of the administration and the rights and obligations of the administrator shall be governed by the Rules of Court. (804a)

COMMENT:

(1) Distinctions Between an Executor, an Administrator, an Administrator with a Will Annexed, and a Special Administrator

(a) When there is *a will,* an *executor* appointed in such will takes charge in carrying out the wishes of the testator. "When a will has been proved and allowed, the court shall issue *letters testamentary* thereon to the person named as *executor* therein, if he is competent, accepts the trust, and gives bond as required by these rules." *(See Sec. 4, Rule 78, Rules of Court).*

(b) If there is *no will,* it follows that there can be no executor, and therefore the Court appoints an *administrator,* but only if an administrator is really required. Such an administrator will be given letters of administration. *(See Sec. 6, Rule 79, See Rules of Court).*

(c) If there is a will, but no executor has been named therein, or if the executor named is either incompetent or unwilling, the Court will if necessary appoint an administrator, but this time he will be called *administrator with a will annexed;* and he will be granted *letters of administration with a will annexed. (Sec. 6, Rule 79; Sec. 4, Rule 77, Rules of Court).* If several wills are involved, the administrator will be called an *administrator with wills annexed,* and he will be given *letters of administration with wills annexed.*

(d) A special administrator is one appointed *temporarily* as administrator pending the qualification of an executor or the appointment of an administrator to meet the urgent needs of the estate.

Medina and Del Carmen v. Court of Appeals
L-34760, Sep. 28, 1973

FACTS: Beda Gonzales, as an heir, opposed the sale of a certain property belonging to the estate. May he be appointed special administrator of the estate?

HELD: No, because a person with an adverse conflicting interest is unsuitable for the trust reposed in an administrator of an estate.

(2) Qualifications of Executor or Administrator

No person is competent to serve as executor or administrator who:

(a) is a minor;

(b) is not a resident of the Philippines;

(c) is in the opinion of the Court unfit to execute the duties of the trust by reason of drunkenness, improvi-

dence, or want of understanding or integrity, or by reason of conviction of an offense involving moral turpitude. *(Sec. 1, Rule 78, Rules of Court).*

Baluyot v. Paño
L-42088, May 7, 1976

FACTS: The appointment of Sotero Baluyot's widow as administrator of his estate valued at least at two million pesos, was opposed on the ground of mental unfitness. The judge asked her a few questions briefly, and concluded she was capable. Is this the valid procedure for determining capacity?

HELD: No, because there should have been a detailed full dress hearing on the matter of competency, with the oppositor being allowed to present his own contrary evidence. This is so even if the surviving spouse enjoys preference in appointment as administratrix.

(3) Rule With Respect to a Married Woman

A married woman may serve as executrix or administratrix, and the marriage of a single woman shall not affect her authority so to serve under a previous appointment. *(Sec. 3, Rule 78, Rules of Court).*

(4) Preference in the Administration

If no executor is named in the will, or the executor or executors are incompetent, refuse the trust, or fail to give bond, or a person dies intestate, administration shall be granted:

(a) To the surviving husband or wife, as the case may be, or next of kin, or both, in the discretion of the Court, or to such person as such surviving husband or wife, or next of kin, requests to have appointed if *competent,* and *willing to serve;*

(b) If such surviving husband or wife, as the case may be, or next of kin, or the person selected by them, be *incompetent* or *unwilling,* or if the husband or wife, or next of kin neglects for *thirty days* after the death of the person

to apply for administration or to request that administration be granted to some other person, it may be granted to one or more of the *principal creditors,* if competent and willing to serve;

(c) If there is no such creditor competent and willing to serve, it may be granted to such other person as the court may select *(See Sec. 6, Rule 78, Rules of Court)*;

(d) However, the Clerk of Court or any other court employee is generally looked upon with *disfavor* in the matter of appointment as administrator of the estate of a deceased individual because of possible incompatibility in the discharge of duties. *(Medina v. Court of Appeals, L-34760, Sep. 28, 1973).*

Mercado v. Vda. de Juan
64 Phil. 75

FACTS: Bishop Gorordo died in 1934 instituting his sister as heir, and in case of predecease, his nieces. Various legacies were given. Father Mercado, a parish priest, was appointed executor. The appointment of the executor was opposed on the ground that it would be expensive and unnecessary.

HELD: Considering the many legacies to be given, it was essential to appoint an executor who would protect the interest of the estate and enforce compliance with the testator's will. When the evidence shows that the testator, in making his will naming somebody as executor of his estate in preference to anybody else, was in the full enjoyment of his intellectual faculties, it is not only just that we assume that he had good reasons for so doing.

Garcia Fule v. Court of Appeals
L-40502 and L-42670
Nov. 29, 1976

FACTS: An illegitimate sister of the deceased, and the latter's legitimate spouse could not agree as to who should be appointed by the court as special administrator. Who has preference and why?

HELD: The surviving spouse is to be preferred, as in the appointment of a regular administrator. The reason for the preference is clear: aside from her share in the conjugal partnership, the spouse also is an heir of the deceased. She has therefore a greater interest in administering the entire property correctly than any other relative.

(5) Role of the Probate Courts and Need of Administration

(a) Probate courts do not as a rule have authority to brush aside the nomination of an executor and to appoint an administrator with the will annexed, unless the person chosen by the testator is mentally unbalanced or underage. *(Sorreado v. Esteban, 37 O.G. 228).*

(b) The naming of an executor is part of a will, and when the latter is admitted to probate, the Court's plain duty is to give effect to the whole of it, unless it be in contravention of the law. Wills have been devised to carry out men's last wishes with regard to the manner they want their property distributed after their death, and a corollary to this right is that of naming the person who will put those last wishes in execution. *(Sorreado v. Esteban, 37 O.G. 228).*

(c) When there are no debts, and the heirs do not wish to have an administrator (no executor having been appointed), there is no reason why the estate should still be burdened with the costs and expenses of an administrator. *(Illustre v. Alaros Frondosa, 17 Phil. 321).*

(d) In general, however, if a person should die and he leaves property within the Philippines, a *qualified administrator* must be appointed by a Court of competent jurisdiction. *(Utolo v. Passion Vda. de Garcia, 39 O.G. 159).*

Estate of Gelacio Sebial
L-23419, June 27, 1975

FACTS: If an administratrix files the inventory of the estate more than three months after her appointment, may the probate court still approve said inventory?

HELD: Yes, for the three-month period in Sec. 1, Rule 83 of the Rules of Court, is not mandatory. After the filing of the petition for issuance of letters of administration and the publication of the notice of hearing, the proper CFI acquires jurisdiction over a decedent's estate, and retains that jurisdiction until the proceeding is closed. However, an administratrix's unexplained delay in filing the inventory may be a ground for her removal. *(See Sec. 2, Rule 82, Rules of Court).*

De Guzman v. De Guzman-Carillo
L-29276, May 18, 1978

Collectible administration expenses include expenses to preserve the family residence and to maintain the social standing of the family, but NOT expenses for the first death anniversary celebration nor living expenses of one of the heirs (who had been living in the family house) nor expenses for light, water, gas, oil, and floor wax, and the salary of the household help of said heir.

Recto v. De la Rosa
L-42799, Feb. 8, 1977

FACTS: The widow of the decedent sought the revocation of her son's appointment as administrator of the estate, on the ground that the son had committed a breach of trust in having interfered in the ownership of certain properties (thru instruments of conveyance). May the son be removed as administrator on this ground?

HELD: On this specific ground, NO, because of possible conflicts when the ownership of the property is actually threshed out in the proper proceeding (ordinary action, not a probate proceeding). Removal may be possible however on *other* grounds.

Dalisay v. Consolacion
L-44702, July 30, 1979

FACTS: It was proved that the administrator of the decedent's estate is indebted to the deceased for a sum

of money. Is this a sufficient ground to remove him as administrator?

HELD: The fact of indebtedness owing the decedent does not by itself justify the removal of the debtor-administrator.

(6) Two Exceptions to General Rule

(a) Extrajudicial settlements by agreement between heirs. *(See Rule 74, Sec. 1, Rules of Court). (NO DEBTS).*

(b) Summary settlement of estate of small value. *(Rule 74, Sec. 2, Rules of Court). (P10,000 or LESS).*

(7) Extrajudicial Settlement by Agreement Between Heirs

If the *decedent left no will and no debts* and the heirs are all of age, or the minors are represented by their judicial or legal representatives duly authorized for the purpose, the parties may, without securing letters of administration, divide the estate among themselves as they see fit by means of a public instrument filed in the office of the register of deeds, and should they disagree, they may do so in an ordinary action of partition. If there is only one heir (or one legatee or one devisee), he may adjudicate to himself the entire estate by means of an affidavit filed in the office of the register of deeds. The parties to an extrajudicial settlement, whether by public instrument or by stipulation in a pending action for partition, or the sole heir who adjudicates the entire estate to himself by means of an affidavit shall file, simultaneously with and as a condition precedent to the filing of the public instrument or stipulation in the action for partition, or of the affidavit in the office of the register of deeds, a bond with the said register of deeds in an amount equivalent to the value of the personal property involved as certified to under oath by the parties concerned and conditioned upon the payment of any claim that may be filed under Section 4 of this rule. It shall be presumed that the decedent left no debts if no creditor files a petition for letters of administration within two (2) years after the death of the decedent.

The fact of the extrajudicial settlement or administration shall be published in a newspaper of general circulation in the

manner provided in the next succeeding section; but no extrajudicial settlement shall be binding upon any person who has not participated therein or had no notice thereof. *(See Sec. 1, Rule 74, Rules of Court).*

[NOTE: The law allows the extrajudicial partition by agreement of the heirs only if the decedent left no debts and the heirs and legatees are all of age or the minors are represented by their judicial and legal representatives. Where the deceased left *pending obligations,* the same must be first paid before the estate can be divided; and unless the heir can reach an amicable settlement as to how the obligations should be settled, the estate would inevitably be submitted to administration for the payment of such debts. *(Guico, et al. v. Bautista, et al., L-14291, Dec. 13, 1960).* It should be noted that an ordinary action for partition cannot be converted into a proceeding for the settlement of the estate of a deceased, without compliance with the procedure outlined in the Rules of Court. *(See Ibid.).].*

(8) Some Queries

(a) Does this *extrajudicial settlement* by agreement between heirs apply to both testate and intestate succession?

ANS.: Yes, in view of the use of the terms heirs and legatees. (Leano v. Leano, 25 Phil. 180). However, it must be noted that even in this case of extrajudicial partition, the heirs and legatees must FIRST present the will for *probate* (and this is so even if no one raises any question as to the authenticity and the execution of the will). The Court advanced two reasons: *firstly*, the law expressly provides that no will shall pass property unless said will is probated and allowed; *secondly*, the probate of a will, which is a proceeding *in rem,* cannot be dispensed with and substituted by any other proceeding, judicial or extrajudicial, without offending against public policy designed to effectuate the testator's right to dispose of his property by will in accordance with law and to protect the rights of the heirs and legatees under the will thru the means provided by law among which is the *publication* required under the law. *(Ventura v. Ventura, et al., L-11609, Sep. 24, 1959).*

(b) Suppose the division or partition is made orally, will partition or division be valid as among the co-heirs and co-legatees?

ANS.: *Yes. The purpose of the requirement that it be in a public document and registered is to prejudice creditors and third parties. (Hernandez v. Andal, et al., L-273, Mar. 29, 1947).* If as between strangers, even the transmission of ownership through sales can be effected by oral contract or parol agreement (provided of course there has been full or partial execution), notwithstanding the requirement that it be put in writing; there is no *reason why a simple partition or division among co-heirs,* an act where there is no change of ownership but simply a designation and segregation of that part of the estate which belongs to each heir, cannot be allowed. It is binding among the heirs, but will not prejudice third persons. *(Hernandez v. Andal, supra).*

(c) In the event that the heirs or legatees or devisees should disagree as to the division of the estate, does a special proceeding for the settlement of the estate have to be brought?

ANS.: No. A simple action for partition would be sufficient provided, of course, that the requirements set forth for what should have been an extrajudicial settlement *(See Sec. 1, Rule 74, Rules of Court)* are all present. *(Hernandez v. Andal, supra).*

(9) Summary Settlement of Estates of Small Value

Whenever the gross value of the estate of a deceased person, whether he died testate or intestate, does not *exceed ten thousand pesos,* and that fact is made to appear to the Court of First Instance (now Regional Trial Court) having jurisdiction of the estate by the petition of an interested person and upon hearing, which shall be held not less than one (1) month nor more than three (3) months from the date of the last publication of a notice which shall be published once a week for three (3) consecutive weeks in a newspaper of general circulation in the province, and after such other notice to interested persons as the Court may direct, the *Court may proceed summarily*

without the appointment of an executor or administrator, and without delay, to grant, if proper, allowance of the will, if any there be, to determine who are the persons legally entitled to participate in the estate, and to apportion and divide it among them *after the payment of such debts of* the estate *as the court shall then find to be due;* and such persons, in their own right, if they are of lawful age and legal capacity, or by their guardians or trustees legally appointed and qualified, if otherwise, shall thereupon be entitled to receive and enter into the possession of the portions of the estate so awarded to them respectively. The court shall make such order as may be just respecting the costs of the proceedings and all orders and judgments made or rendered in the course thereof shall be recorded in the office of the clerk, and the order of partition or award, if it involves real estate, shall be recorded in the proper register's office. *(See Sec. 2, Rule 74, Rules of Court).*

Del Rosario v. Conanan
L-37903, Mar. 30, 1977

FACTS: A petition for summary settlement of the estate of the deceased was filed although the value of the estate amounted to P33,000 (in excess of the P10,000 set forth in the Rules of Court). Will the summary settlement be allowed?

HELD: No, because the limit of P10,000 is JURISDICTIONAL. *[NOTE: formerly, the limit was P6,000.].*

(10) Purpose of Settlement of Estates

The primordial purpose of the law relative to the settlement of estates is to strive to have the estate settled in a speedy manner so that the benefits that may flow therefrom may be immediately enjoyed by the heirs and beneficiaries. *(Castillo v. Enriquez, et al., L-11440, Sep. 30, 1960).*

[NOTE: Whether or not the sale of a property of an estate is proper should be governed by the interest not only of the heirs but also of creditors and a probate court should enjoy ample discretion in determining under what conditions a particular sale would be most beneficial to all parties interested which discretion should not be interfered with unless exercised

with clear abuse. *(Fernandez, et al. v. Montejo, et al., L-15327, Sep. 30, 1960).]*

(11) How To Recover Decedent's Assets Fraudulently Conveyed to Third Persons

Intestate Estate of the Deceased Gelacio Sebial
L-23419, June 27, 1975

FACTS: If in the course of intestate proceedings, it is alleged that some of the assets of the deceased had been fraudulently conveyed to third persons, what should the probate court do?

HELD: The third persons may be cited to appear in court, and may be examined under oath as to how they came into possession of the assets, but a *separate action* is necessary to recover said assets.

(For a fuller discussion on administration of the property, see Rules 74 to 85 of the Rules of Court.)

Art. 882. The statement of the object of the institution, or the application of the property left by the testator, or the charge imposed by him, shall not be considered as a condition unless it appears that such was his intention.

That which has been left in this manner may be claimed at once provided that the instituted heir or his heirs give security for compliance with the wishes of the testator and for the return of anything he or they may receive, together with its fruits and interests, if he or they should disregard this obligation. (797a)

COMMENT:

(1) Modal Institution

This Article refers to what is known as modal institution or "*institution modal*" or "*institucion sub-modo*."

This occurs when *any* or *all* of the following are stated:

(a) *object of the institution — Example: I institute A* as my heir to give him enough money to obtain a legal education.

(b) *application of the property left by the testator — Example: I institute B* as my heir. He will apply the properties of my estate to the erection of a College of Law in Ortigas Avenue.

(c) *The charge imposed by the testator — Example: I* institute *A* as my heir. He will devote 10% of the annual income from my buildings for the establishment of a professorial chair in Civil Law at the University of Metropolis.

[NOTE: If, in a will, the testator imposes as a duty *("tungkulin")* on the heirs the obligation of allowing *("pahihintulutan")* a third person to be placed as a tenant on a certain parcel of rice land, the duty must be complied with, and the heirs must take in said third person as tenant. *(Yambao v. Gonzales, et al., L-10763, Apr. 29, 1961).].*

(2) Compared with the old Civil Code

(a) In the old Civil Code, the heir or the legatee himself was not required to give the security. Only the heirs of the heir or the heirs of the legatee were so required. *(Chiong Joc-Soy v. Vano, 8 Phil. 119; Art. 797, par. 2, old Civil Code). Reason:* The instituted heir or legatee was assumed to enjoy the trust and confidence of the testator.

(b) In the new Civil Code, the heir himself or his own heirs (as the case may be) are bound to give the security. *(Art. 882, par. 2).*

(3) Modal Institution Compared with Conditional Institution

It is true that as a rule, the modal institution is not a condition *(Art. 881, 1st par.)* but when and if it is violated, the instituted heir is supposed to forfeit the inheritance; to return indeed anything he may have received together with its fruits

and interest, if he should disregard this obligation. *(Art. 882, 2nd par.)*. Inasmuch as there is an obligation, and inasmuch as a violation of the obligation results in forfeiture, it is believed that from this point of view there is no difference between a *modal institution* and a *conditional institution*.

However, one practical difference can be pointed out, namely, that in a modal institution, the inheritance can be immediately demanded, provided that security is given *(Art. 882);* whereas in an institution with a *suspensive* condition, *even if the heir wants to give security,* he will *not* be allowed to do so, and will therefore not be allowed to get the property in the meantime; instead, the property will be placed under administration. *(Art. 880)*.

When the condition however is *resolutory* or is *negative,* the property can be taken upon the giving of a security *(Art. 879),* and from this point of view, there is hardly any difference between the modal institution on the one hand and the resolutory or negative condition upon the other hand.

Examples:

(a) "On condition that *A* marries *B*." This is a suspensive condition, and the estate is not *demandable* pending the fulfillment of the condition, even if security is offered. *(Art. 880)*.

(b) "On condition that *A* does not smoke for a period of one year." This is a negative condition and the estate is demandable right away, provided that security is given. If the condition is violated. *A* forfeits the inheritance plus fruits and interests. *(Art. 879)*.

(c) "*A* is instituted heir. He will use the money for the establishment of a law school." This is a modal institution, and the estate is demandable right away, provided that security is given. If the order of testator regarding the disposition of the property is disobeyed, *A* forfeits the inheritance plus fruits and interest. *(Art. 882)*.

(d) *"A* is instituted heir. He will not marry again." This was provided by his wife in her will. This is neither a conditional institution nor a modal institution: not a condition

because the condition must be express *(Morente v. De la Santa, 9 Phil. 387, supra),* and not a modal institution because there is no application of property or charge here. *(Art. 882).*

(e) "I bequeath to Yla my property and desire her to expend in good works all in excess of that which is necessary for her support. I name her as my heir so that she may attend to the better education of her children." Is this a conditional institution, a modal institution, or merely an expression of personal opinion as to the best disposal of the estate?

According to Scaevola, this is merely an expression of personal opinion of the testator as to the best disposal of the estate, and, therefore, in no way binds the heir. *(13 Scaevola on the Civil Code 646 cited in Chiong Joc-Soy v. Vano, 8 Phil. 119).*

(4) Some Problems

(a) *A* gave *B* a legacy of P300,000. *B* was instructed to buy lands, retain a third of the lands and deliver the rest to *C* and *D*. Before *B* can get the P300,000, does he have to give a bond?

ANS.: This is not a conditional legacy, but a modal legacy (modal institution). The Supreme Court, therefore, decided under the old Civil Code that *B* does not have to give a bond. *(Fuentes v. Canon, 6 Phil. 117).* But under the new Civil Code, he should give the bond, whether it is considered a resolutory condition *(Art. 880) or* a modal institution. *(Art. 882).*

(b) *A* gave *B,* a Chinese, legacy of P500,000, P200,000 of which was for himself, and the remaining P300,000 "for the expenses of interment of my late husband Don Nicasio Veloso." Does *B* have to give a bond?

ANS.: This is not a conditional legacy. The Supreme Court therefore decided under the old Civil Code that B does not have to give a bond. *(Chiong Joc-Soy v. Vano, 8 Phil. 119).* But under the new Civil Code, he should give the bond. *(Art. 882).*

(c) Can an institution apparently modal be considered conditional?

ANS.: Yes. However, a mere direction in a will in connection with the enjoyment of the legacy will not be considered a condition, unless the intention of the testator to that effect is clearly shown. *(Fuentes v. Canon, 6 Phil. 117; Morente v. De la Santa, 9 Phil. 387; Pestigo v. Boval, 13 Phil. 240).* The *"mode"* shall not be considered as a condition unless it appears that such was his intention. *(Art. 882, 1st par.).*

(5) Some Principles

(a) When in doubt as to whether there is a *condition* or merely a *mode,* consider same as a *mode.*

(b) When in doubt as to whether there is a *mode* or merely a *suggestion,* consider same only as a *suggestion. (See 13 Scaevola 646).*

(c) "The 'condition' *suspends* but does not obligate; the 'mode' *obligates* but does not suspend (for he who inherits with a mode *is already* an heir; one who inherits conditionally is *not yet an heir*)." *(6 Manresa 181).*

Art. 883. When without the fault of the heir, an institution referred to in the preceding article cannot take effect in the exact manner stated by the testator, it shall be complied with in a manner most analogous to and in conformity with his wishes.

If the person interested in the condition should prevent its fulfillment, without the fault of the heir, the condition shall be deemed to have been complied with. (798a)

COMMENT:

(1) Analogous or Substantial Compliance

The 1st paragraph deals with analogous or *substantial* compliance. *Example:* "Buy a new 2003 BMW." If this cannot be obtained, a slightly used 2002 BMW will perhaps be suitable.

(2) Constructive Fulfillment

Example of the 2nd par.: A institutes a friend *B* as heir provided *B* passes the bar of 2003. If *C,* a brother of *A* (and the only surviving relative of *A*) *inflicts injuries on B* such that *B* cannot take the bar exams for 2002; it is as if *B* has passed the bar, and *B* gets the estate. *C* here is the person interested in the condition because *C*, being the presumptive or legal heir, would have received the estate had the condition not been fulfilled. To punish *C,* and to prevent an injustice being committed upon *B, B* is entitled to the estate because the condition in this case shall be deemed to have been complied with.

Art. 884. Conditions imposed by the testator upon the heirs shall be governed by the rules established for conditional obligations in all matters not provided for by this Section. (791a)

COMMENT:

Suppletory Force of Rules on Conditional Obligations

The provisions on conditional obligations *(Arts. 1179-1190 et seq.)* govern matters not provided for by this section. In case of conflict, this section will prevail.

Art. 885. The designation of the day or time when the effects of the institution of an heir shall commence or cease shall be valid.

In both cases, the legal heir shall be considered as called to the succession until the arrival of the period or its expiration. But in the first case he shall not enter into possession of the property until after having given sufficient security, with the intervention of the instituted heir. (805)

COMMENT:

(1) Institutions With a Term

(a) *suspensive term* or *ex die* — effects begin from a certain day (*Example:* "beginning 2008")

(b) *resolutory term* or *in diem* — effects cease on a certain day (*Example:* "up to 2008")

(c) *ex die in diem* — from a certain day to a certain day (*Example:* "beginning 2008 until 2009")

(2) Example

A has a brother *B (A's* only relative) but institutes *C* as heir beginning 5 years from *A's* death. During the five-year interval *B* is considered called to the succession until the period expires. But *B* cannot enter into possession of the property until after he has given sufficient security. The security must be approved and considered suitable by *C*, the instituted heir.

[NOTE: While *B* is entitled to inherit in the meantime, this is only so if the testator had not designated any other *interim* heir for this article may be considered suppletory, there being no prohibition to institute such *interim* heir. *(6 Manresa 225).].*

[NOTE:

(a) In the example given, *B* is to be considered merely as the usufructuary, with the right to enjoy but not alienate, *unless* the alienation be subject to the right of *C* to eventually get the property. *(6 Manresa 225).* If *B* does not offer security, it is as if he *renounced* the inheritance and the property *should really* go to the next legal heir, instead of being put under administration, as *apparently required* by Art. 880. *(See 13 Scaevola 767).*

(b) In case the legal heir concerned happens to be the State, is it required to give security? A noted commentator answers this in the negative. *(See 13 Scaevola, p. 777).*

(c) If the institution be *in diem,* and the first heir takes possession in the meantime, does he have to give security for the protection of the legal heirs who will get the property later?

ANS.: No, since this is not required by the law. *(See 2nd paragraph, Art. 885; see also 6 Manresa 225).].*

Section 5

LEGITIME

Art. 886. Legitime is that part of the testator's property which he cannot dispose of because the law has reserved it for certain heirs who are, therefore, called compulsory heirs. (806)

COMMENT:

(1) Historical Notes on the Legitime

(a) The system of legitime is preserved in the new Code. It is a vogue in almost all countries of Europe and Latin America. China has realized that the legitime is essential to maintain her customs and traditions. Russia, though the leading exponent of communism, nevertheless adopted a certain form of legitime in 1928. *(Comment of the Code Commission).*

(b) Generally speaking, freedom of disposition of property is permitted only in England and in the United States of America. But in some States of the American Union, there is a certain kind of legitime for the widow. Some American and English jurists have criticized the present system in their countries and advocated the adoption of the scheme of legitime. Considering the *customs* and *traditions* of the Filipino people, and for the sake of family solidarity, the Commission decided that the legitime should be retained in the new Civil Code. Although legitime is preserved in the new Civil Code, changes are made with respect to the amounts that the compulsory heirs should receive, and illegitimate children other than acknowledged natural are made compulsory heirs. *(Comments of the Code Commission).*

(2) Three Systems Affecting the Legitime

(a) System of the LEGITIME *(PARTIAL RESERVATION)* — here, a part is for the legitime, a part is for the *free portion*.

(b) System of TOTAL RESERVATION — here, *everything* goes to the compulsory heirs, as long as there is at least one. Only when there is none is there *freedom to dispose*.

(c) System of TOTAL FREEDOM OF DISPOSITION — in this system, there is no legitime. Everything is free. *(See 4 Castan 478)*.

(3) System of Legitime

The distribution under the old Civil Code of the estate in testamentary succession has been modified, thus:

(a) The legitime of the surviving spouse has been converted from *usufruct* into full *ownership*.

NOTE: The legitime of the spouse under the old Civil Code (which was a share in *usufruct* equivalent to the share of a legitimate child) was a right, which, of course, could be waived, but the waiver must be *express*. *(Gamis v. Court of Appeals, L-10732, May 23, 1959)*.

(b) Illegitimate children other than acknowledged natural under the Civil Code have been given a regular legitime. Children of void marriages are considered natural children by legal fiction under the Civil Code and receive the same legitime as acknowledged natural children. And other illegitimate children are each entitled to a share equal to four-fifths of that of an acknowledged natural child under the Civil Code.

(c) The *mejora* or betterment has been abolished, but the free portion has been increased to one-half, so that the testator may give a part or all of it to his legitimate children or descendants, or to third persons, subject to the rights of illegitimate children and the surviving spouse. *(Comment of the Code Commission)*.

NOTE: The classification of children and the rights of illegitimate children have been simplified and rationalized. Thus, for instance, the distinction between natural and spurious children has been eliminated.

(4) Purpose of the Legitime

(a) To protect the children and the surviving widow or widower from the unjustified anger or thoughtlessness of the other spouse — this is the purpose of the legitime.

(b) If there are no compulsory heirs, it follows that there can be no legitime.

(c) Legitime may be received from two aspects: first as a right; and second, as the property itself. This means that when a person refers to his legitime from his father, he talks either of the right to succeed to a certain portion of the inheritance; or he may be referring to the actual property itself.

(d) The testator cannot deprive his compulsory heirs of their legitime, except in cases expressly specified by law. Neither can he impose upon the same any burden, encumbrance, condition, or substitution of any whatsoever *(Art. 904),* except, of course, the condition that the property will *not* be divided for a period not exceeding 20 years.

Dorotheo v. CA
320 SCRA 12
(1999)

Even if the will was validly executed if the testator provides for dispositions that deprive or impair the lawful heirs of their legitime or rightful inheritance according to the laws on succession, the unlawful provisions/dispositions thereof cannot be given effect.

(e) Even if a testator does not want to make a compulsory heir an heir, he cannot do so, because this limitation is imposed upon him directly by the law. If he intentionally or unintentionally omits to put them in his will or omits to grant them part of the property in the *succession,* his wish cannot prevail for the law provides that "the preterition or omission of one, some, or all of the compulsory heirs in the direct line, whether living at the time of the execution of the will or born after the death of the testator, shall annul the institution of heir, but the devises and legacies shall

be valid insofar as they are not inofficious. If the omitted compulsory heirs should die before the testator, the institution shall be effectual, without prejudice to the right of representation." *(Art. 854).* If he wants to disinherit any or all of his compulsory heirs, he may do so but this disinheritance should be for causes expressly stated by law, and effected only through a will wherein the legal cause therefor shall be specified. As a consequence of this *valid* disinheritance, a compulsory heir may be deprived of his legitime. *(Art. 915).*

Garcia v. Orozco
L-35213, Aug. 31, 1978

A sale made by the surviving spouse (to a sister of a conjugal lot) to avert the claims of compulsory heirs can be set aside by the court.

(5) Effect of Donations

The law respects the legitime so much that even donations *inter vivos* are to be reduced if found *inofficious* (that is, if they exceed the free portion) for no person may give by way of donation more than he may give by will. The donation is considered inofficious in all that it may exceed this limitation. *(Art. 762).* An alienation, however, which is for an onerous or valuable consideration (as a sale) would be proper since in this case, there merely is the substitution of one kind of property for another.

(6) Vested Right to the Legitime

It is true that the right to enter into the possession of any inheritance commences only from the moment of the death of the predecessor-in-interest. But it is undeniable that a necessary or forced heir (compulsory heir), according to the system of legitimes, has by provision of law, from the time of his birth, a *vested right to eventually acquire* the inheritance from his ascendants, the right to be *actually vested,* from the moment of death. Such a vested right is inherent with his filiation to which belong the obligations and rights of the author of his being. *(Rocha v. Tuason and Rocha de Despujol, 39 Phil. 973).*

(7) No Right of Compulsory Heirs To Insist That the Legitimes Be Given in the Form of Property

While compulsory heirs have a right to the legitime, they cannot insist that they be paid in the form of property, whether real or personal, when they are NOT AVAILABLE, as when the will itself contains a *partition* of the estate, specifically assigning the property to various heirs. In a case like this, the legitimes may be satisfied by paying CASH. *(Marina Dizon-Rivera v. Estela Dizon, et al., L-24561, June 30, 1970).*

(8) Meaning of "Compulsory"

Compulsory heirs are never compelled to accept the legitime — they may accept or reject — for no one can compel another to receive a gift or an economic advantage. They are *called* compulsory, only because the testator *cannot* disregard them.

(9) 'Right of Completion of Legitime'

If some heirs are genuinely interested in securing that part of their late father's property which has been reserved for them in their capacity as compulsory heirs, then they should simply exercise their *actio ad supplendam legitiman,* or their "right of completion of legitime." *(Gala v. Ellice Agro-Industrial Corp., 418 SCRA 431 [2003]).*

Art. 887. The following are compulsory heirs:

(1) Legitimate children and descendants, with respect to their legitimate parents and ascendants;

(2) In default of the foregoing, legitimate parents and ascendants, with respect to their legitimate children and descendants;

(3) The widow or widower;

(4) Acknowledged natural children, and natural children by legal fiction;

(5) Other illegitimate children referred to in Article 287.

Compulsory heirs mentioned in Nos. 3, 4 and 5 are not

excluded by those in Nos. 1 and 2; neither do they exclude one another.

In all cases of illegitimate children, their filiation must be duly proved.

The father or mother of illegitimate children of the three classes mentioned, shall inherit from them in the manner and to the extent established by this Code. (807a)

COMMENT:

(1) Under Art. 185 of the Family Code

Under the Family Code, there are no more spurious children. Both the natural and the spurious children are simply called ILLEGITIMATE CHILDREN having exactly the same rights. Each of them gets half the share of each legitimate child, and will be taken from the free portion after the share of the surviving spouse has been satisfied.

(2) Classes of Compulsory Heirs

There are two kinds of compulsory heirs:

(a) the primary compulsory heirs

(b) the secondary compulsory heirs

(There may be also the concurring compulsory heirs as will be explained later.)

(3) Primary Compulsory Heirs

The *primary compulsory* heirs get their legitime even in the presence of the other primary compulsory heirs and even in the presence of the secondary compulsory heirs. The primary forced heirs are those mentioned in Nos. 1, 3, 4, and 5, Art. 887. Note that the illegitimate children, to be compulsory heirs, must be recognized.

Sanchez v. Fabillaran
Adm. Matter No. P-1175, Oct. 30, 1979

If the alleged father signed on the certificates of live birth of the child as its father, this is very good evidence of acknowledgment or recognition.

Francisco A. Tongoy v. Court of Appeals
L-45645, June 28, 1983

Natural children, *who have not been voluntarily recognized or acknowledged* should be regarded as LEGITIMATED in case their parents will have a subsequent valid marriage. This is particularly true if said children had enjoyed the continuous possession of the status of acknowledged natural children by direct acts of the parents or the members of the family. Estoppel should prevent the family from questioning the status. Besides, technicality should give way. The said children will therefore be allowed to inherit.

NOTE: There is no more distinction between the natural and spurious children under the Civil Code. *(See Art. 185, Family Code).*

(4) Secondary Compulsory Heirs

The *secondary compulsory* heirs are those mentioned in No. 2 in Art. 887. They inherit only in the absence of No. 1 in Art. 887. The father or the mother of illegitimate children is also a secondary compulsory heir but only as provided for in Art. 903.

(5) Table of Compulsory Heirs

[NOTE: The relatives mentioned are those of the TESTATOR.*]*.

PRIMARY COMPULSORY HEIRS	SECONDARY COMPULSORY HEIRS
(1) Legitimate and their descendants (legitimate). *(See Art. 992.)*	(4) legitimate *parents* and *ascendants (legitimate) [NOTE:* They inherit only in DEFAULT of *No. (1).]*.
(2) Surviving Spouse (legitimate).	
(3) Illegitimate *children* and their *descendants (legitimate or illegitimate). (See Art. 902).*	(5) illegitimate parents (no other ascendants) *[NOTE:* They inherit only in DEFAULT of *Nos. (1) and (3).]*.

Ventura v. Ventura
77 SCRA 158

A declaration by a court that certain persons are the legitimate children of the deceased can become final.

Macadangdang v. Hon. Court of Appeals
L-49542, Sep. 12, 1980

FACTS: A married woman had carnal knowledge with a man other than her husband. When the husband discovered his wife's infidelity, they separated from each other. Seven (7) months later, a child, normal and healthy, was born to the wife. Who is the father of the child and what is the status of the latter?

HELD: The husband is the father of the child, the latter being the former's conclusively presumed legitimate child. *(Art. 255, Civil Code).* While the parents are separated, the separation came *after,* not before, the illicit carnal liaison. Besides, the fact that the child was born normal indicates that it had had an intra-uterine life of nine months, and cannot be the offspring of the extramarital intercourse seven (7) months before its birth.

Noble v. Noble
L-17742, Dec. 17, 1966
18 SCRA 1104

FACTS: A person claiming to be an illegitimate child wanted to intervene in the probate proceedings. She alleged that she enjoyed the status of a child of the deceased and that she had evidence indicating that the decedent was her father. Should she be allowed to intervene and thus inherit?

HELD: Generally, she should not be allowed. Mere proof of filiation is not enough. What is important is *recognition of that filiation*. *[NOTE:* If the claimant was a *minor* at the time of the father's death, she can ask that she be recognized if she has a ground to compel recognition. This move for compulsory recognition must be done within four years after attaining majority. *(See Art. 286, Civil Code).].*

Relatives Surviving	Legit. Children and Descendants	Surviving Spouse	Illeg. Children	Leg. Parents and Ascendants	Illeg. Parents
(1) Legitimate Children (alone)	1/2 divided by the number of children	x	x	x	x
(2) One Leg. Child, surviving Spouse	1/2	1/4	x	x	x
(3) Two or more leg. children, Surviving Spouse, Illeg. Children	1/2 (divided by no.)	same as 1 leg. C.	x 1/2 of each L.C.	x x	x x
(4) Surviving Spouse, Illeg. Children	x	1/3	1/3	x	x
(5) Leg. Parents (or ascend.), Surviving Spouse, Illeg. Children	x	1/8	1/4	1/2	x
(6) Leg. Parents (alone)	x	x	x	1/2	x
(7) Illeg. Children (alone)	x	x	1/2	x	x
(8) Surv. Spouse (alone)	x	1/2, 1/3, 1/2	x	x	x
(9) Leg. Parents and Surv. Spouse	x	1/4	x	1/2	x
(10) Ill. Parents (alone)	x	x	x	x	1/2
(11) Ill. Parents and Surv. Spouse	x	1/4	x	x	1/4

Bulos v. Tecson
L-18285, Oct. 31, 1962

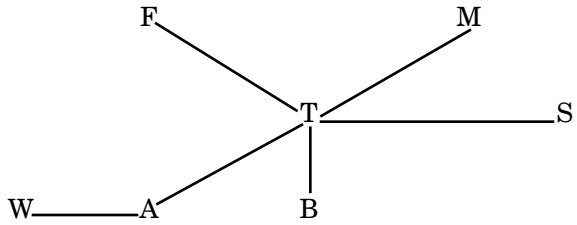
ISSUE: If recognized spurious children were born *before* the effectivity of the new Civil Code, will they be entitled to the legitime?

HELD: Yes, *but* only if their father died AFTER the effectivity of the new Civil Code on Aug. 30, 1950. *(See Art. 2263).*

(6) Simpler Table of Legitimes

Ill. Children — 1/3 Surv. Spouses — 1/3	Ill. Parents alone — 1/2
Ill. Children — 1/4 Surv. Spouse — 1/8 Leg. Parents — 1/2	Surv. Spouse alone — 1/2, 1/3, 1/2 Leg. Child Alone — 1/2
Ill. Children — 1/4 Leg. Parents — 1/2 Leg. Parents — 1/2 Surv. Spouse — 1/4	1 Leg. Child — 1/2 Surv. Spouse — 1/4
Ill. Parents — 1/4 Surv. Spouse — 1/4	2 or more Leg. Children — 1/2 Surv. Spouse — same as 1 Leg. Child
Ill. Child alone — 1/2 Leg. Parents alone — 1/2	Leg. Child — 1/2 of estate Illeg. Child — 1/2 of each Leg. Child (under the Family Code)

(7) Example of Art. 887



Legend:

T is the testator, *F* and *M* are his parents*; A* is *T's* legitimate child*; B is T's* illegitimate child*; S* is *T's* surviving spouse*; W* is the wife of *A*.

[NOTE: The matter of acknowledgment of an alleged natural child and his claim as such to a share in the estate of the alleged natural father may be determined in an ordinary civil action or in the special proceedings for the settlement of the estate *of* the deceased father. *(Escoval v. Escoval, 48 O.G. 616; Tiamson v. Tiamson, 52 Phil. 62; Remela Zaldarviaga v. Enrique F. Mariño, L-19566, May 25, 1964).].*

Explanation:

(a) *A, B,* and *S* are all entitled to their legitimes even if all of them are present.

(b) *F* and *M* are entitled to their legitimes in default of *A*.

(c) If only *F*, *M*, *S,* and *B* are present, they are all entitled to their legitimes.

(d) If only *F* and *A* are present, *A* is entitled to his legitime but not *F,* who is only a secondary compulsory heir.

(e) *W* who is *A's* wife is not a compulsory heir of *T* but is a compulsory heir of *A*.

Rosales v. Rosales
L-40789, Feb. 27, 1987

A surviving spouse is not an intestate heir of his or her parent-in-law. Neither is a widow (surviving spouse) a compulsory heir of her parent-in-law in accordance with the provisions of Art. 887 of the Civil Code.

The aforesaid provision of law refers to the estate of the deceased spouse in which case the surviving spouse (widow or widower) is a compulsory heir. It does not apply to the estate of a parent-in-law. Indeed, the surviving spouse is considered a third person as regards the estate of the parent-in-law.

> We had occasion to make this observation in *Lachenal v. Salas, L-42257, June 14, 1976*, to wit: "We hold that the title to the fishing boat should be determined in Civil Case No. 3597 (not in the intestate proceeding) because it affects the lessee thereof, the decedent's *son-in-law, who, although married to his daughter or compulsory heir is nevertheless a third person* with respect to his estate."

(8) Brothers and Sisters

Brothers *(Gutierrez del Camo v. Varela Calderon, 59 Phil. 631)* and sisters *(Manahan v. Manahan, 58 Phil. 448)* ARE NOT compulsory heirs; neither are strangers *(Barrios v. Enriquez, 52 Phil. 509)* but there is nothing wrong in giving them a share of the inheritance, if the testator so wants provided that the legitimes of the compulsory heirs are not impaired. In such case, the brothers, or the sisters, or even the strangers, would be termed *voluntary* heirs or devisees or legatees as the case may be.

(9) The Case of Rabadilla

Johnny S. Rabadilla v. CA and
Maria Marlena Coscoluella
y Belleza Villacarlos
GR 113725, June 29, 2000

It is a general rule under the law on succession that successional rights are transmitted from the moment of death of the decedent *(Art. 777)* and compulsory heirs are called to succeed by operation of law. The legitimate children and descendants, in relation to their legitimate parents, and the widow or widowers, are compulsory heirs.

Thus, the petitioners, his mother and sisters, as compulsory heirs of the instituted heir, Dr. Jorge Rabadilla, succeeded the latter by operation of law, without need of further proceedings, and the successional rights were transmitted to them from the moment of death of the decedent, Dr. Jorge Rabadilla.

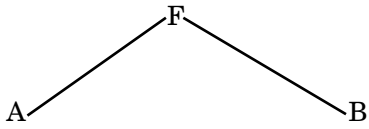
Art. 888. The legitime of legitimate children and descendants consists of one-half of the hereditary estate of the father and of the mother.

The latter may freely dispose of the remaining half, subject to the rights of illegitimate children and of the surviving spouse as hereinafter provided. (808a)

COMMENT:

(1) Legitime of Legitimate Children and Descendants

Example:



The legitime of *A* and *B*, the legitimate children of *F* is one-half of *F's* hereditary estate. If the estate is worth P1,000,000, the total legitime of *A* and *B* together is equal to P500,000. So the legitime of each child is P250,000. The remaining P500,000 is called the free portion. This free portion is however subject to the legitimes of the surviving spouse and the illegitimate children if they exist. For convenience, it would be proper to consider that part of the *free portion* left after deducting the legitimes of the surviving spouses and the illegitimate children, if present, as the *free disposal*, for it is really this part that can be given to strangers and other people.

(2) Rule Under the Old Civil Code

Under the old Civil Code, the hereditary estate was divided into three:

(a) the strict legitime — one-third (this must be divided equally among the legitimate children)

(b) the *mejora* — one-third (This must also be given to the legitimate children but not necessarily in equal portions. It might indeed be given only to one.)

(c) the free portion — one-third

[NOTE: The strict legitime, thus the *mejora* or betterment equalled the *"long legitime"* in the old Civil Code.*].*

(3) Comment of the Code Commission

"… the *mejora* or betterment whose purpose of equalization was more imaginary than real has been eliminated from the new Civil Code. The system of betterment is specially a Spanish institution. It has a peculiar concept in Spanish law in that it forms part of the long legitime and may be given only in favor of legitimate children and descendants. This concept also obtains in Colombia *(Art. 1263),* Guatemala *(Art. 840),* Bolivia *(Art. 571),* and Chile *(Art. 1184).*

"In *other countries,* the *mejora* is taken from the free portion and may be given not only to compulsory heirs but *also to strangers*. Concerning this way of considering the *mejora,* mention may be made of Uruguay *(Art. 893),* Argentina *(Art. 3639),* Louisiana *(Art. 1801),* Belgium *(Arts. 919, 843, 844),* Holland *(Arts. 866, 1132, and 1113),* and Austria. *(Art. 788).* The French *'preciput'* is akin to the Spanish *mejora,* but as in the countries above-mentioned, it is taken from the free portion. *(French Civil Code, Arts. 911, 843, 844).*"

(4) Reasons for Abolishing the Mejora

The Code Commission eliminated the *mejora* from the new Civil Code for the following reasons:

(a) The supposed equalization of natural inequalities among children through the system of the *mejora* was in many cases but imaginary, because parents often acted upon other bases, such as rewarding the better qualities of character of one of the children.

(b) Such reward might (after all) be effected by the father or mother by disposing of part or all of the free half.

(c) The testator should have greater freedom to dispose of his estate by will. Under the old law, the free portion was only one-third of the estate. The testator should be allowed greater scope to decide for himself

how far he shall pay his debts of gratitude (not collectible or demandable debts) to persons other than his children and descendants, subject to the limitations of Article 1028 of the new Civil Code concerning *illegal donations mortis causa. (Comments of the Code Commission).*

(5) Formula

Formula for the legitime of a legitimate child under the new Family Code.

$$\text{Legitime of one Leg. Child} = \frac{\text{Estate}}{2 \textit{ times } \text{No. of Leg. Children}}$$

(6) Articles of the Civil Code Involving the Legitimes of Compulsory Heirs

In testamentary succession, the following articles provide for the legitimes of the compulsory heirs if they succeed with or without the concurrence of other compulsory heirs:

Art. 888 — Legitimate children and descendants.

Art. 889 — Legitimate parents or ascendants.

Art. 892 — a) One legitimate child or descendant concurring with the surviving spouse.

b) Two or more legitimate children or descendants together with the surviving spouse.

Art. 893 — Legitimate parents or ascendants with the surviving spouse.

Art. 894 — Illegitimate children with the surviving spouse.

Art. 895 — Legitimate children or descendants with natural and other illegitimate children.

Art. 896 — Legitimate parents or ascendants and illegitimate children.

Art. 897 — Surviving spouse with legitimate children or descendants and natural children.

Art. 898 — Surviving spouse with legitimate children or descendants and illegitimate children other than natural.

Art. 899 — Surviving spouse with legitimate parents or ascendants and illegitimate children.

Art. 900 — Surviving spouse alone.

Art. 901 — Illegitimate children, with no other compulsory heirs.

Art. 903 — a) Parents of the illegitimate child who leaves neither legitimate descendants, nor a surviving spouse, nor illegitimate children.

b) Parents of the illegitimate child with the surviving spouse. *(Comment of the Code Commission).*

(7) Gaps Filled by the New Civil Code

The old Civil Code aimed to provide for the legitimes of some compulsory heirs when they concurred with others of the same character. In such cases, the commentators of the said Code, especially Jose Maria Manresa, invoked the principle of justice and equity by drawing inferences from other provisions scattered in the same Code. The new Civil Code attempts to fill these gaps, thus making the law on Succession more comprehensive and clarifying. *(Comment of the Code Commission).*

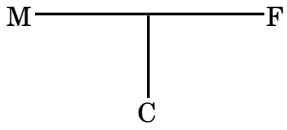
Art. 889. The legitime of legitimate parents or ascendants consists of one-half of the hereditary estates of their children and descendants.

The children or descendants may freely dispose of the other half, subject to the rights of illegitimate children and of the surviving spouse as hereinafter provided. (809a)

COMMENT:

Legitime of Legitimate Parents and Ascendants

Example:



Legend: *C* is the child of *M* and *F*. If *C's* estate is P1,000,000, the legitime of the parents taken together is equal to P500,000; hence, each parent gets P250,000. The remaining P500,000 may be disposed of in favor of strangers (in favor even of *M* and *F*), subject to the legitimes and rights of illegitimate children and the surviving spouse, if present.

[NOTE: In the preceding problem, if *C* has a legitimate child *D,* parents *(M and F)* get no legitime, because said parents are only secondary compulsory heirs. *(Art. 887, No. 2).].*

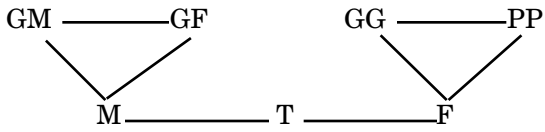
Art. 890. The legitime reserved for the legitimate parents shall be divided between them equally; if one of the parents should have died, the whole shall pass to the survivor.

If the testator leaves neither father nor mother, but is survived by ascendants of equal degree of the paternal and maternal lines, the legitime shall be divided equally between both lines. If the ascendants should be of different degrees, it shall pertain entirely to the ones nearest in degree of either line.

COMMENT:

Division in the Ascending Direct Line

Example:



Legend: *GM* and *GF* are the maternal grandparents, while *M* is the mother. *GG* and *PP* are the paternal grandparents, while *F* is the father. *T* is the testator, leaving a hereditary estate of P1,000,000.

Explanation:

(a) If all (except of course *T*) survive, the grandparents get nothing, P500,000 is the legitime of *M* and *F* together, so each gets P250,000. The remaining P500,000 is the free portion. *(Art. 890, Art. 889).*

(b) If *M* predeceased (died before) *T, F* gets P500,000 as legitime. The remaining P500,000 is the free portion. *GM* and *GF* cannot represent *M,* because there is no right of representation in the ascending line. *(Art. 890, 1st par.; Art. 972, 1st par.).* Besides, in every inheritance, the relative nearest in degree excludes the more distant ones, saving the right of representation when it properly takes place. *(Art. 962).*

(c) If *M* and *F* predeceased *T*, and the others are still alive, the maternal line gets half of the legitime and the paternal line gets the other half. The maternal line gets P250,000 and this should be divided equally between *GM* and *GF,* who will get P125,000 each. If *GM* has also predeceased *T, GF* gets all the P250,000 (the legitime of *T's* maternal line). What has been said of the maternal line is also true of the paternal line. Notice that this rule applies only when the ascendants are all of equal degree, that is, all are grandparents. *(Art. 890, 2nd par.).*

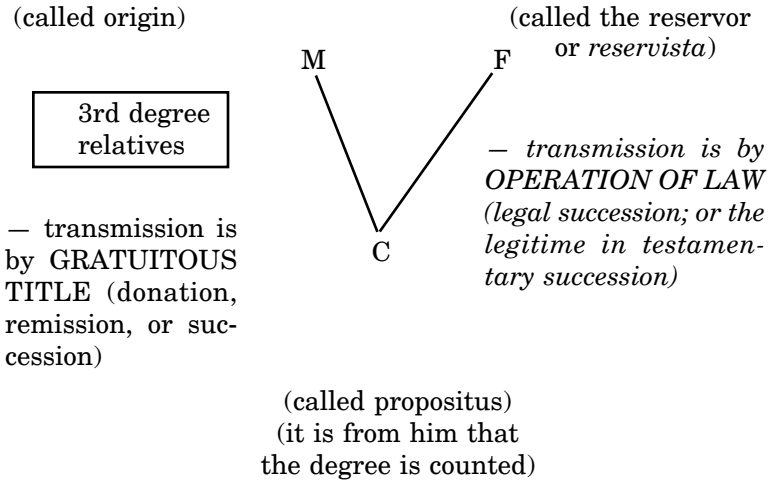
(d) If the only survivors are ascendants of different degrees, (as when only *GM* and the mother of *PP* survive — a case of grandparent and great grandparent) the legitime shall

pertain *entirely* to the ones nearest in degree of either line, that is, *GM,* the grandmother, being nearer in degree than the great grandmother, gets the entire legitime. *(Art. 890, 2nd par.).* This is in line with the principle that as a rule, the nearer excludes the farther. *(Art. 962).*

Art. 891. The ascendant who inherits from his descendant any property which the latter may have acquired by gratuitous title from another ascendant, or a brother or sister, is obliged to reserve such property as he may have acquired by operation of law for the benefit of relatives who are within the third degree and who belong to the line from which said property came. (871)

COMMENT:

(1) Example of Reserva Troncal



Explanation:

(a) *M* and *F* are the parents of *C*. *M* died leaving a will, one provision of which gave a parcel of land to *C*. One week later, *C* died *without* any descendant, and *without* any will. The father *F* then inherited the land. This land is

however subject to what is known as the *reserva troncal* (or the *reserva lineal*). This means that *F* owns it only till he dies, and at his death, it should NOT go to anybody whom he desires, but is *reserved* by the law in favor of the *relatives* of *M;* in other words, in favor of the *line* from which the property came. These relatives must be within the 3rd degree, to be counted from *C*.

[Problem — If in the problem given, the property is claimed by a *brother* of *F* and by a *brother* of *M*, who should get the property?

ANS.: The brother of *M* gets the property as a result of *reserva troncal. (See Leona Aglibot, et al. v. Andres Acay Mañalac, et al., L-14530, Apr. 25, 1962,* where the Court applied the provision on *reserva troncal).].*

Frias Chua v. CFI of Negros Occidental
L-29901, Aug. 31, 1977

FACTS: During his marriage to his first wife, a man had a son and two grandchildren. When the wife died, he married again, and with the second wife, he had a son. When the man died, a parcel of land owned by him was inherited by his son and the second wife (half, half) thru intestate succession. After a while, the son of the second marriage died and his half-share in the land was inherited by his mother (his father's second wife) by operation of law. After the mother's death, can the son and the grandchildren of the first marriage get the land?

HELD: They can get the *half share of* the land that was held by the second wife by way of *reserva troncal.* This 1/2 had been inherited by the son of the second marriage by gratuitous title, and transferred to his mother by operation of law. The present claimants are relatives within the third degree *(reservees).*

(b) As will be noticed, there are *two different modes* of transmission present:

1) the transfer from the ascendant *M* (or from *C's* brother or sister) to *C* must be by *GRATUITOUS*

TITLE (donation, remission, testamentary succession, legal succession);

2) the transfer from *C* to the ascendant *F* must be by OPERATION OF LAW (legal succession, or the legitime in the case of testamentary succession).

Lacerna v. Vda. de Corcino
L-14603, Apr. 29, 1961

FACTS: A son inherited a parcel of land from his mother. Is there already a *reserva troncal*?

HELD: Not yet, for the requisites under Art. 891 are not present. *[NOTE:* If in the case presented, the father will *later* inherit, by operation of law, the land from the son, a *reserva troncal* will arise, with the father as reservor.*]*.

Beatriz Gonzales v. Court of First Instance
L-34395, May 19, 1981

Benito Legarda died survived by three groups of heirs who partitioned the real properties among themselves in three equal portions:

(1) one daughter

(2) another daughter

(3) heirs of a deceased son (Benito Legarda, Jr.).

These heirs were:

(a) the son's widow (Filomena)

(b) seven children (4 daughters named Beatriz, Rosario, Teresa and Filomena, Jr., and 3 sons named Benito, Jr., Alejandro, and Jose).

Filomena, Jr., died intestate, and without any child. Her mother Filomena, Sr., partitioned their 1/3 share in the estate of Legarda, Sr., with her 6 surviving children and *then gave the properties she inherited from Filomena, Jr., to her sixteen*

(16) grandchildren by means of a holographic will. May this giving in the holographic will be lawfully done?

HELD: No, because the properties given by such holographic will were *reservable properties (reserva troncal, reserva lineal, reserva familiar, reserva extraordinario, reserva semi-troncal — all are synonymous)* because they were inherited gratuitously from an ascendant (Benito, Jr.), transmitted to a descendant (Filomena, Jr.) then given to another ascendant (Filomena, Sr.) by operation of law. *(Art. 891, Civil Code).* Said properties should not have been given to the *grandchildren* (3rd degree reservees) but to the *children* (2nd degree reservees).

(c) *Illustrative Problems*

1) A mother SOLD an automobile to her son. Later the child died without any descendant of his own. Said child died *intestate,* and therefore all his properties including the automobile were inherited by the father. Is the automobile subject to *reserva troncal*?

ANS.: No, for while it went to the father by *operation of law,* it nevertheless had NOT been acquired by the son from the mother by GRATUITOUS TITLE, there having been a SALE. (It would have been different had there been instead a *simple donation.*).

2) If the property was acquired by virtue of a *compromise involving hereditary properties,* it can be truthfully said that the property was acquired, not by the document of compromise but by *inheritance.* Hence, the acquisition was by *gratuitous title. (TS, Nov. 8, 1894, cited in Cabardo v. Villanueva, 44 Phil. 1866).*

3) A son inherited an automobile from his mother. Later, the son sold the automobile to his father. Is the automobile reservable property?

ANS.: No, because it had not been acquired by

the father by operation of law. A transfer by sale (and delivery) is not a transfer by operation of law.

4) A mother died intestate, leaving among other things, a car to her child. Later, the child died *intestate* and without issue *(without* descendants *of his own). Thus,* the father inherited the car. Is the car reservable property?

ANS.: Yes, because the child obtained it from the mother by gratuitous title (intestate succession is of course by operation of law, YET it is also gratuitous); and the father obtained it from the child by operation of law (intestate succession).

Frias Chua v. CFI of Negros Occidental
L-29901, Aug. 31, 1977

FACTS: When a father died, his son inherited 1/2 of a piece of land from him (the other 1/2 went to the surviving spouse, the mother of the child). Upon the death of the son, his 1/2 share went to his mother by operation of law. The property had been received from the father out of his pure generosity, and was therefore gratuitous. Yet the probate court ordered payment of interests, costs, and other fees. Is the said 1/2 still considered gratuitous for the purpose of the rule concerning *"reserva troncal"*?

HELD: Yes, for it was really a gratuitous object received from the father, who had not imposed any condition or burden on the lot. The obligation to pay was imposed not by the "origin" but by the court. The said 1/2 is therefore "reservable."

(d) As will be noticed also, there are four people (at least) involved in *reserva troncal.*

1) the ascendant or brother or sister from whom the property came (called ORIGIN)

2) the descendant who acquired the property gratuitously (called the PROPOSITUS)

3) the ascendant who in turn acquired the property

from the descendant by operation of law (said ascendant is called the RESERVOR or the RESERVISTA)

4) the relatives within the third degree belonging to the line from which the property came (said relatives are called RESERVEES or RESERVATARIOS).

Sumaya v. IAC
GR 68843-44, Sep. 2, 1991

The obligation to reserve rests upon the reservor. Article 891 of the new Civil Code on *reserva troncal* provides: "The ascendant who inherits from his descendant any property which the latter may have acquired by gratuitous title from another ascendant or a brother or sister, is obliged to reserve such property as he may have acquired by operation of law for the benefit of relatives who are within the third degree and who belong to the line from which said property came."

The Supreme Court does not agree with the disposition of the appellate court that there is no need to register the reservable character of the property, if only for the protection of the reservees, against innocent third persons. This was suggested in *Director of Lands v. Aguas, 63 Phil. 279 (1936),* where the main issue submitted for resolution was whether the reservation established by Article 811 (now Art. 891 of the new Civil Code) of the old Civil Code, for the benefit of relatives within the third degree belonging to the line of the descendant from whom the ascendant reservor received the property, should be understood as made in favor of all relatives within said degree and belonging to the line above-mentioned, without distinction, legitimate, natural and illegitimate ones not having the legal status of natural children.

However, in an *obiter dictum,* the Supreme Court stated therein: "The reservable character of a property is but a resolutory condition of the ascendant reservor's right of ownership, if the condition is fulfilled, that is, if upon the ascendant reservor's death, there are relatives

having the status provided in Article 811 *(Art. 891, New Civil Code),* the property passes, in accordance with its special order of succession, to said relatives, or to the nearest of kin among them, which question not being pertinent to this case, need not be determined. But if this condition is not fulfilled, the property is released and will be adjudicated in accordance with the regular order of succession. The fulfillment or non-fulfillment of the resolutory condition, the efficacy or cessation of the reservation, the acquisition of rights or loss of the vested ones, are phenomena which have nothing to do with whether the reservation has been noted or not in the certificate of title to the property. The purpose of the notation is nothing more than to afford to the persons entitled to the reservation, if any, due protection against any act of the reservor, which may make it ineffective. The reservable character of a property may be lost to innocent purchaser for value. The obligation imposed on a widowed spouse to annotate the reservable character of a property subject to *reserva viudal* is applicable to *reserva troncal*.

Consistent with the rule in *reserva viudal* where the person obliged to reserve (the widowed spouse) had the obligation to annotate in the Registry of Property the reservable character of the property, in *reserva troncal,* the reservor (the ascendant who inherited from a descendant, property which the latter inherited from another ascendant) has the duty to reserve and therefore the duty to annotate also.

The jurisprudential rule requiring annotation in the Registry of Property of the right reserved in real property subject of *reserva viudal* insofar as it is applied to *reserva troncal* stays despite the abolition of *reserva viudal* in the new Civil Code. This rule is consistent with the rule provided in the second paragraph of Section 51 of Presidential Decree 1529, which provides that: "the act of registration shall be the operative act to convey or affect the land insofar as third persons are concerned. x x x" Where the properties are covered by a Torrens title, no third person shall be prejudiced unless the registration of the limitation is effected (either actual or constructive).

The cause of action of the reservees does not commence upon the death of the *propositus*, but upon the death of the reservor. Relatives within the third degree in whose favor the right (or property) is reserved, have no title to ownership or of fee simple over the reserved property during the lifetime of the reservor. Only when the reservor should die before the reservees will the latter acquire the reserved property, thus creating a fee simple, and only then will they take their place in the succession of the descendant of whom they are relatives within the third degree.

The *reserva* is extinguished upon the death of the reservor, as it then becomes a right of full ownership on the part of the *reservatarios,* who can bring a reivindi-catory suit therefor. Nonetheless, this right if not exercised within the time for recovery may prescribe in ten (10) years under the old Code of Civil Procedure, or in thirty (30) years under Article 1141 of the new Civil Code. The actions for recovery of the reserved property was brought by respondents on Mar. 4, 1970 or less than two years from the death of the reservor. Therefore, respondents' cause of action has not prescribed yet.

(2) The ORIGIN Discussed

(a) The *origin* of the property must be an *ascendant* or *brother* or *sister*.

(b) The origin must be a LEGITIMATE relative because *reserva troncal* exists only in the legitimate family. *(See Niena v. Alcala, 41 Phil. 915; Centeno v. Centeno, 52 Phil. 332; Director of Lands v. Aguas, 63 Phil. 279).*

(c) The transmission from the *origin* to the *propositus* must be by gratuitous title.

Illustrative Problem:

A mother gave her son a sweepstakes ticket. Said ticket fortunately won first prize. On the child's death, the money went to the child's only surviving relative, his father. Is the money subject to *reserva troncal*?

ANS.: No, because the first prize came from the Philippine Charity Sweepstakes Office, not from the mother who was *never* the *owner* of said prize. *(See 6 Manresa 300-301).* (Of course, it would be different if the mother had given the money to her son only AFTER she had won the money; moreover, in the original problem presented, even if the money came only after the gift had been given, there would be *reserva troncal* — since this of course did *not* come from the sweepstakes ticket office.).

[NOTE: The same principle applies to *proceeds* from an insurance. It has been held that said proceeds do not partake of a donation.*]*.

(d) While the ORIGIN owns the property, there is of course no *reserva yet,* and therefore, the origin has the perfect right to dispose of it, in any way he wants, subject however to the rule on *inofficious donations*.

Hollero, et al. v. Court of Appeals
L-16579, June 29, 1964

FACTS: Paz Hollero mortgaged her paraphernal land. She died, leaving a son Felix, and her husband, Generoso Hollero. Generoso later paid off the mortgage (after Paz's death). Felix subsequently died. Still later, Generoso himself died. Upon Generoso's death, the relatives of Paz claimed the land on the allegation that a *reserva troncal* existed and that therefore they were entitled to the land. On the other hand, Generoso's own relatives denied the existence of a *reserva,* claiming that what Paz had executed was a *pacto de retro* transaction, and not a mere mortgage; there being a *pacto de retro* sale, Paz lost her ownership over the same, and therefore she could not have transmitted the property to her son, Felix. The Court of Appeals held that the transaction was a mere mortgage, thus Paz in her lifetime could not have lost ownership; thus also, there really was a *reserva troncal*. The ruling of the Court of Appeals was appealed to the Supreme Court. *Issue: May the Supreme Court still reverse the Court of Appeals on the nature* of the transaction entered into by Paz?

HELD: No, for the character of the transaction, according to the Supreme Court, was a question of FACT, on which the Court of Appeals' pronouncement is FINAL.

[NOTE: Please observe that it is evident that the Supreme Court considered the land as having exclusively passed to Felix (upon Paz's death) without any part thereof being inherited by the husband Generoso. This is not exactly accurate for under the old law (Paz having died in 1935), the surviving husband was entitled to a certain USUFRUCT over the property. Of course, under the new Civil Code, the share of the surviving spouse is NOT a mere usufruct.*].*

(e) If the *origin* be a brother or sister of the propositus, said origin must be a HALF-BROTHER or HALF-SISTER of the propositus, otherwise property would not be transferred to *another* line in passing from the propositus to the *common ascendant*.

[NOTE: The purpose of the *reserva* is to put it back to the line from which it *originally* came, and thus prevent outsiders of the line from obtaining by some special accident or streak of fortune, property that would otherwise have remained in the line. *(See TS, Dec. 30, 1897).].*

(3) The PROPOSITUS Discussed

(a) The *propositus* is the descendant (brother or sister) whose death gives rise to the *reserva,* and from whom therefore the third degree is counted. *(6 Manresa 275; 6 Sanchez Roman 1004).*

(b) While the *propositus* is still alive, there is no *reserva* yet, therefore he is the absolute owner of the property, with full *freedom to alienate or encumber.* Thus, he may even destroy the property or *exchange* or *sell* the property. In case he *sells* for example, the property he had received gratuitously, and because of such sale he receives *cash,* there is no *reserva* even if said cash is later on inherited by the ascendant by operation of law. This is so because the cash is NOT the *same* property that he had acquired gratuitously. *(6 Manresa 315).*

(c) The *propositus* must be a *legitimate* descendant (or legitimate half-brother or half-sister) of the *origin* of the property.

(d) Inasmuch as the *propositus* is the full owner of the property while he is *alive, he may even defeat* the existence of any possible *reserva* by simply *not giving* the property involved to his ascendant, by way of inheritance thru operation of law. This he may do by an effective partition or otherwise. *(See 6 Manresa 320).*

(4) The RESERVOR or RESERVISTA Discussed

(a) The *reservor* is the *ascendant* who inherits from the propositus by "operation of law." It is he who has the obligation to *reserve*.

(b) If he inherited the property from the descendant *not* by *legal succession* nor by virtue of the legitime, there is *no* obligation to reserve. This happens for example when he inherits the *free portion* by virtue of a will. *(See 6 Sanchez Roman 995-996).*

(c) *Kind of ownership possessed by the reservor*

The reservor is a full owner, *subject to a resolutory condition*. The resolutory condition is this: *If* at reservor's *death,* there should still exist relatives within the third degree of the propositus, and belonging to the line from which the property came, the reservor's ownership over the property is *terminated*. Hence, the property is *not part any more of his estate (and therefore not subject to the payment of his own debts)*. Instead, ownership is *transferred* to the relatives hereinabove referred to. (*See 6 Sanchez Roman 1034; see also Cabardo v. Villanueva, 44 Phil. 186* where the Supreme Court among other things said: "… supposing the property in question to be of reservable character, an *interest on the part* of the reservor Lorenzo Abordo and his heirs therein *terminated* with his death. Said property therefore does not pertain to his estate at all … in other words the property … is not, properly speaking, a *part* of the estate in administration at all.").

Beatriz Gonzales v. Court of First Instance
L-34395, May 19, 1981

The reservor's title is similar to that of a *vendee a retro* or that of the fiduciary in a fideicommissary substitution *(fideicomiso conditional)*. He has the legal title and dominion over the reservable property but subject to the resolutory condition that such title is extinguished if the reservor predeceases the reservees. The reservor is a *usufructuary* of the reservable property. He may alienate it subject to the reservation.

(d) In general, the reservor must make an INVENTORY *(including the actual condition of the properties and their value)* of the reservable property, and must furnish a *BOND, SECURITY* or *MORTGAGE* to guarantee the safe delivery later on to the *reservee* of the *properties* concerned, or their values, in the proper cases. (Unless the property involved is *real property,* the inventory can be made in *any form,* judicially or extrajudicially, private or public writing. If real property is involved, its eventual registration necessarily presupposes the execution of a *public* instrument). *(See 6 Sanchez Roman 1896).* It is understood that the reservor is liable for all deteriorations imputable to his neglect, fault, or malice. *(6 Sanchez Roman 1035).* The bond, security, or mortgage is, however, *not* needed when the property has been *registered* as SUBJECT to the reservation or *reserva troncal. (Riosa v. Rocha, 48 Phil. 737; Dizon v. Galang, 48 Phil. 601).*

[NOTE: It is unfortunate that the new Civil Code does not have any provision regarding the rights and obligations of the *reservor* and the *reservees*. While it is true that even under the old Civil Code, no such provision also was found, still the Supreme Court has held that the rights and obligations referred to in *reserva viudal* could apply to a case involving *reserva troncal. (Riosa v. Rocha, 48 Phil. 737; Dizon v. Galang, 48 Phil. 601; TS, Dec. 30, 1897).* Despite the abolition of the *reserva viudal* in the new Civil Code, it is believed that the jurisprudence on the subject can very well be made use of in determining

the rights and obligations of the parties in *reserva troncal.].*

(e) The reservor, being the full owner of reservable PERSONAL property, may *donate, sell,* or *pledge* them, and the donee-purchaser becomes full *owner* of the property. However, so as not to prejudice the reservees (in case they should exist after the reservor dies), the estate of the reservor must *reimburse* them for whatever they have lost by virtue of such donation, sale, or pledge.

(f) Has the reservor the power to alienate or encumber the reservable REAL PROPERTY?

ANS.: Yes, but subject to the reserva, that is, the reservee can get the real property from the transferee as soon as ownership is transferred to such reservee, *without prejudice* of course to the Land Registration Act and the Mortgage Law. Said alienation or encumbrance can even be made without the consent of, or notice to, the reservees. *(See 7 Manresa 287; Riosa v. Rocha, 48 Phil. 737).* Thus, if *reservable land* is registered under the Torrens System as free (that is, no encumbrances, liens, or *reservas*), an *innocent* purchaser for value will be preferred over a *reservee*. *(Tuason v. Reyes, 48 Phil. 844).* However, the estate of the reservor will of course have to indemnify the reservee.

[NOTE: Even if the property is registered under the Torrens System as FREE, still, if a purchaser *knows* of the existence of the reserva, it is clear that he buys the property subject to the *reserva*, for after all, actual knowledge is equivalent to registration. Of course, it would be permissible for the reservees to *ratify* the sale, that is, they *can validly renounce* their right to the *reserva*. *(See 6 Sanchez Roman 1895).].*

BAR QUESTION

May the property subject to *reserva* be alienated?

ANS.: Inasmuch as the reservor is not a mere usufructuary, the answer is YES, without prejudice to reim-

bursement by his estate concerning *personal properties,* and *without* prejudice to the reservation insofar as real properties are concerned. *(See Lunsod v. Ortega, 46 Phil. 664; see also the following succeeding cases).*

(g) CASES

De Los Reyes v. Paterno
34 Phil. 420

FACTS: In Sep. 1909, reservable property was registered as free under the Torrens System. No *objection* was presented to the registration of the land, although the registration did not include the reserva. *Six years* later, the reservees *(reservatarios)* claimed their rights to the reservable properties. Are they justified?

HELD: No, the reservees are not justified. "The provisions of Sec. 38 of Act No. 496 — the Land Registration Act — seem to prohibit absolutely the raising of any question concerning the validity of a title of land registered under the Torrens system, after the expiration of *one year.* We are of the opinion that the prohibitions contained in said section apply to *every claim, of whatever nature,* which a person may have had against registered lands... The plaintiff in this case did not protect his rights during the pendency of the action. Unless such right is protected during pendency of the action for the registration of land under the Torrens System or within a period of one year thereafter, such right is lost forever."

Riosa v. Rocha
48 Phil. 737

FACTS: Rufina Dizon died, and three parcels of land were inherited by her childless son. Later, the son died and the lands were inherited *intestate* by the father.

ISSUES:

1) What should the father now do insofar as the reservable property is concerned?

HELD: He must annotate the reservation in the Registry of Property within 90 days from the time he accepts the inheritance (if there be NO court litigation) or within 90 days from the time the court awards him the property (if there be court proceedings). *(See also Arts. 199 and 191, Mortgage Law).*

2) Suppose the annotation is not made by the father (reservor) within the period of 90 days, what is the right of the existing reservees?

HELD: Their right is to judicially demand that the reservor comply with his obligation or to demand that a mortgage be constituted for their security.

3) Suppose within the period of 90 days, the reservor alienates the property in favor of a purchaser who *knew* of the existence of the *reserva*, can the purchaser be compelled to make the annotation?

HELD: If the 90-day period has *not* yet lapsed, the purchaser cannot be compelled yet, because he still has the opportunity to make the annotation himself. If the 90-day period has lapsed, and he has not yet caused the annotation to be made, he can be *judicially compelled* to make the annotation. *Prior* to the lapse of the 90-day period, the reservees cannot be blamed if they fail to cause the annotation of the *reserva* — for the simple reason that they do *not yet* have the right to *compel* such annotation.

4) If within the 90-day period, the reservor dies, may the reservees get the property from the purchaser who had bought the property — knowing fully well that a *reserva* existed?

HELD: Yes, for the purchaser here acquired no better right than what the reservor had — full ownership *that was subject to a resolutory condition.*

5) Suppose the reservor has not yet died, and the 90-day period has already lapsed, may the reservee compel the purchaser to *annotate* the reservation and at the *same time* to constitute a mortgage or security?

HELD: Annotation can be compelled, but not the constitution of the mortgage or the giving of security. This is because once the annotation is made, the reservor is amply protected, and therefore, there is no more need for the security. The property itself, in this case, can answer for the efficacy of the *reserva troncal*.

Edroso v. Sablan
25 Phil. 295

The reservees are entitled to have their right annotated when the property is being registered under the Torrens System, so that the reservation may be annotated as a lien on the property. Unless this right is done, the *reserva* is *extinguished,* after the one-year period, insofar as innocent third parties are concerned. *(See also De los Reyes v. Paterno, 34 Phil. 420).*

(h) Aside from the obligation of making the inventory, annotation, and the giving of security (in the proper cases), the reservor is *duty bound not* to substitute the reservable property with others. *(See TS, Apr. 30, 1906).* Of course, if the property is lost or destroyed thru his fault or, in case the real property is now in the hands of an innocent purchaser for value who cannot be made to give up the property, the reservor must respond either with money or with equivalent substitute property. *(See 6 Manresa 314).*

(i) From that viewpoint, it may truly be said that *reserva troncal* constitutes a restriction or limitation on the right to the LEGITIME of ascendants.

(j) *BAR QUESTION*

A inherited certain property from his son *B*, who in turn had acquired it by inheritance from his deceased mother. Do you think that *A* can dispose by will of said property in favor of his own brothers, provided that at the time of his death, he should have no compulsory heirs?

ANS.: No, insofar as the property was inherited by *A* by *legal succession or as part of his legitime* in view of the existence here of *reserva troncal*. *(Art. 891).*

(5) The RESERVEES or RESERVATARIOS Discussed

(a) The reservees are the relatives within the third degree (from the propositus) who will become the full owners of the property the moment the reservor dies, because by such death, the *reserva* is extinguished. Indeed the only requisites for the passing of the title from the *reservista* (reservor) to the *reservatario* (reservee) are: (1) death of the reservista; and (2) the fact that the *reservista* had survived the *reservatario*. *(Cano v. Director of Lands, et al., L-10701, Jan. 16, 1959).*

(b) The reservees inherit the property from the propositus, not from the reservor. *(Gonzales v. CFI, L-34395, May 19, 1981).* We say from the propositus because had the propositus so desired it, there would not have been any *reserva*. Indeed, the *propositus* as "arbiter of the *reserva*" could have prevented the *reserva's* ever coming into existence by, for example, disposing of the properties, or substituting the same, while he was still alive, considering that he was FULL OWNER of said properties. Thus, it has been correctly ruled that the reservee is not the reservor's successor *mortis causa;* nor is the reservable property part of the reservor's estate: the reservee receives the property as a conditional heir of the propositus, said property merely reverting to the line of origin from which it has temporarily and accidentally strayed during the reservor's lifetime. It is also well-settled that the reservable property cannot be transmitted by the reservor to his own successor's *mortis causa* so long as a reservee exists. *(Cano v. Director of Lands, et al., L-10701, Jan. 16, 1959).*

Chua v. Court of First Instance
78 SCRA 412

In a case of *reserva troncal,* the reservee's right or cause of action accrues only from the moment the reservor dies.

(c) *The reservee must be a legitimate relative of the origin and propositus*.

Nieva v. Alcala
41 Phil. 915

FACTS: Juliana, with an acknowledged natural daughter, married Francisco. Their union resulted in a common child. When Juliana died, some of her properties were inherited by said common child, who then died without issue. The property was now inherited intestate by the father, Francisco. When Francisco died, the acknowledged natural daughter of Juliana claimed the property as a reservee in a case of *reserva troncal*.

ISSUE: Is the acknowledged natural daughter entitled to the property?

HELD: No, because she was an illegitimate, not a legitimate daughter of Juliana — Art. 891 applies only to legitimate relatives.

Gonzales v. Court of First Instance
L-34396, May 19, 1981

Reservees may be the common descendants of the reservor and the origin *reserva troncal* contemplates *legitimate* relationship. Illegitimate relationship and relationship by affinity are excluded.

(d) *BAR QUESTION*

Does the *reserva* mentioned in Art. 891 of the Civil Code apply in favor of all the relatives within the 3rd degree belonging to the line from which the property came, whether they be legitimate or illegitimate?

ANS.: The *reserva* favors only the legitimate relatives *(Nieva v. Alcala, 41 Phil. 915)* and even then, preference is given to the direct line as against the collateral line, and the rule of "nearer excludes the farther" also applies. *(Florentino v. Florentino, 40 Phil. 480).*

(e) If the reservor has no CASH when he dies, and the reservable property is MONEY, the reservees can either:

1) select equivalent property from the estate;

2) or demand the sale of sufficient property so that cash may be obtained. *(See 6 Manresa 315).*

(f) If the property (land) is about to be registered under the Torrens System of the reservor, the reservee is given the rights to oppose, not for the purpose of opposing, but for the purpose of annotating the reservatory lien on the property. *(Edroso v. Sablan, 25 Phil. 295).* Once the reservatory lien is annotated in the Registry in favor of the reservee, it is understood that, as soon as the reservor dies, the Registrar can issue a transfer Certificate of Title to the reservee, without the necessity of testate or intestate settlement proceedings. This is because the *reserva* in favor of the reservee had already been previously recognized. It would have been different had there been no previous registration of the lien.

(g) Even while the reservor is still alive, may the reservee *sell* the property to strangers?

ANS.: Yes, subject of course, to the condition that the reservee is *still alive* at the time the *reservor dies,* otherwise the sale is not valid for failure of the condition to materialize.

While it is true that a *negative* answer has been given by our Supreme Court in the case of *Edroso v. Sablan (25 Phil. 295),* still it should be noted that the Edroso decision on this point was based only on a decision of the Supreme Court of Spain dated *Dec. 30, 1897,* a decision later REVERSED in principle by same Spanish Tribunal on Apr. 1, 1914.

Moreover, it is very clear under our new Civil Code that "future property" or "thereafter-acquired property," which in the *meantime is merely* an expectancy, can be validly sold. *(See Canuto Martin v. Maria Reyes, L-4402, July 28, 1952).*

Art. 1462, new Civil Code reads, in the second paragraph:

"There may be a contract of sale of goods, whose acquisition by the seller depends upon a *contingency which may or may not happen*."

Furthermore, Art. 1461 of the Civil Code, in its second paragraph provides:

"The efficacy of the sale of a mere hope or expectancy is deemed subject to the condition that the thing will come into existence."

(h) Among the relatives *within* the third degree counted from the propositus and belonging to the line from which the property originally came are: the parents of the propositus *(1st degree);* the grandparents; full and half-brothers; full and half-sisters of the propositus *(2nd degree);* the uncles and aunts by blood; the great grandparents; and the nephews and nieces of the propositus *(3rd degree).*

[NOTE: The nephews and nieces referred to are the children of the full and half-brothers, and full and half-sisters of the propositus.*].*

[NOTE: Do not confuse the reference to the *full* brothers and sisters here with the discussion of the origin of the property. (See Note 2{e} under the discussion of the ORIGIN, where we submitted the proposition that if the ORIGIN be the brother or sister of the propositus, same must only be a *half-brother* or *half-sister,* otherwise the property would *not* be transferred to *another line*).*].*

(i) To become reservees, is it enough to be within the 3rd degree at the time the *propositus dies* (beginning of *reserva*), or should one be such a relative at the time the reservor dies (here, the right really becomes certain and definite)?

ANS.: At the moment the propositus dies, all the relatives within the 3rd degree have an EXPECTANCY. At the moment the reservor dies, all those surviving have a DEFINITE RIGHT (subject however to the rules

of "preference of the direct line to the collateral line" and "the nearer relatives exclude the farther"). *(See 6 Manresa 296-297; see also Florentino v. Florentino, 40 Phil. 480).*

(j) Thus, if there be two reservees *(reservatarios)*, one of the 2nd degree and the other of the 3rd degree, the former gets ALL the reservable properties, *without prejudice* however to the right of representation, but the representative must himself be within the 3rd degree from the propositus. *(See Florentino v. Florentino, 40 Phil. 480).*

[NOTE: In the said case of Florentino v. Florentino, supra, the Supreme Court held: Following the order prescribed by law in legitimate succession, when there are relatives of the descendant within the third degree, the right of the *nearest* relative *reservatario,* over the property which the *reservista* (person holding it subject to reservation) should return (deliver) to him *excludes* that of the one more remote. The right of representation *cannot* be alleged when the one claiming same as a reservable property is *not* among the relatives within the third degree belonging to the line from which such property came — inasmuch as the right granted by the Civil Code in Art. 891 is in the highest degree *personal* and for the exclusive benefit of designated persons who are the relatives, within the third degree, of the person from whom the reservable property came. Therefore, relatives of the fourth and the succeeding degrees can never be considered as *reservatarios*, since the law does not recognize them as such.

"In spite of what has been said relative to the right of representation on the part of one alleging his right as *reservatario* who is *not* within the third degree of relationship, nevertheless, *there is a right of* representation on the part of *reservatarios* who are within the third degree mentioned by law, as in the case of nephews of the deceased person from whom the reservable property came. These *reservatarios* have the right to represent their ascendants (fathers and mothers) who are the brothers of the said deceased person and relatives within the third degree in accordance with Art. 891 of the Civil Code."*].*

[NOTE: The above decision thus sets aside the theory of RESERVA INTEGRAL, which would allow ALL the relatives within the third degree to get the reserved property, per capita, and individually, each in his own right. *(See 14 Scaevola 287).].*

(k) *BAR QUESTION*

Are the relatives within the 3rd degree referred to in Art. 891, entitled to the property subject to reservation, all at the same time and jointly, or are they subject to the regular order of succession, whereby the relative nearer in degree excludes the farther ones?

ANS.: Nearer excludes farther. *(Florentino v. Florentino, supra).*

[NOTE: In the case of *Dionisia Padura, et al. v. Melania Baldovino, et al., L-11960, Dec. 7, 1958,* the principal issue involved was: "where, upon the death of the reservor the only surviving relatives of the descendant propositus are nephews and nieces some of them children of a sister of the FULL BLOOD, and other children of a brother of the HALF BLOOD, how shall the reservable property be apportioned among the several reservees?"

HELD: Each of the children of the sister of the FULL BLOOD shall get *double* the share of each of the children of the brother of the HALF BLOOD. After the rule of *reserva troncal* has determined the group of relatives who constitute the reservees, the rules of intestate succession *(Arts. 1006, 1008, 1009)* should apply.*].*

(Incidentally, the Court should *not* have used the terms "nephews of the full blood" and "nephews of the half blood." In law, the half-blood relationship is used to refer only to brothers and sisters with *one common parent*).

(l) The reservees have the rights of a naked owner (as distinguished from the estate of the reservor — which now has the rights of a usufructuary) over the *improvements* made by the reservor on the reservable property — once said property becomes their (the reservees') own. *(See 7 Manresa 299-300).*

(m) The reservees have the right to demand reimbursement for defects or deteriorations imputable to the reservor. The reimbursement may be made either from reservor's estate or from proceeds realized from the foreclosure of securities that may have been given for the performance of obligations of the reservor. *(See 7 Manresa 300).*

(n) But the reservees cannot, as long as the reservor is alive, impugn or annul any alienation or encumbrance effected by the reservor, whether same be on personal or real property. *(See Edroso v. Sablan, 26 Phil. 296; see also Art. 976, old Civil Code).*

(o) *BAR QUESTION*

A died intestate leaving a considerable fortune. His widow *B* gave birth to a son three months after *A's* death. The child died two days after it was born. The widow *B* died two days after her child. The inheritance left by *A* is claimed by the legitimate mother of *B,* and a legitimate brother of *A*. There are no other relatives. Who do you believe is entitled to the inheritance? Why?

ANS.: Upon *A's* death, his fortune was inherited by his widow (1/2) and by his son (1/2) by intestate succession (gratuitous title). (The son inherited because at the time of his father's death, he was already *conceived,* and a conceived child is already considered born for all purposes favorable to it). Upon the death of the son, *without issue,* the mother inherited by operation of law, his *half-share*. On this *half-share,* there is a *reserva troncal,* the requisites therefor all being present — and therefore, on the widow *B's* death, said one-half should properly go to the *legitimate brother of A,* who is a relative *within the 3rd degree* counted from the propositus (the baby son). Said half is indeed not part of the estate of *B*. *(Cabardo v. Villanueva, 44 Phil. 186).*

But the *other half* inherited by *B* direct from *A* by legal succession is certainly not reservable property. It belongs to her estate. And therefore, on her death, it should go to her nearest (in the problem, the *only*) intestate heir, namely, the legitimate mother of *B*.

(6) Extinguishment of the Reserva

(a) *BAR QUESTION*

When does the obligation to reserve cease?

ANS.:

1) Death of the reservor.

2) Death of ALL the would-be reservees AHEAD of the reservor (reservista).

3) LOSS of the reservable properties, provided the reservor had no fault or negligence. (Thus, LOSS must be ACCIDENTAL.)

4) Prescription (as when the *reservor* or *stranger* holds property *adversely* against the reservees, as FREE from the reserva). *(Reservor* — 30 years for *real;* 8 years for personal property, because of his *bad faith).*

Frias Chua v. CFI of Negros Occidental
L-29901, Aug. 31, 1977

FACTS: In *reserva troncal*, it is possible that the reservees will not be able to get the property anymore from the estate of the reservor on account of prescription. From what moment should the period of prescription start?

HELD: The prescriptive period begins from the death of the reservor. (This is because during the reservor's lifetime, the reservees are not yet entitled to the property.)

5) Registration under the Torrens System as free from the reservation (without prejudice to the liability of the reservor to the reservees).

(However, while the property is still under the name of the reservor, an action for CONVEYANCE may be brought against his estate after his death.)

6) Renunciation or waiver by ALL the reservees AFTER the death of the reservor.

(But the renouncer's share alone is affected; thus, if only one or some of the reservees waive, the others may still get the property.)

[NOTE: There can be NO VALID *waiver* while the reservor lives because such a waiver is contrary to the *nature* and *purpose* of the *reserva*. *(See Velayo v. Siojo, 58 Phil. 89).* (A contrary conclusion however has been reached by the Supreme Court of Spain in its *Decision of Apr. 1, 1914; see also Art. 970, old Civil Code*).*]*.

(b) Suppose the reservable property is expropriated by the government, is the *reserva* extinguished?

ANS.: The *reserva* continues on the INDEMNITY. This is required by justice and equity.

(c) Suppose the reservable property is insured and then destroyed, is there still a *reserva*?

ANS.: Yes, on the insurance indemnity.

(d) A 3rd degree *reservatario* was *still alive* at the time the *reservista* died. Said *reservatario*, even if he dies, before claiming the property nevertheless *transmits rights* to his own heirs for after all, he SURVIVED the reservor. *(6 Manresa 316).*

[NOTE: While it is true that the *reservatario* inherits from the PROPOSITUS, it is essential that he, the *reservatario*, should *survive* the *reservor*. This is a condition that must be fulfilled.*]*.

(7) How Much is Reservable?

A son received from his mother P200,000 by virtue of a will. The son had properties of his own amounting to P400,000. When the son died without issue, he left a *will* giving all his estate (P600,000) to his father. How much is the reservable property?

ANS.: This is a case of testate succession. Since the father's legitime is only one-half, he received the P600,000 in two capacities: P300,000 as a compulsory heir — and which was received

therefore as legitime or by operation of law; and P300,000 as a voluntary heir, and therefore not by operation of law. Now then:

(a) According to the theory of *reserva maxima,* the reservable property is P200,000. In other words, the reservable property includes all that can be included in the *half* constituting the legitime of the *reservista*.

(b) According to the theory of reserva *minima*, the reservable property is only P100,000. The theory is based on the fact that *half* of the P200,000 received from the origin (mother, in this case) was given to the father as his legitime or by operation of law. Therefore, the reservable property is only P100,000.

[NOTE:

1) the *reserva maxima* is obviously more in consonance with the spirit of the lawmaking body in providing for Art. 891.

2) But the *reserva minima* is more just, more equitable and more logical.

According to Manresa, in view of the silence of the law on the matter, the principle of the *reserva minima* should be followed. So, in the problem given, the reservable property is only P100,000. This seems to be also the opinion of Scaevola. *(6 Manresa 319; 14 Scaevola 236-237).].*

(8) The Purpose of Reserva Troncal

"To keep the property in the family to which the property belongs." *(Velayo Bernardo v. Siojo, 58 Phil. 89).*

Tioco De Papa v. Camacho
GR 28032, Sep. 24, 1986

The stated purpose of the reserve is accomplished once the property has devolved to the specified relatives of the line of origin. But from this time on, there is no further occasion for its application.

[NOTE: The Code Commission in its draft of the Civil Code abolished the *reserva troncal,* together with all the other reservas in the Code, but Congress revived it, without however reviving the articles related to it. Among the proposed amendments to the new Civil Code (but which are still unacted upon) is the *abolition* of the *reserva troncal.].*

(9) Reasons of the Code Commission in Abolishing the Reservas (in the Draft of the Civil Code)

Among the provisions of the old Civil Code that have been eliminated are those of Arts. 811 *(reserva troncal)*, 812 *"reversion legal,"* and 968 *("reserva viudal")* and other articles connected therewith. The repeal of these provisions is in line with one of the underlying objectives of the Title on Succession, which is to prevent the estate from being entailed.

More specifically, the following are some of the reasons for the abolition of these *reservas:*

(a) The reservation creates an uncertainty in the ownership of property which is against the principle of economic progress and security, and both the *"reservista"* and the *"reservatario"* have no enthusiasm for the improvement of the property subject to reservation. This is an obstacle to the economic development of the country.

(b) The confinement of property within a certain family for generations is conducive to economic oligarchy, and is absolutely incompatible with the principles of socialization and ownership. These *"reservas"* are the *remnants of feudalism* and contrary to the modern tendency of the law on succession. The entailing of property within specific families leads to agrarian troubles, because a few families may dictate the terms and conditions in a contract of *"aparceria,"* and they may even fix the price of rice and other foodstuffs in a certain area, a serious problem which our country is now actually facing.

(c) The operation of these *"reservas"* is limited to the *legitimate* members only of the family, and a father

or mother of a natural child who inherits property from this child, and who in turn acquired it from another progenitor, acquires absolute dominion of the property without the reservation. This is both unjust and inequitable, and penalizes legitimate relationship.

(d) With respect to the *"reserva viudal,"* when the surviving spouse remarried, he or she should reserve what the deceased spouse or a child of the former marriage has left, but a concubine of a deceased person is free from such obligation. Again it gives protection to illegitimate relation and penalizes the legitimate one.

(e) The *"reserva VIUDAL"* has disappeared from the modern codes, except those of Argentina, Peru, Bolivia, Louisiana, and California.

(f) The *"reserva VIUDAL,"* by discouraging second and subsequent marriages, runs counter to sound public policy.

(g) Authors, commentators, and jurists look with disfavor on the *"reserva viudal."* Castan believes that this reservation follows the system of fear and distrust; and Valverde thinks the reservation implies that the surviving spouse intends to prejudice the children of the first marriage who are also her or his children. The implication mentioned by Valverde is not in harmony with the parents' attitude towards their own children." *(Comment of the Code Commission).*

[NOTE: Despite the abolition of the reservas by the Code Commission, Congress revived the *reserva troncal* hence, in the preceding paragraphs, we examined some of the decided cases and principles on the subject.*]*.

Art. 892. If only one legitimate child or descendant of the deceased survives, the widow or widower shall be entitled to one-fourth of the hereditary estate. In case of a legal separation, the surviving spouse may inherit if it was the deceased who had given cause for the same.

If there are two or more legitimate children or descendants, the surviving spouse shall be entitled to a portion equal to the legitime of each of the legitimate children or descendants.

In both cases, the legitime of the surviving spouse shall be taken from the portion that can be freely disposed of by the testator. (834a)

COMMENT:

(1) Legitime of Surviving Spouse Concurring With Legitimate Descendants

(a) Example of first paragraph

A dies leaving an estate worth P1 million, and the surviving relatives are *B,* a legitimate child, and *C,* the surviving spouse. *B's* legitime is P500,000, and *C's* legitime is P250,000, which is one-fourth of the hereditary estate. The remaining P250,000 is the portion for free disposal, and may be given to anybody. In case *A* and *C* were legally separated at the time of *A's* death, *C* gets her legitime of P250,000 if *A* was the one who had given cause for the legal separation.

(b) Example of the second paragraph

A died leaving three legitimate children and one surviving spouse. The estate is P600,000. Since the total legitime of the children, is P300,000 each one gets P100,000. The surviving spouse also gets P100,000. The remaining P200,000 is the disposable portion.

[NOTE: Although the sentence "In case of a legal separation, the surviving spouse may inherit if it was the deceased who had given cause for the same" is found in the first paragraph implying possibly that such a clause is given effect only in case there is only one legitimate child or descendant, the same sentence or rule can be applied when there are two or more legitimate children or descendants.*]*.

(2) Comment of the Code Commission

The legitime of the surviving spouse has been changed from usufruct to full ownership. This is but a just recognition of the close and sacred ties that bind husband and wife and of the fact that the spouses cooperate materially and morally in building up the family fortune. It is true that the conjugal partnership property is divided equally on dissolution of the partnership but in order to strengthen the bonds of union between the husband and the wife, the legitime of the surviving spouse should be in absolute ownership. *(Report of the Code Commission, p. 23).*

(3) Children Referred To

All the children or descendants of the deceased spouse are included whether they be of the marriage recently dissolved, or of any previous marriage. *(TS, Feb. 21, 1929).*

(4) Presence of Grandchildren

If there be no children, but there are, say, 6 grandchildren, the share of the surviving spouse should *not* be the same as the share of each of said six *descendants,* but should be computed on the number of *children* which said grandchildren are supposed to represent, for after all, grandchildren inherit by right of *representation. (6 Manresa 589).* This is also TRUE even if *all* the children *repudiate,* and the grandchildren inherit in their own right, and not by representation. A contrary answer would make it possible for the children to *reduce* very much the share of the surviving spouse by the simple expedient of refusing to accept the inheritance.

(5) Legacy or Devise to Surviving Spouse

Any devise or legacy given to the surviving spouse should be considered as being *in addition* to his or her legitime, and must therefore be charged to the free portion. Such devise or legacy should be considered in the same footing as those given to strangers.

Art. 893. If the testator leaves no legitimate descendants, but leaves legitimate ascendants, the surviving spouse shall have a right to one-fourth of the hereditary estate.

This fourth shall be taken from the free portion of the estate. (836a)

COMMENT:

Surviving Spouse Concurring with Legitimate Ascendants

Example: A leaves his parents *B* and *C* and his *(A's)* wife *D*. The estate is P400,000. How much is *D's* legitime? P100,000. This is taken from the free portion.

Art. 894. If the testator leaves illegitimate children, the surviving spouse shall be entitled to one-third of the hereditary estate of the deceased and the illegitimate children to another third. The remaining third shall be at the free disposal of the testator. (n)

COMMENT:

Surviving Spouse with Illegitimate Children

Example: A leaves 2 acknowledged natural children *B* and *C,* and a surviving spouse *D*. How much can *A* in his will give to a stranger *E*? The estate is P900,000.

ANS.: A can leave P300,000 to stranger *E*. *Reason*: *D* gets one-third or P300,000 as her legitime; *B* and *C* each gets P150,000 producing a total of P300,000 for the two of them. Hence, only one-third of the estate or P300,000 remains at the free disposal of *A*. Note that under the premises given, there are neither legitimate children or descendants; nor legitimate parents or ascendants.

Art. 895. The legitime of each of the acknowledged natural children and each of the natural children by legal fiction shall consist of one-half of the legitime of each of the legitimate children or descendants.

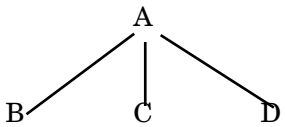
The legitime of an illegitimate child who is neither an acknowledged natural, nor a natural child by legal fiction, shall be equal in every case to four-fifths of the legitime of an acknowledged natural child.

The legitime of the illegitimate children shall be taken from the portion of the estate at the free disposal of the testator, provided that in no case shall the total legitime of such illegitimate children exceed that free portion, and that the legitime of the surviving spouse must first be fully satisfied.

COMMENT:

(1) See COMMENT No. 1 under Article 887 for the share of the spurious child under the Family Code.

(2) Legitimate Children Concurring with Illegitimate Children



Legend: B is a legitimate child; *C* an acknowledged natural child; and *D* a recognized spurious child of *A*. The estate is P1 million. Give their respective legitimes.

ANS.:

(a) *B* gets P500,000 (one-half of the estate)

(b) *C* gets P250,000 (half the legitime of a legitimate child)

(c) *D* gets P200,000 (four-fifths of the legitime of an acknowledged natural child; or two-fifths of the legitime of a legitimate child)

(d) The remaining P50,000 is the disposable portion.

[NOTE: Under the Family Code, there lies no distinction between the *natural* and *spurious* children. *(See Art. 185, Family Code).].*

(3) Reason Why Illegitimate Children are Given their Legitimes

Illegitimate children are considered *innocent,* and therefore despite the *moral lapse* of their parents, they are still given a legitime, but precisely because they are born outside marriage, their legitime are LESS than those given to legitimate children. *(See 6 Manresa 570).*

Art. 896. Illegitimate children who may survive with legitimate parents or ascendants of the deceased shall be entitled to one-fourth of the hereditary estate to be taken from the portion at the free disposal of the testator. (841a)

COMMENT:

Illegitimate Children Concurring with Legitimate Parents or Ascendants

Example: A dies, leaving *B*, his father, and *C, (A's)* illegitimate child. The hereditary estate is P1 million. How much is *C's* legitime?

ANS.: P250,000 (one-fourth of the hereditary estate).

Art. 897. When the widow or widower survives with legitimate children or descendants, and acknowledged natural children, or natural children by legal fiction, such surviving spouse shall be entitled to a portion equal to the legitime of each of the legitimate children which must be taken from that part of the estate which the testator can freely dispose of. (a)

COMMENT:

Surviving Spouse Concurring with Children

Example: If there are 5 legitimate children, one acknowledged natural child, and one surviving spouse and the hereditary estate is P1 million, how much is the legitime of the surviving spouse?

ANS.: She gets P100,000, which is also the legitime of each legitimate child in the problem given.

[NOTE: Art. 897 does not apply when there is only one legitimate child, because in such a case, the surviving spouse gets one-fourth the same share as the estate. *(Art. 892).* She should not be given the same share as the lone legitimate child because if this were so, the acknowledged natural child would be left without a legitime.*].*

[NOTE: There is no distinction between the natural and *spurious* child under the Family Code.*].*

Art. 898. If the widow or widower survives with legitimate children or descendants, and with illegitimate children other than acknowledged natural, or natural children by legal fiction, the share of the surviving spouse shall be the same as that provided in the preceding article. (n)

COMMENT:

(1) See COMMENT No. 1 under Article 887 for the Share of the Spurious Child under the Family Code.

(2) Another Article on Surviving Spouse Concurring with Children

Example: Same as in Art. 897 but here, there is a recognized spurious child instead of an acknowledged natural child.

[NOTE: Art. 898 does not apply when there is only one legitimate child. See reason in the note in Art. 897.*].*

(3) Rule in Case of Legitimate and Illegitimate Children Surviving Together (With or Without the Surviving Spouse)

(a) First, give the legitimes of the *legitimate children* and of the *surviving spouse* (if any).

(b) Secondly, give the legitimes of the illegitimate children in proportion to the legitime of the legitimate children (10,

5) — if estate is SUFFICIENT (for in no case should the legitimes of the legitimate children and of the surviving spouse be reduced).

(c) If estate is NOT SUFFICIENT, just give whatever remains of the estate to the illegitimate children.

(4) Example

Estate = P1.2 million

Surviving: 3 leg. children, widow, 2 illegitimate children.

ANS.:

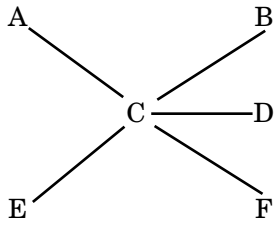
3 leg. children = 1/2 of P1.2 million	=	P600,000 (P200,000 each)
Widow	=	P200,000 (same share as each leg. child)
2 illegitimate children	=	P200,000 (P100,000 each — for each gets 1/2 of each leg. child's share)
		P1 million TOTAL LEGITIMES
		P200,000 FREE

Art. 899. When the widow or widower survives with legitimate parents or ascendants and with illegitimate children, such surviving spouse shall be entitled to one-eighth of the hereditary estate of the deceased which must be taken from the free portion, and the illegitimate children shall be entitled to one-fourth of the estate which shall be taken also from the disposable portion. The testator may freely dispose of the remaining one-eighth of the estate. (n)

COMMENT:

Surviving Spouse Concurring with Legitimate Parents or Ascendants and Illegitimate Children

Example:



Legend: A and B are the legitimate parents of *C*, the testator. *D* is *C's* surviving spouse. *E* and *F* are the illegitimate children of *C*. Give the legitimes of each, if the estate is P800,000.

ANS.:

(a) *A* and *B* together get P400,000 (one-half of the estate). So each gets P200,000.

(b) *D,* the surviving spouse, gets P100,000 (or one-eighth of the estate).

(c) *E* and *F* together get P200,000 (one-fourth of the estate), so each gets P100,000.

(d) The remaining P100,000 (one-eighth) is the free portion.

[NOTE: Art. 899 applies when only the following are present:

(a) at least one legitimate parent or ascendant

(b) surviving spouse

(c) at least one illegitimate child (whether acknowledged natural or spurious).

(When there are legitimate children or descendants, Art. 899 does not apply.)*.]*.

[NOTE: Under Art. 185 of the Family Code, there lies no distinction between the natural and spurious child.*]*.

Art. 900. If the only survivor is the widow or widower, she or he shall be entitled to one-half of the hereditary estate of the deceased spouse, and the testator may freely dispose of the other half. (837a)

If the marriage between the surviving spouse and the testator was solemnized in *articulo mortis,* and the testator died within three months from the time of the marriage, the legitime of the surviving spouse as the sole heir shall be one-third of the hereditary estate, except when they have been living as husband and wife for more than five years. In the latter case, the legitime of the surviving spouse shall be that specified in the preceding paragaph. (n)

COMMENT:

(1) Surviving Spouse as the Only Compulsory Heir

(a) General rule — Surviving spouse, if she is the ONLY compulsory heir left, gets *one-half.*

(b) Exception to general rule — Surviving spouse gets *one-third if:*

1) the marriage was in *articulo mortis*;

2) and the testator or testatrix died within three months from time of celebration of marriage. (Applies only if it was the *deceased* who was the *party in danger of death* at the time of the marriage; AND if the cause of death is the SAME as the sickness, illness or injury *existing* at the time of the marriage — the purpose of the law being to avoid a marriage purely for FINANCIAL GAIN.)

(c) Exception to exception — Surviving spouse gets one-half if despite presence of requirements under (b), the couple had been living previously as husband and wife (without marriage) for more than five years. *(Reason:* Suspicion of financial profit motive is more or less erased because of the 5-year period.*)*.

(2) Problem

A lives with *B* as husband and wife without marriage for three years. At the end of that time, *A* and *B* really got married. The marriage was not in *articulo mortis*. One week after said marriage, *A* died leaving an estate of P900,000. How much is *B's legitime?*

ANS.: B's legitime is P450,000 or half of the hereditary estate since she is the only survivor. In this problem, we have to apply the general rule, in view of the absence of a marriage in *articulo mortis*. The shortness of the marital union under the premises given, is immaterial.

(3) Rule in Legal Succession

In legal succession, there is NO similar provision, hence, the Article applies only to a case of testamentary succession, or whenever the legitime is affected, as in the case of mixed succession.

Art. 901. When the testator dies leaving illegitimate children and no other compulsory heirs, such illegitimate children shall have a right to one-half of the hereditary estate of the deceased.

The other half shall be at the free disposal of the testator. (842a)

COMMENT:

Illegitimate Children as the Only Compulsory Heirs

Example:

A leaves an illegitimate child *B,* and an estate worth P500,000. There are no other forced or compulsory heirs. How much is *B's* legitime?

ANS.: P250,000, or half of the estate.

Art. 902. The rights of illegitimate children set forth in the preceding articles are transmitted upon their death to their descendants, whether legitimate or illegitimate. (843a)

COMMENT:

(1) Transmission of Hereditary Rights of Illegitimate Children

The right of representation is given both to legitimate and illegitimate descendants of *illegitimate* children.

(2) Example

A
|
B (illegitimate child of A)
|
C (illegitimate child of B)

A died leaving an estate worth P1 million. In his will, *A* gave *X,* a stranger, P500,000 and gave *B* his legitime of P500,000. But *B* predeceased *A*. How much, if any, can *C* get?

ANS.: C inherits *B's share* of P500,000 in *A's* estate, by the right of representation.

[NOTE: Under the old Civil Code, only legitimate descendants could represent acknowledged natural children. *(Art. 843, old Civil Code).].*

(3) Query

Can the illegitimate descendants of legitimate children inherit by right of representation?

ANS.: No, because of the barrier between the legitimate family. *(See Art. 992; see also Llarante v. Rodriguez, 10 Phil. 585).* This is unfair because this would place the *illegitimate children of illegitimate children* in a better position than the *illegitimate children of legitimate children* contrary to the doctrine set forth in *Conde v. Abaya, 13 Phil. 249*. But then Art. 992 is the law, and harsh as it is, it must be applied.

(4) Shares of Representatives

When *representatives* are of different classes (that is, legitimate, acknowledged, or spurious), they inherit naturally

in the SAME PROPORTIONS as in Art. 895, since this is also the rule in *legal succession,* and succession by representation is nothing but succession by OPERATION OF LAW.

Example:

T has an illegitimate child *A*, who in turn has a legitimate child *B*, and an illegitimate child *C*. If *A* predeceases *T*, both *B* and *C* will inherit by representation in the proportion of *2 is to 1*.

Art. 903. The legitime of the parents who have an illegitimate child, when such child leaves neither legitimate descendants, nor a surviving spouse, nor illegitimate children, is one-half of the hereditary estate of such illegitimate child. If only legitimate or illegitimate children are left, the parents are not entitled to any legitime whatsoever. If only the widow or widower survives with parents of the illegitimate child, the legitime of the parents is one-fourth of the hereditary estate of the child, and that of the surviving spouse also one-fourth of the estate. (n)

COMMENT:

(1) Legitime of Illegitimate Parents as the Only Compulsory Heirs

(a) The whole Article deals with the estate of an illegitimate child.

(b) The illegitimate parents are only secondary compulsory heirs because they inherit their legitimes only in the absence of the legitimate or illegitimate children or descendants of the decedent.

Example:

A
|
B Testator (illegitimate child of A)
|
C (illegitimate child of B)

If the estate of *B* is P1 million, how much, if any, is *A's* legitime?

ANS.: A is not entitled to any legitime because of the presence of *C*.

(2) Problems

(a) *A* has an acknowledged natural child *B*. *B* dies, without any surviving relative except *A*. Estate is P1 million. How much is *A's* legitime?

ANS.: P500,000, or half of the estate.

(b) *A* has an illegitimate child *B,* who has a wife *C*. If the estate of *B* is P1 million, how much will be the legitime of *A* and *C*, and how much can *B* give to *E*, a friend?

ANS.:

1) *A's* legitime is P250,000 (one-fourth of estate)
2) *C's* legitime is P250,000 (also one-fourth of estate)
3) Free portion is P500,000 (the remaining one-half of the estate)

This P500,000 can be given to *E,* the friend.

[Note that Art. 903 refers only to *illegitimate parents* and not to other ascendants like the *parents of the illegitimate parents*. (Thus, the rule here is different from the case of the *grandparents of a legitimate child,* for they may inherit in default of both legitimate parents).].

Art. 904. The testator cannot deprive his compulsory heirs of their legitime, except in cases expressly specified by law.

Neither can he impose upon the same any burden, encumbrance, condition, or substitution of any kind whatsoever. (813a)

COMMENT:

No Deprivation of or Burden on the Legitime

(a) This is due to the very nature of the legitime — that part exclusively reserved for the forced heirs. *(6 Manresa 371).*

(b) Should there be any charge, condition, substitution or encumbrance upon the legitime, said charge, etc. shall be considered *as not imposed. (Art. 872).* They are indeed disregarded and considered not written *(6 Manresa 382),* except of course the prohibition to partition the inheritance, including the legitime, for a period not exceeding 20 years. *(Art. 1083).*

(c) The only way to deprive the compulsory heirs of their legitime is by expressly disinheriting them in a will, wherein the legal cause therefor shall be specified. *(Arts. 916 and 917).* Intentional or unintentional preterition does not deprive the compulsory heirs of their legitime, and as a matter of fact, preterition shall annul the institution of heir. *(Art. 854).*

Art. 905. Every renunciation or compromise as regards a future legitime between the person owing it and his compulsory heirs is void, and the latter may claim the same upon the death of the former; but they must bring to collation whatever they may have received by virtue of the renunciation or compromise. (816)

COMMENT:

(1) Renunciation or Compromise Re Future Legitime

Reason for the law: The right to a *future* legitime is a mere expectancy, an inchoate right regarding future inheritance, hence, it cannot be made the subject of a contract inasmuch as it is against public policy. *(Art. 1347).* The nullity may be claimed by any compulsory heir who has been prejudiced. *(14 Scaevola 381).*

(2) Example

A wife, during the lifetime of her husband, wrote in a statement that she was renouncing all hereditary rights from him. When the husband dies, is the wife still entitled to her legitime and other successional rights?

ANS.: Yes, because the waiver is null and void. *(Uson v. Del Rosario, L-4963, Jan. 29, 1953).*

(3) Some Queries

(a) Art. 905 states: ". . . between the person owing it and his compulsory heirs." Now then, suppose the compromise is made among the compulsory heirs themselves (during the lifetime of the testator), would such a compromise be valid?

ANS.: No, such a compromise would still not be valid, not because of Art. 905 but because "no contract (and a compromise is indeed a contract) may be entered into upon *future* inheritance except in cases expressly authorized by law." *(Art. 1347, par. a)*. This is also the opinion of Sanchez Roman. *(6 Sanchez Roman, 940-941).*

(b) Because a son wanted his legitime during the father's lifetime, the father gave him a car worth P800,000 and both agreed that the son would no longer be entitled to any legitime. If on the father's death, the son insists on claiming his legitime, will he be allowed to do so?

ANS.: Yes, but he should collate the P800,000 value of the car. In other words, if he is really entitled to a legitime of P1.5 Million, he will be given only P700,000 more.

(c) Can there be a renunciation of or compromise on present (as distinguished from future) legitime?

ANS.: Yes. Here the subject matter is no longer future inheritance. *(Art. 1347, par. 2).* As a matter of fact, "any person having the free disposal of his property may accept or repudiate an inheritance." *(Art. 1044, par. 1).* Notice that Art. 905 speaks of "future legitime."

Art. 906. Any compulsory heir to whom the testator has left by any title less than the legitime belonging to him may demand that the same be fully satisfied. (815)

COMMENT:

Completion or Satisfaction of the Legitime

(a) *Example:* If *A* is entitled to a legitime of P1 Million and in the will he had been given merely P800,000, he may demand that he be given the balance of P200,000. In the example given above, is *A* entitled to ask for the annulment of the institution of heirs as in the case of preterition?

ANS.: No. In preterition, the preterited heir gets nothing from the *inheritance.* Hence, he is entitled to ask for the annulment of the institution of heir. *(Art. 854).* But in the problem given, there will not be any annulment of the institution of heirs because after all, *A* has not been forgotten. *A* will just be entitled to the completion of his legitime. *(Art. 906).*

Reyes v. Barretto-Datu
L-17818, Jan. 25, 1967

FACTS: A father instituted his illegitimate daughter to a share less than her legitime AND a stranger. Is the institution of the stranger valid?

HELD: Yes, for there was no preterition of the compulsory heir, the illegitimate daughter. Her being instituted to a share less than her legitime is *not* preterition.

(b) *"Any title"* — means, for example, donation, intestate succession, remission, since a donation or a remission, for example, is merely an advance of the legitime. *(See 6 Manresa 391).* Of course, if there is a REAL PRETERITION, as when absolutely nothing is given, the heir concerned is entitled not only to a completion of his legitime, but also to the annulment of the institution. This is particularly true if the heir concerned is deliberately omitted from the will or his existence is deliberately concealed. *(See TS, June 17, 1908).*

Art. 907. Testamentary dispositions that impair or diminish the legitime of the compulsory heirs shall be reduced on petition of the same, insofar as they may be inofficious or excessive. (817)

COMMENT:

Reduction of Inofficious Testamentary Dispositions

Reason for the law: The legitimes of the forced heirs should not be impaired. Note that *this Article:*

(a) applies only to *testamentary dispositions* (and therefore not to donations). *(Arts. 771 and 772 deal with the reduction of inofficious donations).*

(b) can be availed of only by the *compulsory heirs*.

[NOTE: The excess must of course be given to the compulsory heirs. *(Osorio v. Osorio, L-1965, Dec. 29, 1949).].*

Art. 908. To determine the legitime, the value of the property left at the death of the testator shall be considered, deducting all debts and charges, which shall not include those imposed in the will.

To the net value of the hereditary estate, shall be added the value of all donations by the testator that are subject to collation, at the time he made them. (818a)

COMMENT:

(1) Formula for the Computation of the Net Hereditary Estate

Formula is: PROPERTY LEFT *minus* DEBTS and CHARGES *plus* VALUE OF COLLATIONABLE DONATIONS *equals* NET HEREDITARY ESTATE.

Example: A died leaving an estate worth P1 million and debts amounting to P300,000. During his lifetime, *A* had given donation of P500,000 to *B,* his legitimate son. When *A* died, two legitimate sons, *B* and *C*, survived him. How much is the legitime of each legitimate child?

ANS.: P1 million – P300,000 + P500,000 = P1.2 million (net hereditary estate). The legitime is therefore P600,000. But there are two children, hence, each gets P300,000 as his legitime.

[NOTE: The legitime of *B* is only P300,000. But since he has been given P500,000 as a donation *inter vivos,* this should first be charged to the legitime. But there is an excess of P200,000. This should be taken from the free portion which is P600,000. This leaves a net free portion of only P400,000, which can be given to anybody. Hence, out of the actual net assets of P700,000 (because the debts have been deducted) —

C gets	P300,000	(as legitime)
B gets	0	(as legitime, since he has already
Free Portion =	P400,000	received it in the form of donation)
	P700,000.*]*.	

(2) The Charges Referred To

Note that the charges referred to in Art. 908 which should be deducted are not the charges *imposed in the will* (like legacies) but the *charges which, even without the will, would be demandable.* In the example above, if *A* directed the heirs to pay the P300,000 debts, this amount should be deducted although apparently imposed in the will, because even without said order, said amount should be paid just the same.

According to the Rules of Court, no distribution of the estate shall be allowed until all debts and obligations have first been paid. *(Rule 90, Sec. 1).* If, upon the other hand, in his will, the testator ordered his heir to give P300,000 to a friend, and such amount was *not* a debt of the testator, this would really be an example of a charge on the heirs and should therefore NOT be deducted for purposes of computing the net value of the hereditary estate, otherwise, by this means, a testator can deprive the compulsory heirs of their legitime or otherwise burden them.

For example:

A, having an estate worth P1 million, instituted *B,* his legitimate child as his heir, but ordered him to give P900,000

to *C*, a friend. If the P900,000 is deducted, the net estate would be P10,000 and *B's* legitime would only be P50,000. But such is not the intention of the law. Here, the net estate would still be P1 million; the legitime would be P500,000 and, therefore, the legacy, charge, or disposition in *C's* favor should be reduced so as not to impair the legitime. In other words, *B* would be bound to give *C* only P500,000 since this would be the free portion.

(3) Problem

If the remaining estate is P1 million, the debts are P1.2 million, and the collationable donations are P500,000, how much is the net hereditary estate?

ANS.: P500,000. Although arithmetically (P1 million – P1.2 million + P500,000) the answer should have been P300,000, said answer is wrong because this would in effect hold part of the donations as *responsible* for the *debts* of the estate. This should not be the case. The true rule is that the debts should be taken only from the estate remaining (without touching the donation). Hence, the correct solution is:

P1 million – P1.2 million = 0

P0 + P500,000 = P500,000

(4) Value to be Collated

Note also that the value of the collationable donations should not be the value at the time of the collection, but the value *at the time the donations were made.* What is the reason for this?

ANS.: This is so because when a donation is made, ownership (a real right) is transferred over the same once the donation is accepted. The increase in value should therefore be given to the donee. In the same way, in case of loss, whether by a *force majeure* or through negligence or through wanton destruction, the donee must suffer in accordance with the rule of *"res perit domino." (6 Manresa 411).*

(5) How Value of Estate is Determined

How is the *value of the estate* at the time of the decedent's death determined?

ANS.:

(a) If there are *judicial proceedings* where the estate is settled, the *administrator* must determine the value of the estate. For this purpose, he will be helped by a *tax-appraiser. (See Rule 83, Sec. 1, Rules of Court).* The *market value* should be the basis.

(b) If there are no judicial proceedings for the settlement of the estate, the heirs must also determine the value of the estate, subject to the provisions of the Internal Revenue Code. Here also, it is the market value that must be considered. It is however *presumed* that the assessed value is the true market value. This presumption may naturally be rebutted.

(6) CASE

Pagkatipunan v. IAC
GR 70722, July 3, 1991

FACTS: Petitioner Canuta Pagkatipunan is the surviving spouse of Jose Velasquez, Sr. and the other 13 petitioners are their children. On the other hand, respondents Jose Valencia, Jr., *et al.*, are Jose, Sr.'s descendants with his first wife Victorina Real who died in 1920. No dissolution of the first conjugal property had been made after Victoria's death. So, Jose, Sr. enjoyed full possession, use, usufruct and administration of the whole conjugal property of the first marriage. In 1930, Jose, Sr., took Canuta as his second wife although they cohabited as early as 1921, when she was 16, soon after his first wife's death. From this marriage, the other 13 co-petitioners were born.

Neither had there been any liquidation of the second conjugal partnership after Jose, Sr.'s death in 1961. Jose Valencia, Jr., *et al.* sued Canuta Pagkatipunan, *et al.* in 1969 in a complaint entitled "*accion reivindicatoria*, annulment of deeds of sale, partition and damages." However, both the trial and the appellate courts considered the real controversy to be liquidation of the conjugal partnership properties acquired by the deceased Jose, Sr., in his two marriages with Victorina

Real, who predeceased him, and Canuta Pagkatipunan, as well as the partition of Jose, Sr.'s estate among his heirs. The Court appointed two sets of commissioners. The first set made and submitted an inventory of Jose, Sr.'s estate. The second set determined which of the parcels of land listed in the inventory submitted by the first set of commissioners belong to the conjugal partnership of the first marriage or to that of the second marriage. The three members of the second set of commissioners expressed divergent findings and opinion. They refused to make findings on the nature of the properties because petitioners had caused the issuance of titles covering said properties. But the commissioners agreed that all the other properties listed in the inventory belonged to the conjugal partnership of the first marriage. After Jose, Sr.'s death, Canuta acquired full possession of the properties. On March 4, 1967, she sold the same property to the spouses Moises and Magdalena Pagkatipunan. The property was later resold to Canuta. During the pendency of the suit, this property was subdivided and assigned by Canuta in favor of her thirteen children. The trial court: (1) declared the properties listed in the inventory as belonging to the conjugal partnership of Jose Sr. and Victorina; (2) confirmed all the conveyance, by sale or donation, executed by Jose Sr., during his lifetime; (3) declared fictitious and void, the sale executed by Canuta in favor of Magdalena and the deeds of assignment she executed in favor of her children; (4) declared fictitious and void, the sales by Canuta in favor of her children and Magdalena, and ordered Canuta and children to deliver possession of the properties to the plaintiff. The Intermediate Appellate Court affirmed the trial court's decision.

HELD: The Supreme Court set aside the decision of the trial court and remanded the case to the Regional Trial Court for further proceedings and ruled that both the trial court and the Court of Appeals failed to consider some basic principles in the law on succession. Such an oversight renders the appealed decision defective and hard to sustain. Before any conclusion about the legal share due to the heirs may be reached, it is necessary that certain steps be taken first. The Court of Appeals affirmed the trial court's decision that Jose, Sr. had already disposed of and exhausted his corresponding share in the

conjugal partnership owned by him and Victorina, so that his heirs have nothing more to inherit from him. Hence, whatever remaining portion of the conjugal property must necessarily appertain only to respondents as heirs of Victorina Real. The trial court failed to consider Articles 908 and 1061 of the Civil Code. Jose, Sr. made numerous donations *inter vivos* in favor of his compulsory heirs. Yet, there was no determination whatsoever, of the gross value of the conjugal properties of Jose Sr., and Victorina Real. Obviously, it is impossible to determine the conjugal share of Jose Sr. from the said property relationship. Likewise, no collection of the donations he executed during his lifetime was undertaken by the trial court. Thus, it would be difficult to ascertain whether or not such donations trenched on the heirs' legitime so that the same may be considered subject to reduction for being inofficious.

Relative to the sale executed by Canuta to Magdalena, the resale of the same property to her and the subsequent deeds of assignment she executed in favor of her children, the trial court had established that Canuta employed fraudulent acts to acquire title over the said properties. Hence, the trial court and the Court of Appeals correctly ruled that said sales and assignments are void, sham and fictitious. The fact that petitioners had succeeded in securing title over the said parcels of land does not warrant the reversal of the trial court's ruling that the above mentioned sales and assignments were sham and fictitious. A Torrens title does not furnish a shield for fraud notwithstanding the long-standing rule that registration is a constructive notice of title binding upon the whole world. If the registration of land is fraudulent and the person in whose name the land is registered thus holds it as a mere trustee, the real owner is entitled to file an action for reconveyance of the property within a period of ten years. While the trial court has authority to order the reconveyance of the questioned titles, the court cannot agree that the reconveyance should be made in favor of respondents. The reason is that it is still unproven whether or not respondents are the only ones entitled to the conjugal properties of Jose, Sr. and Victorina Real. As the lawful heirs of Jose, Sr. the petitioners are also entitled to participate in his conjugal share. To reconvey said property in favor of respondents alone would not only be improper but

will also make the situation more complicated. There are still things to be done before the legal share of all the heirs can be properly adjudicated.

The appellate court properly adjudicated the one-half portion of the house and lot situated in West Avenue as belonging to the petitioners to the extent of their respective proportional contributions and the other half to the conjugal partnership of Jose, Sr. and Canuta. It is modified as it readily partitioned the conjugal share of Jose, Sr. to his 18 heirs. No conclusions as to the legal share due to the compulsory heirs can be reached in the case without: (1) determining first the net value of the estate of Jose, Sr.; (2) collating all the donations *inter vivos* in favor of some of the heirs; and (3) ascertaining the legitime of the compulsory heirs.

Art. 909. Donations given to children shall be charged to their legitime.

Donations made to strangers shall be charged to that part of the estate of which the testator could have disposed by his last will.

Insofar as they may be inofficious or may exceed the disposable portion, they shall be reduced according to the rules established by this Code. (819a)

COMMENT

(1) Donations to Children Charged Against Legitime

Regarding donations to children — these should first be imputed to or charged against their legitime; and if the legitime is not sufficient to cover the donations, the excess should be charged to the free portion; and if still excessive, they should be reduced so as not to impair the legitimes of the others.

(2) Donations to Strangers

(a) May donations to strangers be reduced?

ANS.: Yes, if found to be inofficious, that is, if they exceed the amount set for free disposal. *(Art. 909, last par.).*

(b) But should donations *inter vivos* to strangers be *collated* — that is, should their value be added to the remaining estate in order to find out just how much the net hereditary estate is?

ANS.:

1) According to Sanchez Roman, Scaevola and Manresa, donations *inter vivos* to strangers *should not be collated. Reason:* Art. 1061 (on collation) speaks only of compulsory heir being forced to collate. *(6 Sanchez Roman, 948-949; 14 Scaevola 395; 6 Manresa 409-410, 1 Padilla, Civil Code, 1126).*

2) According to Falcon, Morrel, the Supreme Court of Spain, and Capistrano, said donations given to strangers should be collated.

Reason: Said donations should be considered as advances on the free disposal, just as donations inter vivos to children are considered advances on their inheritance or legitimes. Besides, how can the free portion be determined or computed unless the value of said donations be added to the actual estate? *(3 Falcon 210-211; 6 Manresa 410 citing Moreu; Decision of the Supreme Court of Spain of May 4, 1899).* The opinion was ratified in the decision of said Court of June 16, 1902 *(cited in 6 Manresa 410-411; 2 Capistrano, Civil Code of the Philippines, p. 411)*, stating that "Donations to strangers are also taken into account in determining the legitime." This is clear from the words "of which the testator could have disposed by his last will" in par. 2 of Art. 909.

3) According to the Philippine Supreme Court, citing Manresa, "Donations are collationable only when the heirs of the deceased are *forced heirs* and when it is proven that they prejudice the legitime." *(Udarbe v. Jurado, 50 Phil. 11).*

[AUTHOR'S NOTE: The Supreme Court of the Philippines, by citing Manresa, seems to imply that, following Manresa's opinion, donations given to strangers should not be collated.

But examining the quotation closely — it is said that "donations are collationable only when the heirs of the deceased are forced heirs..." This is very true, and nobody questions this fact, inasmuch as when there are no forced heirs, there will be no legitime to preserve. BUT the question is, when there are forced heirs, are the donations to them only the ones to be collated?

It would certainly be more just if donations given to strangers are also collationable, that is, considered as advances of the free portion. The author submits that Falcon's opinion is correct. *(TS, May 4, 1888; TS, June 16, 1902).].*

(3) Problem

A gave *B*, his legitimate child, a donation *inter vivos* of P500,000 and to *C*, a friend, a donation *inter vivos* of P1 million. When *A* died, his remaining estate was worth only P1 million. Should the donation to *C* be reduced?

ANS.:

(a) *Manresa's opinion* (donations to strangers should not be collated):

P1 million (estate)

Plus

P500,000 (donation to B)

P1.5 million (net estate)

Legitime = P750,000 (half of estate)

Free Portion = P750,000

Since the donation given to *C* is more than the free portion, it should be reduced by P250,000.

(b) *Falcon's opinion* (donations to strangers should be collated):

P1 million (estate)

Plus

P500,000	(donation to B)
P1 million	(donation to C)
P2.5 million	(net estate)

Legitime = P1.25 million

Free Portion = P1.25 million

Since the donation given to *C* does not exceed the free disposal, it should not be reduced.

(c) *AUTHOR'S OPINION* (follows Falcon's opinion):

1) Manresa's solution is unjust. If *B's* legitime is only P750,000, we can not say that it has been impaired, for after all, can he not get all of it from the P1 million still remaining? Besides, is not the donation of P500,000 to him already considered an advance of his legitime? *(Art. 909, par. 1).* If then *B's* legitime is unimpaired, how can we say that the donation to *C* is inofficious?

2) Donations to strangers are charged to the free disposal, but how can they form part of the free disposal unless they are considered or added in the determination of the net hereditary estate? *(Art. 909, pars. 2 and 3).*

3) Under Art. 752 of the Civil Code, "no person may give by way of donation more than what he may give by will." Impliedly, I can give as a donation as much as I am allowed to do so, in case I make a will. Now then, suppose today I have P1 million and I have one *legitimate child,* it is clear that I can validly dispose of P500,000 in favor of strangers. Surely, the donation here would not be inofficious. If tomorrow I should die, leaving *one legitimate child* (same as when I made the donation) and leaving an estate of P500,000 (since P500,000 had already been given by way of donation), then, if we follow Manresa's opinion, this will happen: P500,000 will be the hereditary estate. (The donation of P500,000 will not be

added.) The free disposal will therefore be P250,000. Since the donation exceeds the free portion, it will be reduced by P250,000, and the effect would be that the donation is valid only to the extent of P250,000, which would then be a clear absurdity. We should not construe the law in such a way as to create an absurdity, otherwise the purpose of the law would be frustrated.

4) Conclusion — Donations to strangers SHOULD BE COLLATED, not as advances of the legitime — for they are *not* compulsory heirs and have therefore no legitime — but as advances of the FREE DISPOSAL.

Art. 910. Donations which an illegitimate child may have received during the lifetime of his father or mother, shall be charged to his legitime.

Should they exceed the portion that can be freely disposed of, they shall be reduced in the manner prescribed by this Code. (847a)

COMMENT:

Donations to Illegitimate Children — also Charged Against the Legitime

(a) The donations to said illegitimate children are collationable.

(b) The donations given to illegitimate children should never impair the legitime of the legitimate children.

(c) Any donation in excess of the legitime shall be charged to the free disposal and shall be considered in the same category as donations to strangers.

Art. 911. After the legitime has been determined in accordance with the three preceding articles, the reduction shall be made as follows:

(1) Donations shall be respected as long as the legitime can be covered, reducing or annulling, if necessary, the devises or legacies made in the will;

(2) The reduction of the devises or legacies shall be *pro rata* without any distinction whatever.

If the testator has directed that a certain devise or legacy be paid in preference to others, it shall not suffer any reduction until the latter have been applied in full to the payment of the legitime.

(3) If the devise or legacy consists of a usufruct or life annuity, whose value may be considered greater than that of the disposable portion, the compulsory heirs may choose between complying with the testamentary provision and delivering to the devisee or legatee the part of the inheritance of which the testator could freely dispose. (820a)

COMMENT:

(1) Order of Preference in the Hereditary Estate

After the net hereditary estate has been ascertained, what should be the order of payment?

(a) First, give the legitimes.

(b) Then the donations *inter vivos*.

(c) Then the *preferred* legacies and devises.

(d) Then all other devises and legacies *pro rata* (in case the estate is *not sufficient*).

[NOTE: The reduction should of course be made in the inverse order of payment.*]*.

(2) Reasons Why Donations Inter Vivos are Preferred Over Dispositions Mortis Causa

(a) *First*, because they were made first, showing preference in the generosity of the decedent. As has been aptly said, "priority in time is priority in right," or "first come, first served." *(6 Manresa 421).*

(b) *Second*, because a donation is a bilateral act, there should be acceptance on the part of the donee, while a disposition *mortis causa,* as by a devise or a legacy, is in a sense, unilateral. Of course, these dispositions may later on either be accepted or repudiated. *(6 Manresa 621).*

(c) *Third*, because donations are generally irrevocable.

(3) Preference Among Donations

Suppose there are two or more donations *inter vivos,* and suppose they would impair the legitime if allowed to stand, which must be reduced or suppressed?

ANS.: "If, there being two or more donations, the disposable portion is not sufficient to cover all of them, those of the *more recent* date shall be *suppressed or reduced* with regard to the excess." *(Art. 773, Civil Code).* In other words, "first come, first served." Suppose the dates of the donation are the same, what should be done? They should all be proportionately reduced. *(6 Sanchez Roman 963; 6 Manresa 423).*

(4) Cross-Reference to Art. 950

Art. 950 of the Civil Code reads as follows: "If the estate should not be sufficient to cover all the legacies or devises, their payment shall be made in the following order:

a) *Remuneratory* legacies or devises;

(b) Legacies or devises declared by the testator to be *preferential;*

(c) Legacies for *support;*

(d) Legacies for *education;*

(e) Legacies or devises of a *specific, determinate* thing which forms a part of the estate;

(f) *all* others *pro rata*."

(KEYWORD: RPSESA)

Now then, is *there no conflict* between Art. 911 and Art. 950?

ANS.: None.

1) Art. 911 applies only when aside *from the various legacies* and *devises,* there are *legitimes to be preserved* (whether impaired or not by the testamentary provisions) or there are donations *inter vivos* which should be respected as much as possible. *(6 Sanchez Roman, 965; 15 Scaevola 377-3781).*

2) Art. 950 applies only when there are no compulsory heirs or when there are no inofficious donations *inter vivos*. *In other words, if the reduction concerns itself merely with the legacies or devises, Art. 950 should be applied. (6 Sanchez Roman 96B).*

(5) Example

A died, instituting *B*, a legitimate child as his heir. The estate is P1 million. *A* gave *C* a preferred legacy of P300,000, *D*, a legacy of P150,000 for support and *E*, a legacy of P100,000 for education. What legacies if any should be reduced, and by how much?

ANS.: Adding all the legacies together, we have:

C	—	P300,000
D	—	P150,000
E	—	P100,000
		P550,000

The legitime of *B* is P500,000 and this will be impaired if the legacies are allowed to stand. We should therefore apply Art. 911 and divide the properties in this way:

(a) *B* gets P500,000 (legitime)

(b) *C* gets P300,000 (preferred legacy)

The remaining P200,000 will be given to *D* and *E* proportionately. The law says, "The reduction of (said) legacies shall be *pro rata, without any distinction whatsoever*." Since *D's* proposed legacy is P150,000 and *E's* is P100,000, the ratio is therefore 3:2, that is, 3 parts will go to *D*, and 2 parts will go to *E*.

Therefore:

5 parts	=	P200,000	
1 part	=	40,000	
3 parts	=	120,000	(to be given to *D* as his legacy for support)
2 parts	=	80,000	(to be given to *E* as his legacy for education)

(The legacy to *D* has been reduced by P30,000, and the legacy to *E* has been reduced by P20,000.)

Resume:

B	—	P500,000	(legitime)
C	—	300,000	(pref. legacy)
D	—	120,000	(support)
E	—	80,000	(education)
Total	—	P1 million	*(hereditary estate)*

(6) Another Example

A dies without any compulsory heir, and leaves an estate of P500,000. He gives *C* a preferred legacy of P300,000; *D* a legacy of P150,000 for support; and *E*, a legacy of P100,000 for education. All in all, the legacies amount to P550,000 giving an excess of P50,000. What legacies, if any, must be reduced and by how much?

ANS.: We should apply Art. 950 *(6 Sanchez Roman 965)* because in this problem there are no compulsory heirs.

Hence:

C	—	P300,000	(preferred)
D	—	150,000	(for support)
E	—	50,000	(for education)
Total	—	P500,000	*(hereditary estate)*

Therefore, only the legacy to *E* must be reduced.

This is reduced by P50,000. The others are not reduced because they are ranked higher in the order of preference given under Art. 950 of the Civil Code.

(7) Rule Re Usufruct or Life Annuity

The last paragraph of Art. 911, reads as follows: "If the devise or legacy consists of a usufruct or life annuity, whose value may be considered greater than that of the disposable portion, the compulsory heirs may choose between complying with the testamentary provision and delivering to the devisee or legatee the part of the inheritance of which the testator could freely dispose." Please give an example.

ANS.: A gave *B* a legacy of usufruct over a piece of land. The estimated value of the usufruct (calculated over a period of time) is P120,000 but the free portion of *A's* estate is only P100,000.00. It is clear, therefore, that the value of the usufruct-legacy is greater than the disposable portion. The compulsory heirs of *A* are given the right to either comply with the testamentary provision by giving *B* said usufruct, or else give *B* merely a sum of money or properties equivalent to P100,000 which is the free portion. Note that *B* has no right to choose. It is *A's* forced heirs who are given the choice so that the legitime may not be impaired or jeopardized. *(6 Sanchez Roman, 967).*

[NOTE: Suppose in the preceding problem aside from the legacy of the usufruct, there are other legacies, what should be done in case the forced heirs do not want to comply with the testamentary disposition regarding the usufruct?

ANS.: If there is a danger that the legitime will be impaired, and if no legacy is preferred, all the legacies must be reduced proportionately. It is this reduced value of usufruct that should then be given to *B*. *(14 Scaevola 406).].*

(8) Reason For Separate Paragraph on Usufructs

Why is there a separate paragraph for devises and legacies of *usufructs*?

ANS.: Because usufructs may be constituted to last till the usufructuary's death *(Art. 603, par. 1),* therefore, the value

of the usufruct may conceivably exceed that of the free disposable portion of the testator. Hence, the necessity of granting the compulsory heirs the option hereinabove referred to. [In order "to determine the value of the right of usufruct... as well as that of annuity, there shall be taken into account the *probable life* of the beneficiary in accordance with the latest Basic Standard Mortality Table, to be approved by the Secretary of Finance, upon recommendation of the Insurance Commission." *(See Sec. 88[A], Nat. Int. Rev. Code of 1997).*

(9) Rule for Life Annuities

What has been said of a legacy of *usufruct* may also be said of a legacy of life annuity. The life annuity should last till the recipient's death, and might, therefore, extend for a conceivably long period of time. As defined in our law, "the aleatory contract of life annuity binds the debtor to pay an *annual* pension or income *during the life* of one or more determinate persons in consideration of a capital consisting of money or other property whose ownership is transferred to him at once with the burden of the income." *(Art. 2021, Civil Code).*

(10) 'Annuity' Defined

An *annuity* refers to a series of equal payments at fixed intervals deriving from an original lump-sum investment. *(Christopher Pass, et al., Unwin Hymon Dictionary of Business, 2nd ed., 1995, p. 25).*

Art. 912. If the devise subject to reduction should consist of real property, which cannot be conveniently divided, it shall go to the devisee if the reduction does not absorb one-half of its value; and in a contrary case, to the compulsory heirs; but the former and the latter shall reimburse each other in cash for what respectively belongs to them.

The devisee who is entitled to a legitime may retain the entire property, provided its value does not exceed that of the disposable portion and of the share pertaining to him as legitime. (821)

COMMENT:

How To Reduce Inofficious Devises

(a) *Example of 1st paragraph: A house worth P2 million was devised to X,* but because it is excessive, it has to be reduced by P800,000. Since the reduction does not absorb one-half of its value, the house goes to *X,* but *X* has to pay the compulsory heirs the sum of P800,000. If the reduction would be to the amount of, say, P1.5 million, the compulsory heirs get the house, but they have to give to *X* the sum of P500,000.

(b) If the reduction absorbs exactly half the value, the devisee should get the house just the same after proper reimbursement. The intent of the testator must prevail over the literal statement of the law. *(6 Sanchez Roman, 965-966).*

(c) *Example of the 2nd paragraph: A* was a compulsory heir entitled to a legitime of P1 million. The free portion of the estate was P500,000. If *A* is given a devise of a house worth P1.5 million, *A* can retain the house.

Art. 913. If the heirs or devisees do not choose to avail themselves of the right granted by the preceding article, any heir or devisee who did not have such right may exercise it; should the latter not make use of it, the property shall be sold at public auction at the instance of any one of the interested parties. (822)

COMMENT:

Sale at Public Auction

Example: A house worth P2 million was devised to *X* but because it is excessive, it has to be reduced by P800,000. The house should therefore go to *X*, but if *X* does not want the house, the compulsory heirs can get the house and just pay *X* the sum of P1.2 million. If still the compulsory heirs do not make use of this privilege, the property should be sold at auction at the instance of any of the interested parties, and the proceeds will be divided accordingly. *(6 Sanchez Roman 966).*

[NOTE: In the example given above, suppose *one* compulsory heir wants to get the house, but the others do not want to do so, may said heir do what he wants?

ANS.: Yes, but he cannot compel the other co-heirs to share with him the expenses for reimbursement. He himself will have to take care of the reimbursement angle. *(6 Sanchez Roman, 968).].*

Art. 914. The testator may devise and bequeath the free portion as he may deem fit. (n)

COMMENT:

The Free Disposal

(a) The *free portion* (really the "free disposal") may be the object of a charge, a substitution, or a condition. The so-called "free portion" is not exactly free for if the surviving spouse and/or illegitimate children are present, the "free portion" is burdened by their legitimes. If anything is still left, this would really be "free," and the more proper term for this would be the "free disposal."

(b) Evidently, the term "bequeath" applies in this Article to movable property, as distinguished from "devise" which can only have reference to immovable property.

(c) The free portion (really the "free disposal") if the testator so desires, can be given to the compulsory heirs in any proportion he may deem fit.

TABLE OF STEPS TO DETERMINE LEGITIMES, INOFFICIOUS DONATIONS, AND EXCESSIVE LEGACIES AND DEVISES

(1) From the Value of Property left, SUBTRACT debts and charges (excluding legacies and devises).

[NOTE: If debts exceed property left, estate is INSOLVENT. Apply BOOK IV, Title XIX, Civil Code, on PREFERENCE OF CREDITS (Creditors of insolvent estate *cannot* ask that donations be re-

duced just to satisfy the credits; however, they can ask for rescission of the donations made in fraud of creditors). *(Art. 772, par. 1; Art. 1381{3}).].*

(2) ADD to No. (1) the VALUE of all the *COLLA-TION-ABLE DONATIONS INTER VIVOS* (Including remissions, etc.).

[NOTE: Donations to strangers are also to be ADDED to the value, so as to determine the net hereditary estate. *(TS, May 4, 1888; TS, June 16, 1902).].*

(3) From the NET HEREDITARY ESTATE, determine the *actual legitimes* of the compulsory heirs surviving. *(Consult table of legitimes).*

(4) *CHARGE or IMPUTE Donations*

[NOTE:

a) a donation to a COMPULSORY HEIR is *charged* or imputed to his legitime; any excess is imputed to the *free disposal*. *(Arts. 909, 910).*

b) a donation to a STRANGER is charged or imputed to the *free disposal;* if excessive — reduce. *See Art. 909, pars. 2 and 3.].*

[NOTE: If a compulsory heir is EXEMPTED from collation — apply (b) donation to stranger. *(Art. 1062).].*

(5) ADD donations (which are *imputed* to the *free disposal*) to LEGACIES AND DEVISES.

[NOTE: If TOTAL *exceeds free disposal* — reduce, but *donations are preferred* to legacies and devises.*].*

[NOTE: Since in this case the free disposal is exceeded, and the *legitime* has been *impaired,* apply *Art. 911* (not Art. 950) in reducing the legacies and devises.*].*

Section 6

DISINHERITANCE

Art. 915. A compulsory heir may, in consequence of disinheritance, be deprived of his legitime, for causes expressly stated by law. (848a)

COMMENT:

(1) 'Disinheritance' Defined

Disinheritance is the process or act, thru a testamentary disposition of *depriving* in a will any *compulsory heir* of his *legitime* for *true* and *lawful causes*. *(See 6 Manresa 614; 4 Castan 367; see also Art. 951).*

(2) Purpose of Disinheritance

(a) *Manresa* says "The purpose of disinheritance is not vengeance BUT RETRIBUTION inasmuch as there can possibly be no feelings of vengeance between parents and children or between husband and wife at the supreme hour of death." *(6 Manresa 618).*

(b) The object of disinheritance is to punish the ungrateful, the culpable, the cruel, the unnatural heir, or an unfaithful spouse. *(Bocobo and Noble, Wills and Succession, p. 44).* Otherwise stated, its object is to maintain good order and discipline within the family. *(See 4 Castan 367).*

(3) Implications from the Definition of Disinheritance

(a) Since disinheritance must be made in a WILL, there is no disinheritance in legal succession.

(b) Only *compulsory* heirs can be disinherited, for they alone are entitled to the legitime. (So, brothers and sisters for example, cannot be the object of any disinheritance. As to them, and strangers, the testator may institute them or not. The testator may indeed set aside or revoke any legacies or devises, with or without any reason). *(See 6 Manresa 556).*

(c) Since compulsory heirs may be disinherited only for lawful causes, it is clear that the courts may properly inquire into the validity of a disinheritance. *(Pecson v. Mediavillo, 28 Phil. 81).*

(d) A disinheritance *excludes* the heir not only from the legitime but also from the free portion; in other words, he is *completely excluded from the inheritance*. *Reason:* If by disinheritance an heir is excluded from the legitime (which should have been his as a *matter of right) with greater reason* should the testator's attitude or dislike toward him, exclude him from the free portion (which is not his as a matter of right).

Example:

T has 5 legitimate children, and an estate of P1 million. *T* made a will, the only provision of which disinherited the eldest child for cause. The estate will thus be distributed as in intestacy. It is clear that the disinherited child is deprived also of his intestate share. Hence, the P1 million will be distributed only among the 4 remaining children, each one to get P250,000. Had the child not been disinherited, he would have received, like the others, P200,000. He loses all this amount — and clearly he loses more than his legitime which is only P100,000.

(4) Other Ways of Depriving the Heirs of their Legitime

Aside from disinheritance, there are other conceivable ways in which a compulsory heir is deprived, in *effect,* of what should have been his legitime, namely:

(a) In case of PREDECEASE, INCAPACITY, REPUDIATION (of course, in case of predecease or incapacity, his own heirs may inherit by representing him).

(b) In case the liabilities of the estate EQUAL or EXCEED its assets, there would be no hereditary estate, and consequently, no legitime.

Art. 916. Disinheritance can be effected only through a will wherein the legal cause therefor shall be specified.

COMMENT:

(1) Requisites for a Valid Disinheritance

(a) Must be made in a valid will. *(Art. 916).*

(b) Must be made *expressly (See Art. 918)* (thus, disinheritance is NOT presumed).

(c) Must be for a LEGAL CAUSE. *(Art. 916).* (The cause must be one authorized by law; hence, even if graver than those set forth in the law, if it be not one of those enumerated, the disinheritance will be ineffective.) *(Art. 918; 6 Manresa 620).*

(d) Must be for a TRUE CAUSE. *(Arts. 917 and 918).*

(e) Must be for an EXISTING CAUSE therefore, there can be no *conditional* or *preventive* disinheritance; although the REVOCATION of a DISINHERITANCE may be conditional. *(6 Manresa 623).*

(f) Must be TOTAL or COMPLETE *(not partial). (6 Manresa 623).*

(g) The cause must be STATED in the WILL itself *(Art. 918).* (Although the exact words of the law need not be used *[14 Scaevola 871]* nor details given, nor is it essential that the statement of the fact of disinheritance and the statement of the cause be made together in one will or instrument as long as a *necessary connection is proved. [6 Manresa 621].* Neither is it essential that the disinheritance be made in the same instrument by which the testator provides for the disposition of his properties *mortis causa,* for the law merely says "a will," meaning "any will"). *(Merza v. Paras, L-4888, May 25, 1953).*

(h) The heir disinherited must be *clearly identified,* so that there will be no doubt as to who is really being disinherited. *(6 Manresa 623).*

(i) The will must not *have been revoked* — at least insofar as the disinheritance is concerned. *(6 Sanchez Roman 1106).*

(2) Illustrative Problems and Cases

(a) A will provided, "I hereby disinherit some of my children because of their disgraceful lives." Is this a valid disinheritance?

ANS.: Unless it can be ascertained who are referred to, the disinheritance is not valid. Applying the rule of institution of heirs, we may say that *evidence aliunde* can even be allowed to determine the identity of the heirs concerned *(6 Sanchez Roman 601; see also Art. 844),* but in no case may oral declarations of the testator be taken into account. *(Art. 789).*

(b) *T* validly disinherited a child in his will, but he later revoked the will. Does the disinheritance continue?

ANS.: No, for the will has already been revoked.

(c) In his will, *T* disinherited his child, and the said child should get only 2/3 of his legitime. Will the child inherit? How much if any?

ANS.: The disinheritance being partial, it is not valid. Therefore, it is as if there is no disinheritance, and the child can still get at least his legitime. *(See 6 Manresa 622).*

(d) *T* has a son *A*. In his will, *T* said, "If *A* tries to kill me, I will disinherit him." Later *A* really tried to kill *T* and was duly convicted therefor. *T,* however, never made any other will. Has *A* been validly disinherited? Will *A* inherit anything? Why?

ANS.: A has not been validly disinherited, because the disinheritance was conditional, and for a cause that had *not* yet occurred at the time the will was executed. *(6 Manresa 623).* HOWEVER, *A* will not inherit, not because of disinheritance, but because he is incapacitated to succeed, by virtue of Art. 1032(2), which says that "The following are incapable of succeeding by reason of unworthiness … Any *person* who has been *convicted* of an *attempt* against the *life* of the *testator* …"

(e) The testator in his will said, "I hereby disinherit my child *A* but if he reforms from his disgraceful life, this disinheritance will be void." Is this a valid provision?

ANS.: Yes, for the disinheritance is *not* conditional; it is the *revocation* of the disinheritance that is. *(6 Manresa 623).*

(3) Case

Seangio v. Reyes
508 SCRA 177 (2006)

ISSUE: For *disinheritance* to be valid, what does Art. 916 of the new Civil Code requires?

HELD: That the same must be effected thru a will wherein the legal cause therefor shall be specified. In the case at bar, maltreatment of a parent by a child presents a sufficient cause for the disinheritance of the latter.

Art. 917. The burden of proving the truth of the cause for disinheritance shall rest upon the other heirs of the testator, if the disinherited heir should deny it. (850)

COMMENT:

Burden of Proving the Truth of the Cause for Disinheritance

A disinherited his son *B* for leading a dishonorable life. In the court proceedings after *A's* death, the executor, filed a motion asking for a judicial declaration as to who should be the heirs, and in said motion, the executor asked the judge to have *B* declared as disinherited and consequently deprived of his legitime. *B,* however, stoutly maintained that he had never led a dishonorable life. Upon the advice of his attorney, *B* filed his opposition to the motion of the executor, and in said opposition flatly and categorically denied his having led the kind of life complained of. What should the other heirs of the testator now do? They should now prove the truth of the cause for disinheritance. They may present witnesses or documents to prove the truth of the cause stated in the will. In turn, the disinherited

heir should be given a chance to rebut whatever proof had been presented against him. In the end, it is the Court who should decide as to whether or not the disinheritance is valid. If the court finds no justification for the disinheritance, it will adjudge *B* as one of the heirs. The institution of the other heirs will remain valid however as long as *B's* legitime is not impaired. *(Art. 918).*

Art. 918. Disinheritance without a specification of the cause, or for a cause the truth of which, if contradicted, is not proved, or which is not one of those set forth in this Code, shall annul the institution of heirs insofar as it may prejudice the person disinherited; but the devises and legacies and other testamentary dispositions shall be valid to such extent as will not impair the legitime. (851a)

COMMENT:

(1) Ineffective Disinheritance

This Article treats of *three cases* when the disinheritance is considered *invalid* or *ineffective* or *illegal*.

(a) without giving the cause (NO CAUSE STATED)

(b) a cause denied by the heir concerned and not proved by the instituted heir (NOT TRUE CAUSE)

(c) a cause not given in the law (NOT LEGAL CAUSE)

[NOTE: It is believed that this Article also governs the effect of that kind of disinheritance where there is a *subsequent reconciliation,* and where therefore there is also an ineffective disinheritance. *(14 Scaevola 880).* "A subsequent reconciliation between the offender and the offended person deprives the latter of the right to disinherit and renders *ineffectual* any disinheritance that may have been made." *(Art. 922, Civil Code).].*

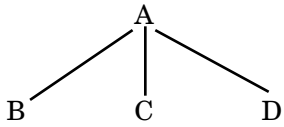
[NOTE: There are therefore FOUR kinds of INEFFECTIVE DISINHERITANCE.*].*

(2) Effects of Ineffective Disinheritance

(a) The institution of heirs is annulled but only insofar as it may prejudice the person disinherited, that is, insofar as the legitime of said heir is impaired.

(b) The devises, legacies, and other testamentary dispositions shall be *valid* to such extent as will not impair the legitime.

(3) Example of the 1st Effect



A disinherited *B*, and instituted *C* and *D* as his *(A's)* heirs. *B, C,* and *D* are *A's* legitimate children. The disinheritance of *B* was however *invalid* because it was for a cause not provided for by the law. The hereditary estate is P900,000. How much will each of the children receive?

ANS.: *B's* legitime is P150,000 (and he gets this)

C gets	P375,000
D gets	P375,000
	P900,000

In other words, the institution of heirs remains valid, but the shares of the instituted heirs will be decreased to give *B* his legitime.

[NOTE: The rule here is different from that in preterition *(Art. 854),* because in such a case, the whole institution of heirs is annulled. Had there been preterition here, each of the children would receive P300,000 each.].

(4) Example of the 2nd Effect

Estate is P1 million. A legacy of P700,000 was given to *X*, a friend. *Y,* a legitimate child of the testator, was ineffectively disinherited. How much should *X* and *Y* get?

ANS.: X gets only P500,000. (The legacy to him is reduced by P200,000 so as not to impair *Y's* legitime. *Y* gets P500,000 [his legitime].).

[NOTE: The rule regarding this 2nd effect is the same as in preterition. *(Art. 854).].*

[NOTE: If the free portion has not been disposed of, the ineffectively disinherited heir gets not only his legitime, but also his intestate share of the free portion. This is because he is an intestate heir also.

Example:

T has two legitimate children *A* and *B*. His estate is P1 million. In his will, *T* gave *A* his legitime of one-fourth, and ineffectively disinherited *B*. How much will *B* get?

ANS.: B gets P250,000 as legitime, and a *half-share* as intestate heir in the free portion of P500,000 (or P250,000).

Thus, he gets a total of P500,000.*].*

[NOTE: A gets the same amount.*] (NOTE ALSO* that in the problem presented, the free portion had not been disposed of.*).*

(5) Distinctions Between Preterition and VALID Disinheritance

Preterition	*VALID Disinheritance*
1. the omission may be either intentional or unintentional (thus, it is an implied deprivation)	1. disinheritance is always *intentional* (thus, it is an *express deprivation*)
2. may be with cause or without cause	2. cause must always be *stated* in the will; must be *true* and *legal*
3. preterition annuls the institution; therefore the omitted heir *inherits*	3. the disinherited heir inherits NOTHING (either by way of legitime, or by way of free portion)

4. may exist with or without a will (as when everything has been given to only one of the compulsory heirs by way of donation *inter vivos*).	4. a will is always required
5. the institution is always VOID — except when the preterited heir predeceases the testator.	5. may be VALID — when all the requirements of the law are followed.

(6) Distinction Between Preterition and Imperfect or Ineffective Disinheritance (BAR)

Preterition	*Imperfect Disinheritance*
The institution of heirs is *completely annulled.*	The institution remains *valid,* but must be *reduced* insofar as the legitime has been impaired.

(7) Similarities Between Preterition and Imperfect or Ineffective Disinheritance

(a) In both cases, the omitted heir and the imperfectly disinherited heir get at *least* their legitime.

(b) In both cases, the legacies and devises remain valid insofar as the legitime has not been impaired.

(c) Both refer to compulsory heirs.

(8) Problems for the Reader to Solve

(a) Estate is P900,000. One child is *instituted*; the second child is *preterited;* and the third child is *validly disinherited*. Divide the estate.

(b) Estate is P900,000. One child is *instituted,* the second child is *preterited*, and the third child is *imperfectly disinherited*. Divide the estate.

(c) Estate is P900,000. Two children are *imperfectly disinherited,* and the third child is validly *disinherited.* Divide the estate.

Art. 919. The following shall be sufficient causes for the disinheritance of children and descendants, legitimate as well as illegitimate:

(1) When a child or descendant has been found guilty of an attempt against the life of the testator, his or her spouse, descendants, or ascendants;

(2) When a child or descendant has accused the testator of a crime for which the law prescribes imprisonment for six years or more, if the accusation has been found groundless;

(3) When a child or descendant has been convicted of adultery or concubinage with the spouse of the testator;

(4) When a child or descendant by fraud, violence, intimidation, or undue influence causes the testator to make a will or to change one already made;

(5) A refusal without justifiable cause to support the parent or ascendant who disinherits such child or descendant;

(6) Maltreatment of the testator by word or deed, by the child or descendant;

(7) When a child or descendant leads a dishonorable or disgraceful life;

(8) Conviction of a crime which carries with it the penalty of civil interdiction. (756, 853, 674a)

COMMENT:

Causes for the Disinheritance of Children and Descendants

(a) *Paragraph one* — "When a child or descendant has been found guilty of an attempt against the life of the testator, his or her spouse, descendants, or ascendants."

Explanation:

(1) found guilty — there should be a final judgment of conviction by a court of justice (however, this judgment may come *before* or *after* the execution of the will)

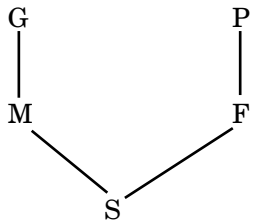
(2) there must be intent to kill

(3) "spouse, descendants, or ascendants" — refers to those of the testator

(4) *A* has a child *B* who has a child *C* who has a child *D*. If *B* is guilty of an attempt to kill *D, A* can disinherit *B*.

(5) *A* has a child *B* who is married to *C*. *B* has been found guilty of an attempt to kill *C*. *A* cannot disinherit *B* under paragraph No. 1. Possibly under No. 7 or 8.

(6)



Legend: G is *M's* mother. *P* is *F's* father. *M* and *F* are married and have a son *S*. *S* has been found guilty of an attempt to kill *P*. May *M* disinherit *S* on that ground?

ANS.: No, at *least not under par. 1*. True, *S* attempted to kill his ascendant, but not *M's ascendant*. Note that *P* is *F's* ascendant.

(7) If an "attempt" is sufficient to disinherit, it follows that if the act is consummated, or frustrated there is sufficient cause for disinheritance. This is true even if the heir be only an *accomplice,* provided of course that there was intent to kill.

(8) If after conviction there is a pardon, disinheritance is also proper, unless, the pardon be based on the heir's complete innocence.

(9) Conviction for "homicide thru reckless imprudence" is not a ground under par. (1) in view of the absence of intent to kill.

(b) *Paragraph 2* — "When a child or descendant has accused the testator of a crime for which the law prescribes imprisonment for six years or more, if the accusation has been found groundless."

Explanation:

(1) *A* has a child *B*. *B* accused *A* of murdering *C*. The penalty for murder is of course more than 6 years imprisonment. But the accusation has been found groundless. May *A* disinherit *B* on this ground? Yes.

(2) Notice here that the alleged crime must have been committed against the child himself or against any descendant, or for that matter *against anybody*.

(3) If the testator has been acquitted on the ground of "lack of proof of guilt beyond reasonable doubt" or "lack of criminal intent," does this necessarily mean that the accusation was groundless?

ANS.: No, this does not necessarily mean that the accusation was groundless. In other words, the testator *would not,* in such a case, have the right to disinherit the accusing heir. *(Javier v. Lucero, L-6706, Mar. 29, 1954).*

(4) There are three elements involved here:

a) the act of accusing

b) the fact that the accusation has been found groundless

c) the offense or crime charged carries a penalty of imprisonment for at least six years.

(5) The act of *accusing* as understood in this paragraph may include the institution of a criminal action, or

even the mere statement of the heir as a witness in a case against the testator, a statement where said heir affirms or corroborates the accusation. As a matter of fact, if the heir-witness is in possession of facts which might result in the testator's acquittal and the heir-witness deliberately fails to reveal said facts, there is also an "accusation." *(6 Sanchez Roman 278).*

(c) *Paragraph 3* — "When a child or descendant has been convicted of adultery or concubinage with the spouse of the testator."

Explanation:

(1) *Example:* When a son has been convicted of adultery with his stepmother, or even with his own mother, the father can disinherit him.

(2) It is essential that there must be a final judgment of conviction either in the adultery case or in the concubinage case before this Article can be applied.

(3) If a son commits adultery with his mother, and is found guilty thereof by final judgment, may the mother disinherit him on this ground? No. The law does not say so. The causes for disinheritance must be strictly construed and should not cover cases not clearly governed by the law. *(6 Manresa 61).*

(d) *Paragraph 4* — "When a child or descendant by fraud, violence, intimidation, or undue influence causes the testator to make a will or to change one already made."

Example:

A makes a will because he was threatened with injury by *B*, his son, if the will was not made. Later on, *A* makes a new will. In this new will, *A* can disinherit *B*. *[NOTE:* Unless a new will is made, there can be no disinheritance, because for this to exist, there must be a will where the disinheritance is made.*]*.

(e) *Paragraph 5* — "A refusal without justifiable cause to support the parent or ascendant who disinherits such child or descendant."

(1) *Example:* A son, although he could afford to do so, refused to support his father, who needed the same. The father can disinherit said son. But of course if the father had been cruel to the son, or had abandoned the latter, the son would be justified in refusing to give support. In such a case, there would be no valid cause for disinheritance under this ground.

(2) No judicial demand is needed for the law does not require this. *(6 Manresa 636)*. Note that when a judicial pronouncement is needed, the law says so.

(3) If there had been a refusal to support, and support is *later given but only because* of judicial compulsion, this would still be a valid ground for disinheritance.

(f) *Paragraph 6* — "Maltreatment of the testator by word or deed, by the child or descendant."

Explanation:

(1) This covers two causes:

a) maltreatment by word (slanderous words, offensive language)

b) maltreatment by deed

(2) The Spanish Supreme Court has decided that it is not necessary that there should first be a judgment convicting the child or descendant for either act. *(Decision of Nov. 4, 1904)*. However, the maltreatment should have been caused intentionally and not merely thru imprudence. *(6 Manresa 638)*.

(3) If the maltreatment in the form of gross disrespect and raising of the hand against a grandfather was caused by a child of tender years (14) and who a little later became insane, this would *not* be sufficient cause for disinheritance. *(Pecson v. Mediavillo, 28 Phil. 81)*.

(4) Manresa is of the opinion that as long as acts of violence are committed against the testator, whether physical injuries resulted or not, there would be a case of maltreatment. *(6 Manresa 638).* This would indeed be maltreatment by deed. Of course, if there was actually an attempt against the life of the testator, paragraph 1 of Art. 919 would govern. *(Art. 919, par. 1).* It is believed, however, that even if there is no *conviction* for such an attempt, still, should there be maltreatment by deed, the latter as such would constitute enough cause for disinheritance. *(6 Manresa 577).*

(5) *Note* that maltreatment by an *ascendant* of a descendant does not constitute a ground for the descendant to disinherit the ascendant, for while it may be an ABUSE, it is generally in the exercise of a power. The reverse is however repugnant to natural law, and is therefore a ground for disinheritance.

(g) *Paragraph 7* — "When a child or descendant leads a dishonorable or disgraceful life."

Explanation:

(1) According to No. 3 of Art. 853 of the old Civil Code, a daughter might be disinherited by the parents or ascendants if she becomes a *prostitute*. The law therefor referred only to the immoral life of a daughter or granddaughter, and did not have any provision regarding the immoral conduct of a son or grandson. The Commission believes that this cause for disinheritance should be broader in scope so as to include both the *males* and the *females*. *(Comment of the Code Commission).*

(2) There need not be final judgment of conviction. The essence of the cause is that anything that brings dishonor or disgrace to the family of the testator merits correction in the form of disinheritance. However, a *single act* is not ordinarily sufficient, for "leading a life" implies *continuity*.

(h) *Paragraph 8* — "Conviction of a crime which carries with it the penalty of civil interdiction."

This is self-explanatory, but it should be noted that there must be a final judgment of conviction here. Moreover, under Arts. 40 and 41 of the Revised Penal Code, civil interdiction is given as an *accessory* penalty to:

(1) death (if commuted)

(2) *reclusion perpetua*

(3) *reclusion temporal*

(NOTE also that if the Indeterminate Sentence Law is applied, it is the MAXIMUM that should be considered, not the MINIMUM*.)*.

Art. 920. The following shall be sufficient causes for the disinheritance of parents or ascendants, whether legitimate or illegitimate:

(1) When the parents have abandoned their children or induced their daughters to live a corrupt or immoral life, or attempted against their virtue;

(2) When the parent or ascendant has been convicted of an attempt against the life of the testator, his or her spouse, descendants, or ascendants;

(3) When the parent or ascendant has accused the testator of a crime for which the law prescribes imprisonment for six years or more, if the accusation has been found to be false;

(4) When the parent or ascendant has been convicted of adultery or concubinage with the spouse of the testator;

(5) When the parent or ascendant by fraud, violence, intimidation, or undue influence causes the testator to make a will or to change one already made;

(6) The loss of parental authority for causes specified in this Code;

(7) The refusal to support the children or descendants without justifiable cause;

(8) An attempt by one of the parents against the life of the other, unless there has been a reconciliation between them. (756, 854, 674a)

COMMENT:

Causes for the Disinheritance of Parents or Ascendants

(a) Paragraph 1 — "When the parents have abandoned their children or induced their daughters to live a corrupt or immoral life or attempted against their virtue."

Explanation:

(1) *Abandonment* includes not merely the exposure of the child or descendant to danger but also the failure to give it due care or attention. *(6 Sanchez Roman 274). Abandonment* is indeed physical, moral, social or educational; hence, it does *not* have the technical signification of "abandonment" under the Rev. Penal Code. Moreover, whether intentional or not, the negligent and careless failure to perform the duties of parenthood is a significant element of abandonment. *(Emmons v. Dinelli, 235 Ind. 249, cited in Intestate Estate of the late Juliana Reyes de Santos, L-23828, June 7, 1966).*

(2) The word "daughters" includes other descendants.

(3) When a mother helps a stranger commit rape on her own daughter, said daughter can disinherit the mother.

(4) When the parents encourage or force their daughters into a life of prostitution, the daughters concerned have a valid cause for disinheriting their parents. As a matter of fact, the life does *not* necessarily have to be one of prostitution. It is sufficient if the life be "corrupt or immoral."

(5) The "attempt against virtue" does *not* have to *be in a final judgment.*

(b) *Paragraph 2* — "When the parent or ascendant has been convicted of an attempt against the life of the testator, his or her spouse, descendants or ascendants."

Explanation:

(1) See comments under par. 1, Art. 919.

(2) "his or her spouse, descendants, or ascendants" refers to those of the testator.

(c) *Paragraph 3* — "When the parent or ascendant has accused the testator of a crime for which the law prescribes imprisonment for six years or more, if the accusation has been found to be false."

Of course, if the accusation proves to be *true,* there will not be a valid disinheritance.

(d) *Paragraph 4* — (*See par. 2,* Art. 919)

(e) *Paragraph 5* — (*See par. 4*, Art. 919)

(f) *Paragraph 6* — "The loss of parental authority for causes specified in this Code."

Explanation:

(1) The words "for causes specified in this Code" are misleading. Under Art. 228 of the Family Code, parental authority ends when the child has been emancipated. It would be absurd to consider this loss of parental authority to be a ground for disinheritance.

(2) Parental authority terminates:

a) upon the death of the parents *(Art. 228, id.)* or of the child *(Art. 228, id.);*

b) upon emancipation;

c) adoption of the child;

d) upon the appointment of a general guardian *(Art. 228, id.);*

e) upon judicial declaration of abandonment of the child in a case filed for the purpose *(Art. 229, id.);*

f) upon final judgment of a competent court divesting the party concerned of parental authority *(Art. 229, id.);*

g) upon judicial declaration of absence or incapacity of the person exercising parental authority. *(Art. 229, id.).*

[NOTE: It is evident that par. 6 of Art. 920 of the Civil Code does not refer to Art. 327.*]*.

(3) The father, and in a proper case the mother, shall temporarily (merely suspended) lose authority over their children:

a) when by conviction in a criminal case, the penalty of civil interdiction is imposed upon him or her. *(Art. 230, Family Code).*

b) Art. 231 of the Family Code provides other grounds where suspension of parental authority may be declared by the court.

(4) The mother who contracts a subsequent marriage *loses* the parental authority over her children, unless the deceased husband, father of the latter, has expressly provided in his will that his widow might marry again, and has ordered that in such case, she should keep and exercise parental authority over the children. *(Art. 328, Civil Code).*

[NOTE: Under the new Civil Code, a literal interpretation of the law would reveal that this is a ground. It is believed however by the author that such was not the intention of the law, although as has been said, the phrase "for causes specified in this Code" is very sweeping.*]*.

(5) The courts may deprive the parents of their authority or suspend the exercise of the same if they should treat their children with excessive harshness or should give them corrupting orders, counsels, or examples, or should make them beg or abandon them. *(Art. 332, Civil Code).*

[NOTE: Under the old Civil Code, the loss of parental authority was not, by itself, considered a valid cause for disinheritance. Under the new Civil Code, it is believed that this would not be considered as a valid cause for disinheriting parents.*]*.

[NOTE: It is thus submitted that *loss of parental authority* is a ground for disinheritance only if there is FAULT on the part of the heir, such as in Arts. 330 and 332 of the Civil Code; and not when there is no such fault.*]*.

(6) Suppose parental authority which had been lost is later on recovered while the child-testator is still alive, would the disinheritance made be invalid?

ANS.:

a) The *disinheritance* continues to be valid, according to Sanchez Roman, because it is sufficient if at one time the parents have been deprived of such authority. *(6 Sanchez Roman 1120)*. The *reason* given is that the disinheritance is made not so much because of *loss* of parental authority but because there had been a commission of an act resulting in such loss of authority.

b) The disinheritance becomes ineffective and invalid according to Manresa and Scaevola, because what is important is the fact that upon the death of the child-testator, parental authority had been regained and therefore, there can exist no just cause for the disinheritance. *(6 Manresa 643-644; 14 Scaevola 918)*. Disinheritance being a deprivation of a right to the legitime must be strictly construed.

c) The author sides with Manresa and Scaevola.

(g) *Paragraph 7* — "The refusal to support the children or descendants without justifiable cause." *(This is self- explanatory. Please refer to notes under par. 5, Art. 919.)*

(h) *Paragraph 8* — "An attempt by one of the parents against the life of the other, unless there has been a reconciliation between them."

Explanation:

(1) This does not require a conviction by final judgment. *(6 Manresa 583).*

(2) Note well that this paragraph does not apply when the attempt is against the life of a person other than the other parent. When a father for instance attempts to kill his own father-in-law, the son of the offending father cannot disinherit him on this ground.

(3) The reconciliation between the parents deprives the child of the right to disinherit the offending parents on this ground. "Reason," says Manresa, "tells us the child concerned should not be more severe than the spouse who has been offended." *(6 Manresa, p. 644).*

(4) A reconciliation implies mutual restoration of feelings to the status quo, that is, to the relationship existing prior to the commission of the act which strained said relationship. A general pardon without removal of hurt feelings is not the reconciliation spoken of by the law. *(6 Manresa 664).*

(5) However, if the parents should again live together in the same house, reconciliation between them is thereby presumed. *(6 Manresa 645).*

(6) Note that the law say *parents,* therefore, it does not apply to other ascendants like the grandparents.

Art. 921. The following shall be sufficient causes for disinheriting a spouse:

(1) When the spouse has been convicted of an attempt against the life of the testator, his or her descendants, or ascendants;

(2) When the spouse has accused the testator of a crime for which the law prescribes imprisonment for six years or more, and the accusation has been found to be false;

(3) When the spouse by fraud, violence, intimidation, or undue influence causes the testator to make a will or to change one already made;

(4) When the spouse has given cause for legal separation;

(5) When the spouse has given grounds for the loss of parental authority;

(6) Unjustifiable refusal to support the children or the other spouse. (756, 855, 674a)

COMMENT:

Causes for Disinheriting a Spouse

(a) *Example:* If a husband without valid reason refuses to support the children, the wife can disinherit him. *(Art. 921, No. 6).*

(b) *Another Example:* One good reason for refusing to support a wife is when she has been convicted of adultery. *(Cisneros v. Akernam, 36 O.G. p. 66).*

(c) Note that in No. (4) of Art. 921, the law says "when the spouse has given *cause* for legal separation." A decree of legal separation is *not* essential nor is a *final judgment* in a *criminal case* required. If there is ALREADY a legal separation decree before the execution of the will, disinheritance is SUPERFLUOUS, for this in effect would be denying the guilty spouse of a right NOT possessed. *(See Art. 106, No. 4).*

Art. 922. A subsequent reconciliation between the offender and the offended person deprives the latter of the right to disinherit, and renders ineffectual any disinheritance that may have been made. (856)

COMMENT:

(1) 'Reconciliation' Defined

Reconciliation is the mutual restoration of feelings to the status *quo*. *(6 Manresa 664).* It is indeed the resumption of friendly relations.

(2) Characteristics of Reconciliation

(a) Reconciliation needs no special form; therefore it may be *express* or *implied*. (Ultimately, this is a judicial question of fact). *(6 Sanchez Roman 1129)*. There is *implied* or *presumed* reconciliation if the parties live again in the same house. *(6 Manresa 646)*.

(b) There is *no reconciliation* in the following instances:

1) A general pardon usually given at the hour of death to all who may have, in some way or another, offended the testator, unless there really be a removal of hurt feelings. *(6 Manresa 647)*.

2) A pardon not *accepted* by the disinherited heir. *(6 Manresa 647)*.

3) A pardon which does not specify the heir concerned nor the act which had been committed. *(6 Manresa 647)*.

4) A pardon given by testator in the very same will wherein he provides for the *disinheritance*. Here, there cannot be said to be a reconciliation, and restoration to the status quo; there only is a sort of *moral force or spiritual influence* which forgives in the name of morality. *(See TS, Nov. 4, 1904)*.

(3) Effects of Reconciliation

(a) If *no* disinheritance has been made yet, no disinheritance can now be done. *(Art. 922)*.

(b) Disinheritance already made is rendered INEFFECTUAL; in other words, it is as if there had been no disinheritance at all. *(Art. 922; 14 Scaevola 880)*.

(4) Rules In Case the Cause of the Disinheritance is ALSO a Cause of Unworthiness:

(a) BASIS — There are grounds for disinheritance which are also causes of *incapacity* to succeed by reason of unworthiness. Among them are the *abandonment of children,* and the attempt to take the life of the testator, etc. *(Art. 1032)*.

(b) If the cause of unworthiness was *made* a ground for disinheritance and there is a reconciliation, Art. 922 will govern, and NOT Art. 1033. In other words, the mere fact of reconciliation extinguishes the unworthiness and NO written document is needed for a condonation.

Reason: A person is rendered unworthy to succeed only because the law *presumes* this to be the will of the testator. This presumed intent certainly cannot prevail over the *express will* of a person shown by his act of reconciliation.

Example:

T disinherited his child *X* for trying to kill him. *X* had been duly convicted. Later, *T* and *X* reconciled. *T* never changed his will (where the disinheritance was made). Neither did *T* make any written document condoning *X's* offense. *T* then died. Will *X* inherit?

ANS.: Yes, in view of the reconciliation, despite the absence of a written condonation, since the cause for unworthiness had been made the ground for disinheritance.

(c) If the cause for unworthiness was NOT made the ground for disinheritance, or there has been no disinheritance at all, Art. 1033 will apply. Art. 1033 says: "The causes of unworthiness shall be without effect if the testator had knowledge thereof at the time he made the will, or if having known of them subsequently, he should condone them in writing."

(5) How Disinheritance is Revoked

Disinheritance is revoked by:

(a) subsequent reconciliation;

(b) the making of a new will making the disinherited heir an instituted heir.

The fact that a void will containing a disinheritance is denied probate cannot be said to revoke a disinheritance, for the simple reason that in such a case, there never was a valid disinheritance. Hence, there is really nothing to revoke.

Art. 923. The children and descendants of the person disinherited shall take his or her place and shall preserve the rights of compulsory heirs with respect to the legitime; but the disinherited parent shall not have the usufruct or administration of the property which constitutes the legitime. (857)

COMMENT:

Representation of the Disinherited Heir

(a) The heirs of the disinherited heir can represent the latter, but only insofar as the legitime of said disinherited heir is concerned.

Example: A dies leaving P1 million and 2 legitimate children, *B* and *C*. *B* was however disinherited validly in *A's* will and *C* was given P1 million. *B* has a legitimate child *D*. *D* represents *B* in getting *B's* legitime which is P250,000. Therefore *C,* the instituted heir, gets only P750,000.

(b) In the example above given, *B* does not have the usufruct or administration of said P250,000. This is, therefore, the exception to the general rule that a parent has the administration and usufruct of the property of a child who is under parental authority. The reason for this exception is obvious when we consider the incapacity of the disinherited heir brought about by his own unworthiness or act of ingratitude.

(c) The children and descendants are allowed to inherit by representation, the legitime of the disinherited heir because the fault of the heir is not the fault of the representative — and it would be unjust to punish them. *(6 Sanchez Roman 1125).*

(d) The law says "the children and descendants of the *person disinherited*." *(Art. 923).* Who is this "person disinherited" who can be represented? Does it refer to a disinherited *parent,* disinherited *wife* or disinherited child or descendant?

ANS.: The phrase refers only to a *disinherited child* or *disinherited descendant*. Thus, neither a disinherited *spouse* nor a disinherited *parent* may be represented. (*See Art. 1035; see also Art. 972,* which states that there is no representation in the ascending line.).

(e) In this Art. 923, the right of representation extends only to the *legitime*. If the disinherited person had been given any legacy, devise, or part of the free disposal, same will go to the substitutes, if any (note that the disinherited heir should not even receive any part of the free disposal); if none, to the other heirs, legatees, or devisees by accretion if proper; if accretion is *not* proper, same should go to the *legal heirs* by *intestacy*.

Section 7

LEGACIES AND DEVISES

Art. 924. All things and rights which are within the commerce of man may be bequeathed or devised. (865a)

COMMENT:

The Grant of Legacies and Devises

(a) A legacy is "bequeathed"; while a devise is "devised."

(b) Legacy defined — it is a gift of *personal* property given in a will.

(c) Devise defined — it is a gift of *real* property given in a will.

(d) Legacies and devises are testamentary dispositions giving an economic benefit or advantage *other* than an *aliquot* or *fractional* part of the inheritance. (This is to distinguish the giving of these gifts from the institution of heir).

(e) Legacies and devises are separated by the testator from the universality of the inheritance that would have appertained to the heir, and they have for their PURPOSES the following:

(1) the compliance by the testator of social duties

(2) his rewarding of the love and devotion of friends and relatives

(3) his show of gratefulness for acts done to him

(4) his giving of funds to beneficent and charitable institutions. *(6 Manresa 652).*

(f) Things within the commerce of man are those:

(1) bought and sold, exchanged, donated

(2) transferred from one person to another

(3) subject to appropriation by man *(6 Manresa 674)*, and should, therefore, exclude such things as *res nullius* or property of public dominion such as public roads. *(See 6 Manresa 674).*

Pastor, Jr. v. Court of Appeals
GR 56340, June 24, 1983

The payment of a legacy provided for in a will cannot be ordered by the court unless the estate of the deceased has first been liquidated, *i.e.*, the assets determined, and all debts, taxes, and expenses have been paid.

Vera v. Navarro
79 SCRA 608

Heirs are *not* solidarily liable for taxes to be paid by them on account of properties received thru inheritance or succession.

Art. 925. A testator may charge with legacies and devises not only his compulsory heirs but also the legatees and devisees.

The latter shall be liable for the charge only to the extent of the value of the legacy or the devise received by them. The compulsory heirs shall not be liable for the charge beyond the amount of the free portion given them. (858a)

COMMENT:

(1) Who Has the Duty of Giving the Legacies and Devises?

ANS.: It depends.

(a) As a general rule, if no one is charged with this duty, it is the estate which must give the legacies and devises. The estate is of course represented by the executor, or the administrator with a will *annexed*.

[NOTE: Under the Rules of Court, this officer is bound to discharge the *devises and legacies*. *(Rule 81, Sec. 1{b}).* As a matter of fact, for this purpose of discharging, he may even be authorized by the court to alienate *personal* and *real* properties, in order to obtain the money or things needed. *(See Secs. 1 and 2, Rule 81, Rules of Court).].*

(b) If the testator gives this duty to the *compulsory heirs,* or to the *legatees* and *devisees,* they must comply with their duties, subject to the limitations imposed by law.

[NOTE: The testator is allowed to charge them with this duty because the *right* to dispose presumes the *right in general to impose conditions for the dispositions.].*

(2) Classification of Legacies and Devises According to the Person or Institution Burdened (Given the Duty of Giving)

(a) *Legacy proper* — when the estate has the duty to give the legacy.

(b) *Pre-legacy* — when the duty is given to the estate but the gift is given to a specific *heir* or *legatee*.

(Example: T in his will gave *his car* to *S*, his son. The car is a pre-legacy*.)*.

(3) Examples of Sub-legacies or Sub-devises

(a) duty is on the HEIR

"I hereby institute my only child *C* as heir. However, he must give a car worth P400,000 to *L."* (The legacy of the car is called a sub-legacy.)

(b) duty is on the LEGATEE or DEVISEE

"I hereby give my car to *L,* but I want *L* to give P500,000 to *X.*

[NOTE: The legacy of the car to *L* is an ordinary legacy; but the legacy of the P500,000 to *X* is a *sub-legacy,* having been imposed upon *L.]*.

[NOTE MOREOVER that in the problem or example just given, *L* is the *legatee burdened* insofar as the P500,000 is concerned; and *X* is the *legatee favored* insofar as the same P500,000 is concerned.*]*.

[NOTE:

(a) A legatee who is bound to give a sub-legacy is liable only to the extent of the legacy given to him. *(Par. 2, Art. 924).*

(b) A compulsory heir is bound to give a sub-legacy only insofar as his legitime has not been impaired. *(Par. 2, Art. 924).]*.

Art. 926. When the testator charges one of the heirs with a legacy or devise, he alone shall be bound.

Should he not charge anyone in particular, all shall be liable in the same proportion in which they may inherit. (859)

COMMENT:

When Heirs Are Charged

(a) Compulsory heirs charged with a sub-legacy are liable in proportion not to how much each actually inherits, but only in proportion to their *institution to the free disposal*.

(b) *Example*:

Estate = P1 million

A and *B,* legitimate children, were instituted in this way: *A* to *3/5* and *B* to *2/5*. However, they were required

to give *F* a legacy of P50,000. How much should each contribute? Why?

ANS.: A was given P600,000 (P250,000 as legitime and P350,000 as free portion); *B* was given P400,000 (P250,000 as legitime and P150,000 as free portion). Since their institution to the *free portion* is in the proportion of P350,000 to P150,000 (or 35 to 15), it follows that of the P50,000 sub-legacy, *A* must give P35,000 and *B* must give P15,000.

Art. 927. If two or more heirs take possession of the estate, they shall be solidarily liable for the loss or destruction of a thing devised or bequeathed, even though only one of them should have been negligent. (n)

COMMENT:

Solidary Liability of Heirs Who Take Possession

Example: A and *B,* heirs, took possession of the estate of their deceased father and used the family car, which had been given as legacy to *C*. If through *A's* negligence, the car is destroyed, can *C* ask for reimbursement of the whole value of the car from *B*?

ANS.: Yes, the liability here is solidary. Of course, *B* can later on demand reimbursement from *A*.

Art. 928. The heir who is bound to deliver the legacy or devise shall be liable in case of eviction, if the thing is indeterminate and is indicated only by its kind. (860)

COMMENT:

Liability For Eviction

Example: An heir was ordered to give to *A* a legacy of a car. If the car given to *A* is lost by *A* through eviction (as when its real owner defeats *A* in a court action) the heir is liable. Since the legacy was generic, the heir should have selected a car he could validly dispose of, and not a car belonging to another.

[NOTE:

(a) If the legacy or devise to be given by the heir is a specific thing, the heir cannot be held liable for eviction since he has no choice.

(b) If the legacy or devise is a burden not on the heir but on the estate itself, there is no *warranty against eviction,* whether the legacy be specific or generic, if there were court proceedings which ordered the giving of such legacy or devise. *Reason:* In such a case, there was court approval.

(c) A thing is considered generic or indeterminate if it is not particularly designated or physically segregated from all other things belonging to the same class.

[NOTE: It is understood, notwithstanding the wording of the law, that in case of *generic* legacies or devises, there is also a warranty against *hidden defects* and *hidden encumbrances.].*

Art. 929. If the testator, heir, or legatee owns only a part of, or an interest in the thing bequeathed, the legacy or devise shall be understood limited to such part or interest, unless the testator expressly declares that he gives the thing in its entirety. (864a)

COMMENT:

(1) The Grant of a Part Interest

(a) *Example:* The testator owned one-third of a house. If the testator gives the house as a devise to *A*, the devise is understood to cover only one-third of the house. An exception occurs when he *expressly* declares that he gives the thing in its entirety despite the fact that he is only a part-owner.

(b) *The general rule* — that only the part owned by the testator should be given — applies *whether* or *not* the testator *knew* that somebody else partly *owned* the property. *(6 Manresa 669).*

(c) Note that for the exception to apply, the testator must "*expressly* declare that he gives the thing in its entirety." This clause has been interpreted to mean that the WHOLE is being given *despite* the testator's *knowledge* that he does NOT own the entire thing. *(NOTE* that an ORDER to acquire the *unowned* part is not essential for it is sufficient for the declaration to be *express.)*. If the testator thought he owned the whole thing, and he says that he gives the whole thing, *only the part* that he owns should be given, the rest being a void legacy *(See Art. 930; 6 Manresa 671)* unless, of course, subsequent to the making of the will, he becomes the owner of said remainder — "by whatever title." *(Art. 930)*.

(d) *Example of how the exception can be applied* — The testator in his will said: "Even if I own only half of the house at 100 Cambridge, Forbes Park, Makati City, Metro Manila, I hereby give the *whole* house to *D*."

(2) Proof of Knowledge

The fact that the gift is given with knowledge by the testator that he owns only *a part* of a thing should be proved, either by evidence of the *will's contents* or by *evidence aliunde*. Burden of proof is of course upon the recipient of the gift. *(See 6 Sanchez Roman 1310)*.

(3) Problems

(a) *T* and *A* owned a *Lincoln Towncar* automobile 50-50. In his will, *T* wrote: "I hereby give the whole automobile to *L* even if I own only half of it." Prior to *T's* death, the co-ownership ceased, and since the car is physically indivisible, the car was adjudicated to *A,* with *T* being reimbursed in money for his share. Subsequently, *T* died. Will *L* get 1/2 of the automobile, the whole automobile, half its value, its whole value, or nothing?

ANS.: *L* will get half of the car. *Reason: It is true that in consenting to be reimbursed his share, T* in effect had alienated his share in the car to *A,* and thus revoked by operation of law the legacy insofar as his *(T's)* original share was concerned. *(Art. 957[2])*. However, inasmuch

as he had *expressly* given the whole car to A, it follows that there is no revocation insofar as the other half is concerned. Hence, *L* is entitled still to half of the car *(A's* original half, not *T's* original half). In other words *L* and *A* will now be the co-owners of the car, without prejudice to *A* collecting its half-value from *T's* estate. *(See Castan).*

(b) *T* and *A* owned a car 50-50. *T* gave *I* in a will his half-share in the car. Before *T's* death, partition occurred, and since the car is physically indivisible, the car was adjudicated to *A* who then reimbursed *T* for his half-share's value. On *T's* death, will *I* get anything?

ANS.: I will NOT get anything, in view of the alienation of *T's* half-share in the car to *A*. Neither can *I* recover the monetary value of the half-share in the car, for the legacy was NOT *money*. *T's* consent to the adjudication of the car to *A* has the effect of an alienation, which revokes a legacy by operation of law. *(Art. 967[2]).*

(c) *T* had the naked ownership of land, the usufruct of which was owned by *U*. In *T's* will, he gave the naked ownership of the land to *D*. On *U's* death (and assuming *T* to be previously already dead), will complete ownership of the land go to *D*?

ANS.: Yes, because death generally extinguishes a usufruct, and full ownership reverts to the naked owner. *(See 6 Manresa 672).*

(Query: Is the doctrine above illustrated applicable if *U* had died ahead of *T*?*).*

[Query: If a testator who is the *full owner* gives only the usufruct of land to a friend, and later on the testator dies followed by the subsequent death of the devisee-usufructuary, will full ownership of the land revert to the testator's estate (or his heirs) or should the land go to the usufructuary's heirs?*].*

Art. 930. The legacy or devise of a thing belonging to another person is void, if the testator erroneously believed that the thing pertained to him. But if the thing bequeathed,

though not belonging to the testator when he made the will, afterwards becomes his, by whatever title, the disposition shall take effect. (862a)

COMMENT:

(1) Effect of Error in Ownership

Example: A testator gave *X* a legacy of a specific car. The testator thought that the car belonged to him (the testator) but it really belonged to *Y*. Is the legacy valid?

ANS.: The legacy is void. But if later on, the testator bought the car from *Y* and it became his (the testator's), the legacy would be valid. The latter case would be justified since after all, the will becomes effective only at the time the testator dies.

[NOTE: The acquisition by subsequent title is an example of an acquisition between the time of the making of the will, and the testator's death.*]*.

(2) Reason for Art. 930

Had the testator known of his non-ownership, the likelihood is that he would not have given the devise or legacy. *(6 Manresa 665).*

If the gift really does not belong to the testator, the law presumes that the testator was ignorant of his non-ownership. Thus, as long as the gift does not belong to the testator, we can presume the gift to be void. *(See 6 Manresa 665).*

(3) Art. 929 Compared With Art. 930

While Art. 929 refers to a stranger who is a PARTIAL owner, Art. 930 refers to property TOTALLY owned by a stranger.

Art. 931. If the testator orders that a thing belonging to another be acquired in order that it be given to a legatee or devisee, the heir upon whom the obligation is imposed or the estate must acquire it and give the same to the legatee or devisee; but if the owner of the thing refuses to alienate

the same, or demands an excessive price therefor, the heir or the estate shall only be obliged to give the just value of the thing. (861a)

COMMENT:

(1) When Testator Orders the Acquisition

In this Article it is evident that the testator *knows* that he is NOT the owner of the thing being given. This is why he ORDERS the acquisition of the thing.

(2) Example

T in his will said: "I hereby order my estate to acquire *X's* automobile so that same may be given to *Y.*" This is a valid provision, and the automobile should be acquired by the estate for delivery to *Y*. If *X* refuses to sell, or if he demands an excessive price, all that *Y* can oblige the estate to give to him would be the just value of the car.

(3) Express or Implied Order

The "order" may be *express or implied,* since the law does not distinguish. It may be implied because when a testator, *knowing* of another's ownership, gives the property to the legatee or devisee, we can presume that he really wants the gift to be effective, and we can infer that he *desires* the acquisition.

Example:

In his will, *T* said, "I hereby give *X's* car to *Y*." (Note that even if this does NOT contain an express order to acquire, the order may be implied.)

[NOTE: Please observe that under Art. 930, if the testator did *not* know that the thing did not belong to him, the gift is *invalid*. *A sensu contrario* — it would follow that as long as the testator *knows* that the thing does not belong to him, the gift would be VALID.*]*.

(4) Problems

(a) In 2003, *T* made a will stating: "I hereby give *X's* car to

Y." In 2004, *X* sold the car to *Z*, a third person. Later, *T* died. Will *Y* inherit?

ANS.: Yes, for here the estate should acquire the car from *Z*. Art. 931 can perfectly apply.

(b) Same as (a) except that the car was sold to *T* himself. Will *Y* inherit?

ANS.: Yes, because said act of *T* may be considered in furtherance of his desire to give to *Y*. Moreover, the important thing is that at his death, *T* was the owner of the car. *(See Art. 930).*

(c) Same as (a) except that the car was *sold* by *X* to *Y* himself, so that at the testator's death, *Y* was already the owner of the car being given to him as legacy. Is *Y* entitled to get anything?

ANS.: Yes, *Y* is entitled to a reimbursement since his acquisition was by *onerous* title. The estate must reimburse him. *(See 2nd par., Art. 933).*

(d) Same as (c) except that instead of a selling, there had been a *donation* by *X* to *Y*. Is *Y* entitled to get anything from the estate?

ANS.: No, because the acquisition had been *gratuitous. (2nd par., Art. 933).*

Art. 932. The legacy or devise of a thing which at the time of the execution of the will already belonged to the legatee or devisee shall be ineffective, even though another person may have some interest therein.

If the testator expressly orders that the thing be freed from such interest or encumbrance, the legacy or devise shall be valid to that extent. (866a)

COMMENT:

(1) When Thing Already Belongs to Recipient

Examples of first paragraph:

(a) *T* gave *L* a particular car in his will. It turned out that at the time *T* made the will, *L* was already the owner of the car referred to. On *T's* death, *L* claimed the monetary value of the car. Is *L* correct?

ANS.: No, because the legacy is void, since the car already belonged to him at the time of the execution of the will. *Reason for the law:* One cannot be given what is already his; moreover, we may presume that had the testator known of said fact, he would not have made the gift. *(6 Manresa 676).* Upon the other hand, if the testator had erroneously believed that the property was his (the testator's), the legacy would be clearly void under the first sentence of Art. 930.

(b) *T* gave *D* a parcel of land in his will. At the time *T* made his will, *he and D* were co-owners of the land concerned. When *T* dies, does *D* get anything?

ANS.: Only the part appertaining to *T* will be inherited by *D*. The part originally his continues to remain his, but *not by* inheritance, for he was already the owner thereof. Neither can he claim the monetary value of said part, for concerning said part, the legacy is void. (Note that Art. 932, 1st paragraph applies "even though *another* person may have some interest therein." The word "another" may refer to the testator himself or a third party, since the law does not distinguish.).

(2) Example of the 2nd Paragraph

T in his will ordered that *L's* car be freed from the chattel mortgage encumbering it. Is the order valid?

ANS.: Yes.

Art. 933. If the thing bequeathed belonged to the legatee or devisee at the time of the execution of the will, the legacy or devise shall be without effect, even though it may have been subsequently alienated by him.

If the legatee or devisee acquires it gratuitously after such time, he can claim nothing by virtue of the legacy or

devise; but if it has been acquired by onerous title he can demand reimbursement from the heir or the estate. (878a)

COMMENT:

(1) Effect of Alienation by Legatee or Devisee

(a) Note that the first paragraph of Art. 932 and the first paragraph of Art. 933 state practically the same thing, except that the latter adds the clause "even though it may have been *subsequently alienated* by him."

(b) *Example for said clause:*

T in his will gave *L* the car of *L*. Later, *L* sold the car to *X,* and at *T's* death, the car was still owned by *X*. Does *L* get anything from *T's* estate?

ANS.: No, the legacy being ineffective and void, since the car belonged to *L* at the time of the execution of the will. Its subsequent alienation is *immaterial*.

(c) *Problem:*

Suppose in the *above* example, *L* had bought back the car from *X* for P300,000, and at the time of *T's* death, the car was again owned by *L*, is *L* entitled to get anything from the estate of *T*?

ANS.: *No, for the important thing is that the car belonged to L* at the time of the execution of the will, and the legacy is therefore void. The subsequent alienation and re-acquisition are *immaterial*. The 2nd paragraph of Art. 933 applies only when the legatee was not the owner of the property at the time of the execution of the will.

(2) Rule If Legatee or Devisee Acquires Only After Execution of the Will (2nd Paragraph, Art. 933)

T in his will gave *L* the car of *B*. Later, *B* sold the car to *L* who remained owner thereof till *T's* death. Can *L* get anything by virtue of the will?

ANS.: Yes, he can be entitled to reimbursement for what he had paid to *B*.

[NOTE: Had the acquisition been gratuitous, *L* would not have been entitled to get anything.*]*.

[NOTE also that the acquisition was only *between* the time the will was executed and the time of the testator's death. For had *L* already been the owner at the time the will was executed, the legacy should have been *void*. *(See also 15 Scaevola 310).]*.

(3) Acquisition From Testator Himself

If the acquisition by the legatee after the execution of the will had been from the *testator himself,* would the legacy be void?

ANS.: No, while it is true that ordinarily an alienation by the testator revokes the legacy, the *exception* is when the alienation is in favor of the legatee himself. Moreover, since the law does not distinguish, the legatee would still be entitled to reimbursement from the testator himself, if the acquisition was by onerous title. *(See 15 Scaevola 311).*

(4) Problem

T in his will gave his car to *L*. Later, *T* sold the car to *S* who subsequently sold the same to *L*. *L* was therefore owner by the time *T* died.

Question: Is *L* entitled to any reimbursement?

ANS.: No, because here the legacy had been revoked by the alienation of the car to *S*. It does not matter that *L* subsequently acquired it from *S* by onerous title. *(Art. 957, p. 2; 6 Manresa 720).*

(5) What To Reimburse

In proper cases for reimbursement, the following should be reimbursed:

(a) if thru a sale — the price paid therefor

(b) if thru barter — the value of the thing exchanged

(c) if thru an onerous donation — the value of the burden imposed

(d) if thru *adjudicacion en pago* — the value of the credit, interests (if any), and costs (if any).

[NOTE: In general, expenses for the above are also to be reimbursed. *(See 6 Manresa 720).].*

(6) Who Reimburses

(a) the estate — if no one has been charged in particular

(b) the heir, legatee, or devisee — who has been charged. *(See Art. 933, 2nd paragraph).*

Art. 934. If the testator should bequeath or devise something pledged or mortgaged to secure a recoverable debt before the execution of the will, the estate is obliged to pay the debt, unless the contrary intention appears.

The same rule applies when the thing is pledged or mortgaged after the execution of the will.

Any other charge, perpetual or temporary, with which the thing bequeathed is burdened, passes with it to the legatee or devisee. (867a)

COMMENT:

(1) Rule if Thing is Pledged or Mortgaged

The estate *must free* the property given from:

(a) pledges

(b) mortgages

(c) any other encumbrance or lien (like antichresis), if given to secure or guarantee a *recoverable debt.*

Exceptions:

(a) if there be a contrary intention

(b) if the pledge or mortgage was given *not* to secure a recoverable debt, but to secure, for example, dutiful performance of the functions of a position or office. *(See 6 Manresa 683-684).*

(2) What Need Not Be Eliminated

The estate need not *free* the property given from:

(a) easements

(b) usufructs

(c) leases which are *real rights* (those for over one year, or those which are registered, whether the lease be for more than one year or not)

(d) leases which are in the nature of *personal* rights

(e) any other charge, perpetual or temporary, with which the thing bequeathed or devised is burdened. *(Last paragraph, Art. 934; see also 6 Manresa 683-684).*

[NOTE: Such encumbrance must be respected by the legatee or the devisee. *(6 Manresa 683).].*

[Note that the *mortgage* or *pledge* may have been executed *before or after* the execution of the will. *(Art. 934, pars. 1 and 2).*].

(3) Problem

T in his will gave *A* a *Cartier* watch which he *(T)* had pledged in a pawnshop; *B*, a parcel of land that was mortgaged to *X* for P500,000; and *C,* another parcel of land, the usufruct of which was being enjoyed by *Y*. On *T*'s death, will *A, B*, and *C* get their gifts free from the abovementioned encumbrances?

ANS.: The estate should pay for the pawnshop and mortgage debts, hence, *A* and *B* should get their gifts unencumbered; but *C* must bear the burden of the usufruct until the usufruct is legally extinguished. *(Art. 934).*

(4) Remedies of Mortgagee

What are the remedies of a mortgagee if the mortgaged property is given as a devise to somebody by the testator?

ANS.: *The mortgagee has three alternative remedies:*

(a) He can ABANDON his security (disregard the mortgage) and prosecute his claim for his now unsecured credit be-

fore the probate court. He can then share in the general distribution of the estate to the various creditors.

[NOTE: Here, the mortgagee creditor naturally loses preference, and he can claim only as an ordinary creditor.*].*

[NOTE: When the estate has paid off this, and other credits, the devisee can now get the property unencumbered.].

(b) He can FORECLOSE the mortgage or realize upon the security by an *ordinary action* in court making the executor or administrator the party defendant (at this stage, he DISREGARDS the probate proceeding). (In case of *a deficiency judgment,* he can prove such deficiency judgment later in the probate court against the estate of the deceased.).

(c) He can RELY on the mortgage ALONE and foreclose at any time within the statute of limitations (10 years from date of maturity). In the meantime, he will NOT receive any share in the distribution of the other assets of the estate.

[NOTE: At any time however, the executor or administrator may redeem the property secured, under the direction of the court, if the court deems this best for the interest of the estate. *(Rule 86, Sec. 7, Rules of Court).].*

Art. 935. The legacy of a credit against a third person or of the remission or release of a debt of the legatee shall be effective only as regards that part of the credit or debt existing at the time of the death of the testator.

In the first case, the estate shall comply with the legacy by assigning to the legatee all rights of action it may have against the debtor. In the second case, by giving the legatee an acquittance, should he request one.

In both cases, the legacy shall comprise all interests on the credit or debt which may be due the testator at the time of his death. (870a)

COMMENT:

(1) Legacy of Credit or Remission

This Article speaks of two legacies:

(a) the legacy of a *credit* (against a third person)

(b) the legacy of the *remission* or *release* of a debt of the legatee

Examples:

(1) *Legacy of a credit*

T is *D's* creditor to the amount of P1 million. In his will, *T* gave this credit to *L*.

(2) *Legacy of remission*

T is *L's* creditor to the amount of P1 million. In his will was remitted (waived or condoned) this debt of *L*.

(2) Legacy of a Credit Discussed

(a) This is really a novation of the credit in that the legatee is subrogated in favor of the testator who is the original creditor. *(6 Sanchez Roman 1315).*

(b) The executor or administrator may either *assign* the creditor's actions to the legatee or himself *collect* the credit. In the latter case, the proceeds should naturally be delivered by him to the legatee. *(6 Sanchez Roman 1316).*

(c) If the executor or administrator chooses ASSIGNMENT, there is no *warranty* that the credit really exists or that it is legal. *Reason:* This is merely in compliance with the testator's wishes about a specified credit. Therefore, the rule on specific legacies can apply. *(6 Manresa 699).*

(d) The legacy of a credit is effective only as regards that part still *existing* at the testator's death, together of course with all the interests still due. *(Art. 935).*

Example:

T assigned his credit of P1,000,000 (over *D*) to *L* in his will. Later, P600,000 was paid to *T*. When *T* died, the

credit consisted of only P400,000 plus interest. It is only this amount which should go to *L*.

(e) The legacy of a credit may be *generic* or *specific:* generic — if it refers to all the credits appertaining to the testator; *specific* — only if specified credits are mentioned.

(f) The legacy of a credit may be revoked by implication of law in the case provided for under Art. 936.

(g) In the legacy of a credit, all guarantees whether *personal* (like the obligation of a guarantor or a surety) or *real* (like a pledge or a mortgage) are deemed included. *(6 Sanchez Roman 1316).*

(3) Legacy of Remission or Release or Waiver Discussed

(a) This really amounts to a sort of donation *mortis causa* and is therefore subject to the rule of inofficious testamentary dispositions; that is, this may be reduced if the legitime is impaired. *(6 Sanchez Roman 1318).*

(b) The amount *remitted* should be *added* in the computation of the testator's net hereditary estate — for it is indeed part of his estate.

(c) The legacy of remission should not be confused with a statement in the will that *"X's* debt has already been paid." The latter is a mere acknowledgment that a certain debt has already been paid to the estate. This debt referred to is *not* to be added to the estate in the hands of the testator. It would have been different had the statement read: "Although *X* has not yet paid his debt, I am considering it as already paid." This really is a gift. *(See 6 Sanchez Roman 1318).*

(d) The legacy of remission requires the estate to give the legatee favored an acquittance (receipt or acknowledgment of payment) should he request one. *(2nd par., Art. 935).*

Art. 936. The legacy referred to in the preceding article shall lapse if the testator, after having made it, should bring an action against the debtor for the payment of his debt, even if such payment should not have been effected at the time of his death.

The legacy to the debtor of the thing pledged by him is understood to discharge only the right of pledge. (871)

COMMENT:

(1) Effect of Action Against Debtor-Legatee

The first paragraph exemplifies a revocation by implication of law.

Example:

T gives his credit of P1,000,000 over *D* to *L*. After the execution of the will, *T* brought an action against *D* for the recovery of the debt. The bringing of the action revokes *T's* legacy. This is true, whether or not by the time *T* dies, *D* shall have paid the debt. (For it is the BRINGING of the action that revokes, not the PAYMENT itself).

[NOTE: The "action" referred to in Art. 936 must be a judicial one. Therefore, a mere extrajudicial demand is not sufficient.*]*.

[NOTE: It is permissible for the testator to provide that his mere *bringing* of *the action* will not revoke the legacy, insofar as the *uncollected balance* is concerned.*]*.

[NOTE: The first paragraph applies whether the legacy be of a CREDIT or a REMISSION.*]*.

(2) Example of the Second Paragraph (Pledged)

To *T* was pledged as security, a ring by *L* who owed *T* P1,000,000. *T* gave to *L* a legacy of the ring. Is the debt of *L* extinguished?

ANS.: No. Only the pledge has been extinguished. The debt itself (the principal obligation) still remains, for same has not been remitted.

[NOTE:

(a) If the principal obligation is remitted however, the accessory obligation (the pledge) is automatically remitted — for its basis has disappeared.

(b) Although the law mentions only "pledge," it is believed that the rule can also refer to a mortgage, an antichresis or any other security. *(See 6 Sanchez Roman 1321).].*

Art. 937. A generic legacy of release or remission of debts comprises those existing at the time of the execution of the will, but not subsequent ones. (872)

COMMENT:

Generic Legacy of Release or Remission

The legacy of release or remission is either *generic* or *specific*. It is generic when no particular debt is mentioned, *i.e.,* when all debts are remitted. The law states however that in such a case, only those existing at the time the will was made, should be included. Subsequent ones are excluded. The legacy is *specific* when a particular debt mentioned is the one remitted. *Generic* — includes all debts whether pure, conditional, or with a term. *(See 16 Scaevola 279).*

NOTE:

(a) Suppose several debts are remitted, should they all be given effect? Yes, unless the free portion is not enough, in which case, the rules on *application of payments,* should by analogy be applied. *(6 Sanchez Roman 1320).*

(b) Even if a credit has been converted into another kind by novation, it is deemed included as long as it has not yet been paid, nor a judicial demand for it has been made, at the time the testator dies. *(See 6 Sanchez Roman 1320).*

Art. 938. A legacy or devise made to a creditor shall not be applied to his credit, unless the testator so expressly declares.

In the latter case, the creditor shall have the right to collect the excess, if any, of the credit or of the legacy or devise. (873a)

COMMENT:

(1) Non-Application of Legacy to Credit

(a) *Example of 1st paragraph* — *A* owes *B* P1,000,000. In his will, *A* gave *B* a legacy of P1,000,000. How much will *B* get all in all? P2,000,000 unless the estate is exhausted after the payment of debts. It must be noted that a legacy or a devise is supposed to be a gift, not a payment. It is an act of liberality on the part of the testator, and not an obligation. A different rule of course subsists when the testator expressly so declares.

(b) *Example of 2nd paragraph* — *A* owes *B* P1,000,000. But *C* owes *A* P1,200,000. If *A* gives his credit of P200,000 as a legacy to *B,* and expressly declares that the legacy should be applied to *B's* credit, there will be payment of P1,000,000 and a true legacy of P200,000 for the balance.

(2) Problem

T owes *C* P100,000. In his will, *T* gave his *Fender* electric guitar to *C* "in payment of his debt." Suppose, *C* accepts the guitar, what effect would this have on his credit?

ANS.: Unless *C* had made his acceptance conditional or with reservations, the credit is deemed COMPLETELY extinguished, for in effect an *adjudicacion en pago* has been made. *(See 6 Sanchez Roman 1325).*

Art. 939. If the testator orders the payment of what he believes he owes but does not in fact owe, the disposition shall be considered as not written. If as regards a specified debt more than the amount thereof is ordered paid, the excess is not due, unless a contrary intention appears.

The foregoing provisions are without prejudice to the fulfillment of natural obligations. (n)

COMMENT:

Application of Rule on Solutio Indebiti

(a) *Example: A* thinks he owes *B* P100,000. He really does

not owe *B* anything, however. If *A* orders the payment of the P100,000, the disposition is considered not written.

(b) Another *Example: A* thinks he owes *B* P100,000, but the debt is really P80,000 only. The P100,000 is ordered paid in the will. *B* will not get the extra P20,000 unless a contrary intention appears, because in the latter case, the intent is really to grant a legacy.

(c) *T* owed *L* P100,000 but the debt has already prescribed. Nevertheless, *T*, recognizing his moral duties, ordered the payment of the P100,000, knowing that the debt had already prescribed. Will *L* get the P100,000, even if the debt no longer exists?

ANS.: Yes, for this is an instance of a natural obligation. (Natural obligations are governed by Arts. 1423 to 1430 of the Civil Code.)

Art. 940. In alternative legacies or devises, the choice is presumed to be left to the heir upon whom the obligation to give the legacy or devise may be imposed, or the executor or administrator of the estate if no particular heir is so obliged.

If the heir, legatee or devisee, who may have been given the choice, dies before making it, this right shall pass to the respective heirs.

Once made, the choice is irrevocable.

In alternative legacies or devises, except as herein provided, the provisions of this Code regulating obligations of the same kind shall be observed, save such modifications as may appear from the intention expressed by the testator. (874a)

COMMENT:

(1) Choice in Alternative Legacies or Devises

Example: A orders *B,* a devisee, to give *C* a ring or a car. *B* is given the right to choose. If *B* dies (before making the choice, but after *A's* death) the right to make the choice is not

considered personal and said right is, therefore, transmitted to *B's* own heirs. Once the choice has been made, it is irrevocable (because in such a case, the obligation has ceased to be alternative, and has become a *simple* one) unless of course there has been fraud, intimidation, or any of the other causes vitiating consent.

(2) Right of Choice — is given to the person burdened; thus, it may be the estate (executor or administrator), the heir charged, or the legatee or devisee charged. *(Art. 940)*. This is the same as the general rule in alternative obligations.

[NOTE:

(a) When out of two or more things to be given, only one is possible, the legacy is converted into a simple one.

(b) The choice must be communicated to the recipient, after which communication the alternative legacy becomes a simple one.

(c) Inasmuch as a choice is involved (although the things to be given may have been specified), the rules relating to generic legacies may be applied, such as Arts. 941, 942, and 943. *(See 6 Manresa 706).]*.

Art. 941. A legacy of generic personal property shall be valid even if there be no things of the same kind in the estate.

A devise of indeterminate real property shall be valid only if there be immovable property of its kind in the estate.

The right of choice shall belong to the executor or administrator who shall comply with the legacy by the delivery of a thing which is neither of inferior nor of superior quality. (875a)

COMMENT:

(1) Legacy or Devise of Generic Property

(a) This Article refers to *generic* property, not to specific one.

(b) The law distinguishes between *generic personal* and *generic real property* — thus:

1) If generic *personal* — *valid* even if there be none in the estate. (Here, it is evident that the estate is being required to get one.)

2) If generic *real* — *not valid* if there be none of its *kind* in the estate.

Reason for the difference:

The genus in personal property is determined by *nature;* in the case of real property, there is practically no *genus* because each property has been practically individualized by the efforts of man. *(See 6 Manresa 708).*

(2) Examples

(a) "I hereby give to *L* one automobile." This is valid even if there be *none* in the estate. The executor or administrator must obtain one of a *middle* quality.

[NOTE: This is different from one contemplated in this statement: "I hereby give to *L* one of my automobiles." It is evident here that an *alternative* legacy is being contemplated, for out of several automobiles in the estate, a choice is to be made of one. Hence, if there be NONE in the estate, the legacy is VOID. *(6 Manresa 710).* If there be several, one of medium or middle quality must be selected.*]*.

(b) "I hereby give to *D* 100 square meters of land." If there be no land in the estate, or if the area thereof be insufficient, the devise is considered void insofar as the area is *not* sufficient.

[NOTE: If there be several parcels of land in the estate, and their individual or total areas be at least 100 square meters, the devise is no doubt valid.*]*.

[NOTE: The example above should not be confused with this statement in a will: "I hereby give to *D* the 100 square meters of land owned by *X*." Here the devise is valid for evidently there is an implied order to get the said land from *X*. This is thus governed by Art. 931.*]*.

(3) Void Legacies

(a) "I hereby give to *L some automobiles*." *(Reason: The absence of quantity* makes the true intent of the testator unknown.*) (6 Manresa 709).*

(b) "I hereby give to *L an animal*." *(Reason: While "animal" is indeed a genus, still the sub-genus like "dog" or "cat" has not been specified, thus, the true intent of the testator is still unknown.)*

(4) Period of Time to be Considered

What period of time must be considered in determining whether or not the property exists in the estate? (This is important in generic *real* properties.)

ANS.: The time of the testator's death, for it is "his estate" to which the law refers. The time of the execution of the will is therefore not important *(See 6 Manresa 711).* (Evidently, this is not the same category as after-acquired properties. *[See Art. 783].*).

(5) Right of Choice

(a) The right of choice is given to the estate or to the person BURDENED, unless such right is *expressly* given to the person favored. *(See Art. 942).* This is the same as the rule in alternative obligations.

(b) When the right to choose is given to the estate (executor or administrator) such right is NOT ABSOLUTE, for certain restrictions must be observed:

1) *Firstly* — the choice must be "neither of *inferior* nor *superior* quality." (Hence, the *medium* quality must be selected.).

[NOTE: It seems that this restriction is *not* imposed when it is the heir (or the legatee or devisee *charged*) who is supposed to make the selection. Note the wording of Art. 942.*]*.

2) *Secondly* — in the case of generic personal legacies, if there be some in the estate, the person charged *must select from* them, and not from those outside the estate. *(See 6 Manresa 713).*

Art. 942. Whenever the testator expressly leaves the right of choice to the heir, or to the legatee or devisee, the former may give or the latter may choose whichever he may prefer. (876a)

COMMENT:

When Right of Choice is Given to Others

(a) When the testator does not state who can choose, the giver has the right to do so. *(Art. 940).*

(b) Art. 942 applies only when the right of choice is *expressly* given to one by the testator himself.

(c) "Legatee or devisee" in this Article refers to the legatee or devisee *favored* (not to the legatee or devisee *charged*). Of course, the legatee or devisee charged may be given the choice in the case of a *sub-legacy* or a *sub-devise*.

(d) The things selected need not be of medium quality.

(e) Once the selection or choice has been made, it is irrevocable except for the usual causes vitiating consent.

(f) How is the choice made? In any way which clearly reveals the conscious and deliberate exercise of the right of choice. *(Decision of the Supreme Court of Spain of Nov. 23, 1904).*

Art. 943. If the heir, legatee or devisee cannot make the choice, in case it has been granted him, his right shall pass to his heirs; but a choice once made shall be irrevocable. (877a)

COMMENT:

When Choice is Passed to Recipient's Heirs

(a) In the clause "his right shall pass to his heirs," "heirs" are the heirs of the person allowed to make the selection, whether they be heirs of the person burdened or of the

person favored except, of course, in the case of an executor or administrator. Here, the successor to said position must make the choice.

(b) The right to choose may, of course, be renounced, provided all the requisites for the waiver of a right are present.

(c) The choosing may even be embodied in a will of the person entitled to make the choice. When so made, it is irrevocable, even if the will itself is revocable. (Note that the rule is the same in the case of the recognition of an illegitimate child.) *(See TS, Nov. 23, 1904).*

Art. 944. A legacy for education lasts until the legatee is of age, or beyond the age of majority in order that the legatee may finish some professional, vocational or general course, provided he pursues his course diligently.

A legacy for support lasts during the lifetime of the legatee, if the testator has not otherwise provided.

If the testator has not fixed the amount of such legacies, it shall be fixed in accordance with the social standing and the circumstances of the legatee and the value of the estate.

If the testator during his lifetime used to give the legatee a certain sum of money or other things by way of support, the same amount shall be deemed bequeathed, unless it be markedly disproportionate to the value of the estate. (879a)

COMMENT:

Legacy for Education and Support

(a) The legacy for education may be for a *shorter* period than that given by the law, despite the lack of an express provision on that matter. *(6 Sanchez Roman 1286).*

(b) The *diligence* required in pursuing the course is a *judicial question*.

(c) Both legacies for support and education are ordinarily personal, and cannot therefore be transmitted unless of

course the testator has ordered otherwise. *(See 6 Manresa 723).* In case the successor to the legatee is specified clearly by the testator, it is believed that the restrictions on the fideicommissary substitution may be followed by analogy so as not to make the legacy very burdensome.

(d) True, the testator can fix the amount but this should not exceed the disposable portion. *(6 Manresa 722).*

(e) In the third paragraph, *"value of the estate"* means the residue of the estate after the payment of all expenses and debts and after expenses, the legitimes. *(6 Sanchez Roman 1288).* But this would be true only if it is the estate that has been charged. If a particular heir, legatee, or devisee has been charged, "value of the estate" should refer only to the value of the property received by virtue of the inheritance, after excluding of course, the legitime, if any, received. *(6 Sanchez Roman 1289).*

Art. 945. If a periodical pension, or a certain annual, monthly, or weekly amount is bequeathed, the legatee may petition the court for the first installment upon the death of the testator, and for the following ones which shall be due at the beginning of each period; such payment shall not be returned, even though the legatee should die before the expiration of the period which has commenced. (880a)

COMMENT:

The Giving of Pensions

(a) Note that the law says "the legatee (of the pension) may petition the court for the *first installment* upon the *death* of the testator." It is submitted that he should first wait until an *order for distribution* has been made by the court, or until distribution is actually made (if there be no such order), for after all, the estate's debts must first be paid. *(See Rule 90, Sec. 1, Rules of Court).*

(b) However, support in *arrears* (from the time of death) should logically be given, since this seems to be the clear intent of the law ("upon the *death* of the testator"). *[NOTE* however,

that in legacies of money not intended for support or for education — *interest* thereon accrues only from the date of judicial demand.*]. (Fuentes, et al. v. Canon, et al., 6 Phil. 117; Chiong Joc-Soy v. Vano, et al., 8 Phil. 119).*

Art. 946. If the thing bequeathed should be subject to a usufruct, the legatee or devisee shall respect such right until it is legally extinguished. (868a)

COMMENT:

(1) Gift Involving a Usufruct

(a) The gift is burdened by the presence of an existing and lawful usufruct (as well as easement, etc.).

(b) This Article is connected with Art. 934, last paragraph.

(c) For the causes of the extinguishment of usufruct, see Art. 603.

(2) How Usufruct is Extinguished

(a) By the death of usufructuary, unless a contrary intention clearly appears;

(b) By the expiration of the period for which it was constituted or by the fulfillment of any resolutory condition provided in the title creating the usufruct;

(c) By merger of the usufruct and ownership in the same person;

(d) By renunciation of the usufructuary;

(e) By the total loss of the things in usufruct;

(f) By the termination of the right of the person constituting the usufruct;

(g) By prescription. *(Art. 603, Civil Code).*

Art. 947. The legatee or devisee acquires a right to the pure and simple legacies or devises from the death of the testator, and transmits it to his heirs. (881a)

COMMENT:

(1) When Right is Transmitted

(a) This Article speaks of the *right to the legacy or devise,* as becoming *vested* as of the moment of the testator's death.

(b) However the right to the *property itself* is vested as follows:

1) if specific — from the testator's death

2) if generic — from the time a selection has been made, so as to make the property *specific*

3) if alternative — from the time the choice has been made

4) if acquired from a stranger by virtue of an order (express or implied) by the testator — from the moment of such acquisition

(2) Rule in Case of Conditional Gifts

Note that the law refers to gifts that are "pure and simple." If conditional, when does the right to the legacy or devise vest (as distinguished from the right to the property itself)?

ANS.: From the moment of death also, provided that the condition is fulfilled. *(See 6 Manresa 727).*

(3) Rules in Case of Gifts With a Term

(a) If the gift is with a suspensive *term,* the right also vests from the moment of the testator's death, although of course, it does not become EFFECTIVE until after the arrival of the suspensive term. *(6 Manresa 727).*

(b) If the gift is with a *resolutory term,* the right also vests from the moment of the testator's death, but will END when the resolutory term arrives.

(4) When No Transmission Occurs

Please remember that a voluntary heir, legatee, or devisee who predeceases the testator, or who is incapacitated, or

who repudiates, transmits no right to his own heirs. *(See Art. 866).*

Art. 948. If the legacy or devise is of a specific and determinate thing pertaining to the testator, the legatee or devisee acquires the ownership thereof upon the death of the testator, as well as any growing fruits, or unborn offspring of animals, or uncollected income; but not the income which was due and unpaid before the latter's death.

From the moment of the testator's death, the thing bequeathed shall be at the risk of the legatee or devisee, who shall, therefore, bear its loss or deterioration, and shall be benefited by its increase or improvement, without prejudice to the responsibility of the executor or administrator. (882a)

COMMENT:

(1) When Ownership of Legacy or Devise is Acquired

(a) *Reason for the Article:* It is logical that ownership (as well as possession) is transmitted from the owner's death, because it is at that time that the right vests under the preceding article.

(b) The following therefore belong to the grantee from the testator's death, provided that the grantee is capacitated and accepts the gift:

1) the devise or legacy

2) *growing* fruits

3) unborn offspring of animals

4) uncollected income (but not those due and unpaid *before* the testator's death, because these may fall under the category of property acquired after the making of the will). *(See also Chingen v. Arguelles, 7 Phil. 296).* Thus, this income is that which accrues between the testator's death, and the receipt by the legatee or devisee.

[Note that "fruits refer to *natural* and *industrial* fruits; while "income" refers to civil fruits. Note also that the law attaches the adjective "growing" to the word "fruits." Hence, if already gathered, or *separated* from the ground, even if they may still be *lying* on said ground or any other part of the estate, same will not be part of the gift. *(See 6 Manresa 730).*].

(2) Expenses for Production

(a) Expenses for PRODUCTION of the growing fruits are *not* charged to the *grantee,* for the law does not provide this; moreover the general provision in the law of possession and accession does not apply with reference to this matter, for the testator is not a third person, insofar as the recipient is concerned. *(See 6 Manresa 731).*

(b) There are no expenses for *growing* crops, for they are still growing, that is, *still not gathered. (See 6 Manresa 731).*

(3) Risk of Loss and Benefit of Improvement

(a) As a consequence of *ownership* from the time the testator dies, *loss* and *deterioration* shall be at the grantee's risk *(res perit domino).* This is so even if the property has not yet been delivered. For it is *not tradition* (delivery) that transfers ownership here but *succession*. Of course, any damage imputable to the executor, administrator, or person *charged* should be the responsibility of such person. *(6 Manresa 731).*

(b) Conversely, any *increase* or *improvement* goes to the recipient, in view of his ownership, without prejudice to the rights of innocent third persons. *(See Art. 948).*

(4) Applicability of Art. 948

Art. 948 applies to:

(a) *simple* and *pure* legacies and devises

(b) those with resolutory conditions, without prejudice to the effects of resolution

NOTE:

(a) In case of suspensive *condition,* while the right becomes effective only upon the happening of the suspensive condition, still in view of the *retroactive effect* of the condition once it is fulfilled, it is believed that ownership also vests at the testator's death. *(See Art. 1187).*

(b) In case of a suspensive term, the *right* is owned from the time of the testator's death, but the *property itself* is owned only from the time the *suspensive term arrives*.

(5) Payment of Debts

It is understood that all devises and legacies are subject to the payment of *debts* of the estate; expenses for administration, and family expenses. *(See Rule 89, Rules of Court).* In other words, as between creditors of the estate upon the one hand, and legatees and devisees on the other hand, the former are preferred, for the latter are valid only if they come from the net hereditary estate; and provided furthermore, that legitimes have been preserved. *(Art. 911).*

(6) Rule With Respect to Donations

Properties *donated inter vivos,* if proper, are not subject to the payment of legacies and devises. *(Cembrano v. Pardo de Tavera de Gonzales, 68 Phil. 175).*

In the Testate Estate of Isidro Aragon
L-2920, Jan. 23, 1951

ISSUES: If the testator orders property to be sold at a certain price, and charges the proceeds therefrom with the payment of certain legacies — should the legacies be *reduced* if the property should be sold for a *smaller* amount?

HELD: No, the legacies should not be reduced even if the property be sold for a smaller amount, as long of course as the legitimes are *not* impaired, and as long as there is no such intention to reduce. The fixing of the price is merely a statement

of the desire of the testator to have the property sold at such price in the hope of obtaining greater profit for the compulsory heirs. We cannot presume that the testator wanted to have that selling price serve as the basis for the amount of the legacies, considering the fact that he is presumed to know that material values always fluctuate in the world of nature.

Lake v. Harrington
120 Miss. 74 (1953)

FACTS: T made a first will giving *L* as legatee a monthly sum of $100 for 10 years. *T* also provided in the will that it was his intention to give a donation *inter vivos* of $100 monthly for 10 years to *L,* and that the legacy in the will was to be effective "If, and only if I have not done this during my lifetime." After a few days, *T,* making *reference to the will,* made a *donation inter vivos* of "$100 monthly for 10 years" to *L*. Payment was then made monthly for 2 years. Then *T* made a second will which *repeated* the original legacy with the same proviso, made changes in other legacies, and revoked all other portions in the first will. Shortly after his execution of the new will, *T discontinued* the monthly payment. *T* is *still alive,* but *L* now brings an action for ADEMPTION (or satisfaction) of the monthly payments stipulated in the legacy. *T* claims that *L* must wait for the testator's death, since it is only at that time that right to the legacy vests.

HELD: Had a new will not been executed, the ademption of the legacy could have prospered, in view of the deed of donation *inter vivos*. But because a new will was made (although the original legacy was repeated), it is clear that *T's* intention NOW is really to give the rest as a legacy and *(no longer* as a donation) to *L*. The new will is *not* exactly the same as the first will, and therefore *cannot be said* to be merely a *republication* of the first. The operation of a gift as an ademption is primarily a matter of the testator's intent, and it is clear that *T* want to continue with the giving, not as a donation *inter vivos* but as a legacy. *L* will *therefore* have to wait for *T's* death, inasmuch as *ademption* in this case, would NOT prosper.

[NOTE: Ademption is the *process* of satisfying or making effective INTER VIVOS a disposition MORTIS CAUSA.*]*.

[NOTE: In the abovementioned case, while it is true that there was a *donation inter vivos,* still it was expressly made subject to the provision of the will and therefore, in that sense, *revocable.].*

Art. 949. If the bequest should not be of a specific and determinate thing, but is generic or of quantity, its fruits and interests from the time of the death of the testator shall pertain to the legatee or devisee if the testator has expressly so ordered. (884a)

COMMENT:

(1) Generic Gifts

(a) This Article refers to *generic* gifts.

(b) Since the recipient will not know definitely what he will receive until after a *selection* or *choice* has been made, it follows that he is entitled to the fruits only from the time such CHOICE has been made — for it is only after such choice that *the obligation to deliver the gift to him arises.*

[NOTE: Under the law of obligations, the creditor is entitled to the fruit of a thing only from the time the obligation to deliver the thing arises.*].*

(c) By way of EXCEPTION, the testator may *expressly* order that the fruits and interests of the generic thing shall be payable from the time of his death.

[NOTE: Here, there is a sort of retroactive effect, for it is evident that a choice can be made only after the testator's death.*].*

(2) Problem

T in his will gave *D* a parcel of land 100 sq. meters in area. At his death, *T* left three parcels of land, each of which was 100 sq. meters. Two weeks after *T's* death, the executor made his choice. *Question:* Aside from delivering the land to the devisee, what fruits must also be given?

ANS.: The fruits accruing to the land from the time the choice was made. All fruits already gathered previous to the

choice belong to the estate. All growing fruits must of course be given to the devisee. *(Art. 949)*. If the testator has *expressly* ordered so, then all those accruing from his death must be given.

(3) Liability of Fruits for Debts

One fact, however, must be borne in mind, namely, that even if the fruits have accrued only since the *choice was made,* still said fruits before being turned over to the devisee, must first be responsible for the payment of whatever debts and expenses there are, that are chargeable to the estate. *(See Rule 88, Sec. 3, Rules of Court)*. This is because the net hereditary estate must first be computed.

(4) Rule in Case of Money

Money is *generic,* and it has been held that interest thereon at six per cent per annum may be recovered from the time there is default in the delivery of the money legacy. And there is default, once demand is made. *(Joc-Soy v. Vano, 8 Phil. 119; 15 Scaevola 353)*.

Art. 950. If the estate should not be sufficient to cover all the legacies or devises, their payment shall be made in the following order:

(1) Remuneratory legacies and devises;

(2) Legacies or devises declared by the testator to be preferential;

(3) Legacies for support;

(4) Legacies for education;

(5) Legacies or devises of a specific, determinate thing which forms a part of the estate;

(6) All others, *pro rata*. (887a)

COMMENT:

(1) Order of Preference for Legacies and Devises

As has been said under Art. 911, we apply Art. 950 only when the reduction concerns the legacies and devises. When the

legitime has been impaired OR when there are *donations inter vivos* chargeable to the *free disposal,* Art. 911 is the article to apply.

(2) Rule Under the Code of Civil Procedure

Under Sec. 729 of the Code of Civil Procedure (which section has not been repealed by the new Civil Code), "the estate, real or personal, given by will to the devisees or legatees shall be *liable* for the *payment of the debts, expenses of administrations, and family expenses, in proportion to the amount of the several devises or legacies*, except that specific devises and legacies may be exempted, if it appears to the court necessary to carry into effect, the intention of the testator and if there be sufficient other estate." Now then, how does this provision affect Art. 950 insofar as the reduction of legacies and devises are concerned?

ANS.: There is no inconsistency between the two cited provisions of law.

(a) First apply the Code of Civil Procedure to find out how much the gifts must be reduced *in order to settle the debts, etc.*

(b) Then apply Art. 950 of the new Civil Code to find out which gifts must be reduced, in order to accommodate all of them in the *free disposal.*

Example:

T left a gross estate worth P410,000, but he also had debts amounting to P50,000. In his will, the following legacies were given:

(a) support — P200,000

(b) education — P200,000

(c) legacy of specific piano — P100,000

There was no other property. Divide the estate.

ANS.: Applying the Code of Civil Procedure *(Sec. 729)* should make all the legacies *proportionately* liable

for the P50,000 debt. Hence, since the proportion of *support, education,* and piano is P200,000 to P200,000 to P100,000 (2:2:1), the P50,000 debt must also be borne in the proportion of 2:2:1. Hence:

1) *support* is reduced by P20,000 making it P180,000

2) *education* is reduced by P20,000 making it P180,000

3) piano is reduced by P10,000 making it P90,000.

Thus, the P50,000 debt is taken cared of. Now there are *no more debts,* BUT adding all the legacies, we still have a TOTAL of (180,000 + 180,000 + 90,000) or P450,000. The property left is only P360,000. We now apply Art. 950 of the new Civil Code. Since support and education are preferred over the piano, the P360,000 will be given in this manner:

a)	support	—	P180,000
b)	education	—	P180,000
c)	piano	—	NO MORE
			P360,000

(3) When Code of Civil Procedure Does Not Apply

It is evident that the Code of Civil Procedure does *not* apply if:

(a) there are NO debts, administration and family expenses

(b) OR if the testator himself has indicated which of his different properties will answer for said debts and expenses.

[NOTE: It is evident too that if the legitime is to be preserved, then in the proper cases, Art. 911 and not Art. 950 should be applied.*]*.

(4) Keyword For Art. 950 (RPSESA)

R — remuneratory	E — education
P — preferential	S — specific things
S — support	A — all others

(5) Remuneratory Legacies or Devises Defined

Those which the testator gives because he feels morally obliged to compensate certain persons, for services which do *not however constitute* recoverable debts.

NOTE:

(a) Why are remuneratory gifts first in the order of preference?

ANS.: Because they are considered moral (not natural) obligations by the testator. *(See 6 Manresa 748).*

(b) To make the bequest "remuneratory," does said fact have to be stated in the will?

ANS.: Not necessarily. It is of course better to so state them in the will, but evidence on this point may be given extrinsically. *(See 6 Sanchez Roman 1436).*

(6) Legacies for Support and Education

Observe that while under Art. 950, legacies for *support* are considered distinct from legacies for education, education is *included* by Art. 290 within the concept of support. Insofar as Art. 950 is concerned however, the distinction between the two must be observed.

(7) Specific Things

Art. 950(5) reads: "Legacies or devises of a specific determinate thing which *forms a part of the estate.*" It follows that specific legacies which *do not form part of the* estate — are taken out of the scope of preference given to Art. 950(5) over Art. 950(6).

Example of such specific legacy not *forming part of* estate — when the testator orders that a specific thing belonging to a

stranger be acquired in order that he may give it as a legacy to another.

Reason for the non-preference:

In the example given, for instance, what is really being bequeathed is not so much the specific property itself as its monetary value, for as has been previously stated, the real owner may refuse to part with the property, or demand an unreasonable price therefor.

[NOTE:

(a) As between a legacy of a specific car as a remuneratory legacy, and a legacy for support, which must be preferred?

ANS.: The legacy of the specific car being given as remuneratory legacy, for it is of course the purpose that controls.

(b) As between a legacy of P50,000 cash and P80,000 cash, which is preferred?

ANS.: Neither is preferred. If necessary, both may be reduced proportionately for both come under Art. 950(6).*]*.

Art. 951. The thing bequeathed shall be delivered with all its accessions and accessories and in the condition in which it may be upon the death of the testator. (883a)

COMMENT:

Accessions and Accessories

(a) *"Accessions"* may be *natural*, like alluvium, or *industrial,* like adjunctions.

(b) *"Accessories"* are those *dependent* on a principal, like the jack for an automobile, or the machines in a factory.

Art. 952. The heir, charged with a legacy or devise, or the executor or administrator of the estate, must deliver

the very thing bequeathed if he is able to do so and cannot discharge this obligation by paying its value.

Legacies of money must be paid in cash, even though the heir or the estate may not have any.

The expenses necessary for the delivery of the thing bequeathed shall be for the account of the heir or the estate, but without prejudice to the legitime. (886a)

COMMENT:

Delivery of the Gift

(a) If the grantee accepts a legacy other than the property specified, or other than money, this is all right. *(6 Manresa 740).*

(b) To satisfy money legacies if there be none in the estate, personal property, and later, real property may be sold. *(See Rule 89, Sec. 2, Rules of Court).*

(c) If delivery is by judicial *proceeds,* the court will determine who should pay the *necessary* expenses for such delivery, for the provision contemplates merely a case of voluntary delivery. *(6 Manresa 742).* This is evident because if the courts are invoked, somebody else may be at fault.

Art. 953. The legatee or devisee cannot take possession of the thing bequeathed upon his own authority, but shall request its delivery and possession of the heir charged with the legacy or devise, or of the executor or administrator of the estate should he be authorized by the court to deliver it. (885a)

COMMENT:

(1) Necessity of Making Request for Delivery

While ownership and possession are transmitted indeed from the testator's death, still actual delivery and possession will have to wait till the formalities required under this Article are complied with.

(2) When Order for Distribution of Residue is Made; Testimony Taken on Controversy Preserved

When the debts, funeral charges, and expenses of administration, the allowances to the widow, and inheritance tax, if any, chargeable to the estate in accordance with law, have been paid, the court, on the application of the executor or administrator, or of a person interested in the estate, and after hearing upon notice, shall assign the residue of the estate to the persons entitled to the same, naming them and the proportions, or parts, to which each is entitled, and such person may demand and recover their respective shares from the executor or administrator, or any other person having the same in his possession. If there is a controversy before the court as to who are the lawful heirs of the deceased person or as to the distributive share to which each person is entitled under the law, the testimony as to such controversy shall be taken in writing by the judge, under oath.

No distribution shall be allowed until the payment of the obligations above mentioned has been made or provided for, unless the distributees, or any of them, give a bond, in a sum to be fixed by the court, conditioned for the payment of said obligations within such time as the court directs. *(See Sec. 1, Rule 90, Rules of Court).*

[NOTE: The quoted provision must be complied with should there be *administration proceedings.].*

Art. 954. The legatee or devisee cannot accept a part of the legacy or devise and repudiate the other, if the latter be onerous.

Should he die before having accepted the legacy or devise, leaving several heirs, some of the latter may accept and the others may repudiate the share respectively belonging to them in the legacy or devise. (889a)

COMMENT:

(1) Partly Onerous and Partly Gratuitous Gifts

(a) *Example of 1st par.* — *X* was given a devise of a house with the stipulation that the lower story was being given

gratuitously, but the upper story would be given on condition that *X* would not marry *Y*. *X* is not allowed to accept the lower story, and renounce the upper one since the latter is onerous. The reason for the law is the presumption that the testator would not have given the devise of the gratuitous lower story without the onerous upper story. *(6 Manresa 753).*

(b) *Example of the 2nd par.* — In the preceding example, if *X* dies before being able to accept, and he leaves two heirs, *A* and *B,* each may accept or repudiate his share.

[NOTE: The death referred to in the 2nd paragraph must come after the death of the testator and not before, because a voluntary heir or legatee or devisee who dies before the testator transmits nothing to his heirs.*]*.

(2) Indivisible Gifts

Should the burden on the onerous legacy or devise be INDIVISIBLE, same must be *totally,* complied with by those heirs of the legatee (who died after the testator but before making an acceptance), who want to accept. This is not a case when there can be only proportionate compliance in view of the indivisible character of the burden. *(See 6 Manresa 753).*

Art. 955. The legatee or devisee of two legacies or devises, one of which is onerous, cannot renounce the onerous one and accept the other. If both are onerous or gratuitous, he shall be free to accept or renounce both, or to renounce either. But if the testator intended that the two legacies or devises should be inseparable from each other, the legatee or devisee must either accept or renounce both.

Any compulsory heir who is at the same time a legatee or devisee may waive the inheritance and accept the legacy or devise, or renounce the latter and accept the former, or waive or accept both. (890a)

COMMENT:

Onerous and Gratuitous Gifts

Example of the 1st paragraph:

A in his will gave to *B* a car and a house, the house being given with a condition. In the same will, *C* was given a diamond ring and a piece of land, to each of which was attached a condition. *B* is not allowed to renounce the house and at the same time accept the car. *C* is allowed to accept both the ring and the land; or to renounce the land and accept the ring; or to renounce the ring and accept the land. But of course if *A* intended that the ring and the land be inseparable from each other, *C* must either accept both or renounce both. This intent of the testator, to be given effect must appear in the will, either expressly or impliedly, from the context.

[NOTE: A compulsory heir was given both his legitime and a legacy. May he accept the legacy and refuse the legitime?

ANS.: Yes, by express provision of the law.*]*.

Art. 956. If the legatee or devisee cannot or is unwilling to accept the legacy or devise, or if the legacy or devise for any reason should become ineffective, it shall be merged into the mass of the estate, except in cases of substitution and of the right of accretion. (888a)

COMMENT:

(1) Effect of Incapacity or Repudiation

(a) In case of incapacity or repudiation or in case it becomes ineffective, the legacy or the devise will descend by intestate succession unless there is substitution or accretion.

(b) *Example: A* has a brother *B* but made *C*, a friend, a legatee. *C* has a child *D*. If *C* repudiates the legacy, *D* will not inherit it because in case of repudiation, there is no right of representation. Moreover, a legatee or voluntary heir cannot be represented. There being no substitute and there being no accretion under the facts presented, the legacy will be merged into the mass of the estate, and will therefore go to *B*, who is the nearest intestate heir.

(2) 'Accretion' Defined

Accretion is a right by virtue of which, when two or more persons are called to the same inheritance, devise, or legacy, the part assigned to the one who renounces or cannot receive his share, or who died before the testator, is added or incorporated to that of his co-heirs, co-devisees or co-legatees. *(Art. 1015).*

[NOTE: In order that the right of accretion may take place in a testamentary succession, it shall be necessary:

(a) that two or more persons be called to the same inheritance, or to the same portion thereof, pro-indiviso; and

(b) that one of the persons thus called die before the testator, or renounce the inheritance, or be incapacitated to receive it. *(Art. 1016).].*

(3) ISRAI

The formula of ISRAI can very well be applied in this Article.

ISRAI stands for the first letters of the following words: *Institution, Substitution, Representation, Accretion, Intestacy.*

Rule: Apply *Institution* if proper; if not, apply *Substitution* if proper; if not, apply *Representation* if proper; if not, apply *Accretion* if proper; if not, apply *Intestacy.*

[NOTE: In case of a legacy or a devise instead of an institution of heir, the word *"Bequest"* can *replace* the word *"Institution"* in the above-mentioned formula.*].*

Art. 957. The legacy or devise shall be without effect:

(1) If the testator transforms the thing bequeathed in such a manner that it does not retain either the form or the denomination it had;

(2) If the testator by any title or for any cause alienates the thing bequeathed or any part thereof, it being understood that in the latter case the legacy or devise shall be without effect only with respect to the part thus alienated. If after

the alienation the thing should again belong to the testator, even if it be by reason of nullity of the contract, the legacy or devise shall not thereafter be valid, unless the reacquisition shall have been effected by virtue of the exercise of the right of repurchase;

(3) If the thing bequeathed is totally lost during the lifetime of the testator, or after his death without the heir's fault. Nevertheless, the person obliged to pay the legacy or devise shall be liable for eviction if the thing bequeathed should not have been determinate as to its kind, in accordance with the provisions of Article 928. (869a)

COMMENT:

When Legacy or Devise is Without Effect

(1) Par. 1. — 'TRANSFORMS'

(a) Form — the external or outward appearance of the thing. *Example:* good all cloth made into a suit.

(b) *Denomination* — the name usually given to it by the public, according of course to its essential elements, species, or genus.

Example: A school converted into a lodging or apartment house.

(c) *A* gave *B* a swimming pool in the former's will. Later *A* converted the swimming pool into a tennis court. Both form and denomination changed. The disposition has therefore been impliedly revoked, because it "shall be without effect."

(d) Par. 1 refers to the legacy or devise of a specific thing. Moreover, the whole Article presupposes a hitherto valid legacy or devise.

(2) Par. 2. — 'ALIENATES'

(a) When the testator donates or sells the property bequeathed, there is implied revocation of the disposition. The presumption under the law is that there has been a

change of intention. *(6 Manresa 689).* However, if there is no change or departure from the original intent of the testator, as when for instance there was *no* consideration for the transfer, or there was undue influence, it could be that the testator merely intended to comply in advance (ademption) with what he had ordered in the testament. *(Dionisio Fernandez, et al. v. Ismaela Dimagiba, L-23638, Oct. 12, 1967).*

(b) *A* gave *B* a legacy of a specific car but *A* later on promised to give it as a donation to *C* provided that *C* would pass the bar in 2004. If *C* does not pass, the legacy remains valid. This is so because the alienation never took effect in view of the non-fulfillment of the suspensive condition.

(c) The creation of a voluntary easement on a piece of land given as a devise is a partial alienation, and the devisee naturally receives the land with the burden of the easement. *(6 Manresa 689).*

(d) *A* gave to *B* a legacy of a specific car (a *Volvo*). *A* then gave the car to *C* and told the latter that if *C* would marry *D*, the donee *C* would have to return the car. The legacy here was revoked the moment *A* alienated the car. It is true that there was a resolutory condition, but then, the alienation became effective right away because under the law, an obligation with a resolutory condition is demandable right away. Suppose later on *C* marries *D,* and the car is returned to *A*, will this revive the legacy? No. And therefore should *A* subsequently die, *B* does not get the car. Notice that the law states that if after the alienation (which was really done, in this case), the thing should again belong to the testator, the legacy (or devise) shall not thereafter be valid.

(e) If the testator reacquires a thing alienated, and the reacquisition is by virtue of the exercise of the right of repurchase, it is evident that:

1) the alienation had not been absolute

2) and he really intended to revive the legacy.

(f) *A* owns a car but is indebted to *B*. In his will, *A* gave *C* the car. When *A* did not pay *B,* the car was attached and the latter sold. After a few days, *A* was able to get some money and he bought the same car from its purchaser. *A* then died. Will *C* get the legacy? Yes, true the car had been alienated but the alienation was not voluntary. The use of the term *"alienates"* clearly indicates that this act must have been voluntary, otherwise this Article cannot apply. *(15 Scaevola 260).*

(g) *A* gave *B* a legacy of a specific car. *C* was desirous of acquiring the car and so he fraudulently informed *A* that *B* was already dead. Convinced, *A* sold the car to *C*. After a few weeks, *A* had the contract voided by the courts on the ground of fraud. After *A's* death, two persons claimed the car: *B,* the legatee, and *X* an intestate heir of *A*. *X* alleged that under the law, *A* had reacquired the car after the alienation by reason of the nullity of the contract. Who should be entitled to the car? *B* should get the car. *Reason:* In view of the fraud committed on him, *A* had really no intention of revoking the legacy. The consent of *A* was therefore vitiated, *i.e.*, not voluntary *(L-23638, Oct. 12, 1967)* where the Court held that "an alienation thru undue influence or through any of the vices of consent, does not revoke a testamentary disposition for the transfer" does not express the real intent of the testator.

(h) A gave B a devise of a specific house. *A* then donated the house to *C* in a *private* instrument. Because under the law such a donation is null and void, *A* was later on able to get back the house. The devise in this case shall be *without effect*. Here, the nullity was not caused by vitiated consent. *(15 Scaevola 263).*

(3) Paragraph 3 — 'LOST'

(a) *A* gave *B* the devise of a particular house. A month later, the house was totally burned. A week after, the testator died. *B* cannot get anything because the devise shall be *without effect*. Even if the house had been burned after *A's* death, *B will* still not get anything if the loss occurred

without any fault on the part of *A's* heirs (like *A's* children, for instance).

(b) If the legacy or devise is generic, the heir charged is liable for eviction. *(See Art. 928).*

(c) "Lost" in this paragraph refers to both physical loss and legal or juridical loss, as in expropriation proceedings. *(6 Manresa 693).* Of course, if later on the testator reacquires the property, the disposition in the will remains valid because the alienation had not been voluntary. In such a case however, the property must have been existing at the time the testator dies. *(6 Manresa 693).*

Art. 958. A mistake as to the name of the thing bequeathed or devised, is of no consequence, if it is possible to identify the thing which the testator intended to bequeath or devise. (n)

COMMENT:

Effect of Mistake in Name of Thing

Example: "My only car, a Ford Expedition Limited 2003" can mean "my only car, a Ford Expedition Limited 2002," provided that identification of testator's intention is possible. The typographical error in this case would not matter.

Art. 959. A disposition made in general terms in favor of the testator's relatives shall be understood to be in favor of those nearest in degree. (751)

COMMENT:

(1) Disposition in General Terms

(a) Observe that the law uses the phrase "the testator's relatives." The relatives must be within the fifth degree, since persons farther than this are no longer considered relatives. It is evident that relatives by affinity are excluded. *(15 Scaevola 227).*

(b) The nearer in degree excludes the farther. Hence, those in the 3rd degree for example exclude the farther. The

affections of the testator are naturally for those nearest to him in degree. *(6 Manresa 36).*

(c) In this Article, the right of representation does not exist.

Reason: In the Project of the Civil Code of 1851, there was a provision similar to Art. 959, and said provision expressly mentioned the right of representation. But in the old Civil Code, the right of representation in connection with this Article was eliminated. This elimination can only mean that in connection with this Article there is no right of representation. *(6 Manresa 36). (Art. 959 in the new Civil Code is only a reproduction of Art. 751 of the old Code.)*

(d) There is no preference between lines, hence, a *grandson* and a *sister* are both relatives of the *second* degree. There is indeed no preference because what is important is the nearness of degree. *(6 Manresa 36).*

(2) Some Problems

(a) A testator gave all of his cash assets to "the relatives of my wife." Can Art. 959 apply to this will? No, says Scaevola, because the law speaks of the testator's relatives. The provision regarding "those nearest in degree" cannot be applied. *(15 Scaevola 227).*

(b) A testator gave some of his properties "to all who are entitled thereto." (Art. 959 *cannot* be applied because the clause evidently refers to the *intestate heirs,* and not to the "testator's relatives.") Here, those who were left were the widow, four brothers, and four nieces. The nieces were the children of a deceased sister. Said nieces were allowed to inherit together with the brothers. *(Singson v. Lim, 47 Phil. 109).*

[NOTE:

(a) The rules given in the above-cited comments may of course be varied or changed by the testator in his will, for after all, his intent must prevail. *(6 Manresa 43).*

(b) See comments under Art. 846. Art. 959 is specifically limited in its application to the case where the beneficiaries are relatives of the testator, not those of the *legatee. (Belen v. Bank of the Philippine Islands, et al., L-14474, Oct. 31, 1960).].*

RESUME IN TABLES

CLASSIFICATION OF LEGACIES AND DEVISES

SUBJECT MATTER	PERSON CHARGED
(1) of property (specific, generic)	(1) payable by estate — *legacy proper*
(2) of rights	(2) payable by heir or legatee — *sub-legacy*

OWNERSHIP	NUMBER, KIND, and BURDEN
(1) belonging TOTALLY to testator	(1) PURE as distinguished from CONDITIONAL legacies
(2) belonging PARTIALLY to testator and PARTIALLY to stranger	(2) PURE as distinguished from LEGACIES WITH A TERM
(3) belonging TOTALLY to stranger	(3) SIMPLE as distinguished from ALTERNATIVE
(4) belonging TOTALLY to legatee	(4) SINGLE as distinguished from DOUBLE or MULTIPLE
(5) belonging PARTIALLY to legatee	(5) GRATUITOUS as distinguished from ONEROUS

ACCORDING TO VALIDITY

VALID	VOID AB INITIO	INEFFECTUAL or INOPERATIVE
1) *within* man's commerce	1) *outside* man's commerce	1) those *revoked expressly*
2) owned by testator	2) owned by stranger but mistakenly believed by testator to be owned by the latter (unless later owned by the latter)	2) those *revoked* impliedly as when same (legacy) is given to another by a subsequent will
3) owned by stranger if there is an *order,* express or implied, to acquire it from him	3) owned by legatee at time will was made (even if it is subsequently alienated)	3) those revoked by *implication of law* — transformation, alienation by testator except when reacquired by right of repurchase or judicial demand
4) given because of a moral obligation	4) legacy in a *void* will	4) destruction or loss thru a fortuitous event
5) given as a *natural* obligation	5) generic real property if there be none of its kind in the estate	5) intentional destruction by testator
6) generic *personal* property — even if there be *none* in the estate	6) if totally inofficious	6) predecease, incapacity, repudiation of legatee
		7) disinheritance if legatee is compulsory heir

Chapter 3

LEGAL OR INTESTATE SUCCESSION

Section 1

GENERAL PROVISIONS

Art. 960. Legal or intestate succession takes place:

(1) If a person dies without a will, or with a void will, or one which has subsequently lost its validity;

(2) When the will does not institute an heir to, or dispose of all the property belonging to the testator. In such case, legal succession shall take place only with respect to the property of which the testator has not disposed;

(3) If the suspensive condition attached to the institution of heir does not happen or is not fulfilled, or if the heir dies before the testator, or repudiates the inheritance, there being no substitution, and no right of accretion takes place;

(4) When the heir instituted is incapable of succeeding, except in cases provided in this Code. (912a)

COMMENT:

(1) 'Legal Succession' Defined

Legal succession is that kind of succession prescribed by the law (and presumed by it to be the desire of the deceased), which takes place when the expressed will of the decedent has not been set down in a will.

[NOTE:

(a) It is called LEGAL, because its terms are fixed by law.

(b) It is called INTESTATE, because it takes place when there is *NO WILL* or no particular disposition of the *property* concerned.*]*.

[NOTE:

(a) In *legal succession,* the law tries to *follow* the *presumed will* of the decedent. In *forced succession* (succession to the legitime), *regardless* of the decedent's desire, he *must comply* with the rules on the legitime.

(b) In a sense therefore, arranged in the *order* of *decreasing* superiority, we have three kinds of succession:

1) forced succession
2) testamentary succession
3) intestate succession

The third one (intestate) takes place generally if (a) there is *no applicable valid will,* (b) *or there is no qualified heir.]*.

Testate Estate of the Late Adrian Maloto v. Maloto
L-32328, Sep. 30, 1977

FACTS: In an intestate proceeding, the heirs presented a partition which was subsequently approved by the court. Later an alleged will turned up, and some of the heirs benefited moved for the reopening of the case. But the court ruled among other things that the discovered will had already been previously revoked. Can the intestate court make this declaration?

HELD: No, because a court before whom the intestate case has been filed has no jurisdiction in matters of probate. The allegation that this is a valid will to consider is a matter over which only a probate court has jurisdiction. The court must order that a separate case be filed in a *probate* court.

Ortañez-Enderes v. CA
321 SCRA 178
(1999)

The jurisdiction of the regional trial court as a probate or intestate court relates only to matters having to do with the settlement of the estate and probate of will of deceased persons and does not extend to the determination of questions of ownership that arise during the proceedings.

The court in charge of the intestate estate proceedings cannot adjudicate or determinate title to properties claimed to be a part of the estate and which are equally claimed to belong to outside parties.

(2) Reason, Purpose, or Basis for Legal Succession

Because *unexpected death* may come to any person, the law presumes what would have been the last wishes of a person had such person made a will while still alive, taking into consideration his love and affection for those closest to him.

(3) Explanation of First Paragraph

(a) "Without a will" — no will made

(b) "Void will" — lacks essential requisites; denied probate

(c) "Subsequently lost its validity" — revoked or ineffective

(4) Explanation of Second Paragraph

This refers to cases where there is no heir, no legatee, no devisee or when there is *partial* disposition. Intestacy controls the remainder.

(5) Explanation of Third Paragraph

(a) If the suspensive condition does not happen

(b) in case of predecease

(c) in case of repudiation

But there will be no intestacy in the above cases if there is:

1) substitution

2) or accretion

Example: A has a brother *B*. In his will, *A* gave a house to *C* provided *C* passes the bar in 2003; and a car to *D*. *E* was designated as *D's* substitute in case of predecease. In 2003, *D* dies. In 2004, *A* dies. In 2005, *C* flunks the bar examinations. Who gets the properties?

ANS.: The house goes to *B*, the intestate heir, because the devise to *C* has become ineffective. The car goes to *E,* because he is the substitute of *D*.

[NOTE: See Arts. 872, 871, 880, 856, 1025, 1041, 977, 1015.*]*.

(6) Explanation of Fourth Paragraph

Example: A instituted *B* as heir, but *B* is incapacitated. The estate descends by intestate succession unless there is a substitute or unless the right of accretion exists.

[NOTE: Aside from the cases enumerated in this Article, intestacy also takes place:

(a) upon the expiration of the resolutory term;

(b) upon the fulfillment of the resolutory condition. *(7 Manresa 36).]*.

(7) When Intestate Heirs Can Inherit

Before intestate heirs can inherit on the ground that the will is void, there must first be a declaration of the nullity of the will or a positive disallowance of a will. If the intestate heirs merely petition to be declared the owners without the abovementioned requirement, they cannot as yet inherit. *(Castro, et al. v. Gallegos, et al., 10 Phil. 306).*

(8) Query: Does Preterition Convert a Court Proceeding into an Intestate Proceeding?

ANSWER:

It depends:

(a) If the proceeding is a TESTATE proceeding, the same is converted into a proceeding for the settlement of an *intestate* estate (except insofar as there are legacies and devises which are not inofficious). Reason for allowing the conversion — the court would have jurisdiction over all the properties of the deceased, whether or not included in the institution or partition that is annulled on account of the preterition. Ordinarily, when the probate of a will is pending in one court, this must first be terminated before an intestate proceeding, based on the alleged preterition can start. *Reason:* Normally, the matter of preterition deals with intrinsic not extrinsic validity. However, when the only provision of the will deals with an institution of a sister or brother, to the exclusion of the parents (who are the only compulsory heirs left), to continue with the probate would be USELESS.

(b) If the proceeding is an *ordinary civil action* to annul the *partition* already made by the other heirs of certain properties, the action *cannot* be converted into an intestate proceeding with jurisdiction over any and all properties of the deceased. *Reason:* In the ordinary civil action, the authority of the court is limited to the properties described in the pleadings, hence, it cannot order the collation and partition of properties which were not included in the partition, which was the subject matter of the action for annulment. *(See Lajom v. Leuterio, et al., L-13557, Apr. 25, 1960,* where an *acknowledged natural* child of the testator was preterited.*)*.

Art. 961. In default of testamentary heirs, the law vests the inheritance, in accordance with the rules hereinafter set forth, in the legitimate and illegitimate relatives of the deceased, in the surviving spouse, and in the State. (913a)

COMMENT:

(1) Who Inherits in Default of Testamentary Heirs

(a) An intestate heir is not necessarily a compulsory heir. *Example:* A brother is never a compulsory heir, but may be an intestate heir.

(b) The order of intestate succession cannot be altered by a contract. *(Rodriguez v. Ravilan, 17 Phil. 63).*

Heirs of the Late Mario V. Chanliongco
Adm. Matter 190-RET
Oct. 18, 1977

FACTS: A government employee (a Supreme Court attorney) died intestate leaving retirement benefits, salary adjustments, and unused vacation and sick leaves. Who are entitled to get them?

HELD: (1) The salary adjustments, and the unused vacation and sick leaves are part of the *salary*, and therefore conjugal. Half goes to the surviving spouse, and the other half to the intestate heirs (including the wife); and (2) The retirement benefits are gratuitous, and in the absence of designated beneficiaries, the benefits (like insurance indemnities) belong to the estate of the deceased, and must therefore be distributed to the intestate heirs.

(2) Query: May Intestate Heirs be Disinherited?

ANS.:

(a) If the intestate heirs are also compulsory heirs (*e.g.*, legitimate children) — YES.

(b) If the intestate heirs are NOT compulsory heirs (*e.g.,* brothers) — No. However, such intestate heirs may be *excluded, expressly or impliedly*.

Examples:

1) *Express Exclusion*

A testator with 2 brothers *X* and *Y* makes a will with this single provision: "I hereby exclude my brother *X*." While *Y* is not being instituted, it is clear that the whole *intestate estate* should go to *Y* because of *X's* express exclusion.

2) *Implied Exclusion*

This takes place when somebody else is instituted, leaving nothing for the intestate heirs.

(3) Principles for the Exclusion of an Intestate Heir

(a) The excluded heir must not be a compulsory heir.

(b) The State, as legal heir, must *never* be excluded expressly because if there be no *relative left,* a case might arise when no one will succeed to the property. Such eventuality must not be allowed to happen.

(c) When a person is excluded, it is he alone who is excluded and not his own descendants or other heirs.

(d) Express exclusion of one intestate heir makes the property go to the heirs of the same degree, if any; if none, then to the heirs of the next degree.

Art. 962. In every inheritance, the relative nearest in degree excludes the more distant ones, saving the right of representation when it properly takes place.

Relatives in the same degree shall inherit in equal shares, subject to the provisions of Article 1006 with respect to relatives of the full and half blood, and of Article 987, paragraph 2, concerning division between the paternal and maternal lines. (921a)

COMMENT:

(1) Two Basic Principles of Intestate Succession

(a) Nearer relative excludes farther relative (without prejudice to the right of representation, because by virtue of representation the farther becomes just as near). The principle is without prejudice to preference to lines however.

Ofelia Hernando Bagunu v. Pastora Piedad
GR 140975, Dec. 8, 2000

The rule on *proximity* is a concept that favors the relatives nearest in degree to the decedent and excludes the more distant ones except when and to the extent that the right of representation can apply.

Among collateral relatives, except only in the case of nephews and nieces of the decedent concurring with their uncles or aunts, the rule of proximity, expressed in Art. 962, is an absolute rule.

(b) In general, inheritance is in equal shares. There are exceptions however.

(2) Principle of Nearer Excludes the Farther

Example: A man died without a will, leaving a brother and a cousin. Only the brother inherits because the nearer relative excludes the farther. If there are two brothers, they get equal shares.

(3) Question

D is survived intestate by a grandfather and a brother. Will both inherit?

ANS.: Although it is true that both are just as near in degree, still it is the grandfather alone who should inherit because the *direct line is preferred* over *the collateral line*.

(4) Some Important Rules

(a) The right of representation takes place in the direct descending line, but never in the ascending. *(Art. 972).*

(b) In the collateral line, the right of representation takes place only in favor of the *children* of *brothers or sisters*, whether they be of the full or half-blood. *(Art. 972).*

(c) Should brothers and sisters of the full blood survive together with brothers and sisters of the half-blood, the former shall be entitled to a share double that of the latter. *(Art. 1006).*

(d) Should there be more than one ascendant of equal degree belonging to the same line, they shall divide the inheritance *per capita;* should they be of different lines but of equal degree, one-half shall go to the paternal and the other half to the maternal ascendants. In each line, the division shall be made *per capita*. *(Par. 2, Art. 987).*

(e) Note that to the rule of equal division, we find at least three exceptions:

1) division in the ascending line
2) division between relatives of the *full* and *half-blood*
3) division in cases of representation

Subsection 1. — RELATIONSHIP

Art. 963. Proximity of relationship is determined by the number of generations. Each generation forms a degree.

COMMENT:

Determination of Proximity of Relationship

Article 963 gives the answer.

Art. 964. A series of degrees forms a line, which may be either direct or collateral.

A direct line is that constituted by the series of degrees among ascendants and descendants.

A collateral line is that constituted by the series of degrees among persons who are not ascendants and descendants, but who come from a common ancestor. (916a)

COMMENT:

Direct and Collateral Lines

The Article defines these lines.

Art. 965. The direct line is either descending or ascending.

The former unites the head of the family with those who descend from him.

The latter binds a person with those from whom he descends. (917)

COMMENT:

Descending and Ascending Lines

The Article is self-explanatory.

Art. 966. In the line, as many degrees are counted as there are generations or persons, excluding the progenitor.

In the direct line, ascent is made to the common ancestor. Thus, the child is one degree removed from the parent, two from the grandfather, and three from the great-grandparent.

In the collateral line, ascent is made to the common ancestor and then descent is made to the person with whom the computation is to be made. Thus, a person is two degrees removed from his brother, three from his uncle, who is the brother of his father, four from his first cousin, and so forth. (918a)

COMMENT:

Computation of Degrees

The Article illustrates how degrees of generation are computed. Stated otherwise, Art. 966 gives direction in the determination of the degree of relationship of the collateral relatives to the decedent. *(Bagunu v. Piedad, GR 140975, Dec. 8, 2000).*

Art. 967. Full blood relationship is that existing between persons who have the same father and the same mother.

Half blood relationship is that existing between persons who have the same father, but not the same mother, or the same mother, but not the same father. (920a)

COMMENT:

Full Blood Distinguished from Half Blood Relationship

This Article defines these two kinds of relationship.

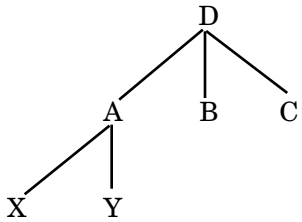
Art. 968. If there are several relatives of the same degree, and one or some of them are unwilling or incapacitated to succeed, his portion shall accrue to the others of the same degree, save the right of representation when it should take place. (922)

COMMENT:

Accretion in Intestate Succession

(a) *Example:* A decedent leaves 3 first-cousins and an estate of P300,000. If one of the cousins is incapacitated or repudiates, the P100,000 which should have gone to him will accrue to the other two, who will each get P150,000. Each therefore gets P100,000 in his own right, and P50,000 by virtue of accretion.

(b) *Another Example:*



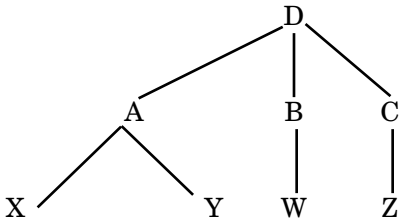
A, B, and *C* are legitimate children of *D*. *X* and *Y* are *A's* legitimate children. *D* leaves P300,000 intestate. If *A* is incapacitated, *X* and *Y* will each get P50,000 by the right of representation, but if *A* repudiates, *X* and *Y* will each get nothing. (An heir repudiating cannot be represented. *[Art. 977].*). Therefore, *B* and *C* will each get P150,000.

Art. 969. If the inheritance should be repudiated by the nearest relative, should there be one only, or by all the nearest relatives called by law to succeed, should there be several, those of the following degree shall inherit in their own right and cannot represent the person or persons repudiating the inheritance. (923)

COMMENT:

Effect of Repudiation

(a) *Example:*



Intestate estate of P1.2 million. *A, B* and *C* are the legitimate children of *D*. *X* and *Y* are the legitimate children of *A; W,* the legitimate child of *B;* and *Z,* the legitimate child of *C*. If *A, B,* and *C repudiate* the inheritance, the estate will be divided among the four grandchildren, and so each gets P300,000 in his *own right*. Remember, in case of repudiation, there is no right of representation. *(Art. 977)*. If only *C* repudiates, how will the estate be divided?

ANS.: A and *B* will each get P600,000. *X* and *Y* are excluded, because the nearer excludes the farther. *(Art. 962)*. *Z* is also excluded because there is no right of representation in case of repudiation. *W* is excluded by *B*. *(Art. 977)*.

(b) Suppose *A, B,* and *C* are all incapacitated, how will the grandchildren inherit? By right of representation, not in their own right. Hence, *X* and *Y* will each get P200,000. *W* gets P400,000 and *Z* gets P400,000. *(Art. 974 and Art. 982)*.

(c) Suppose *A, B,* and *C* all predeceased *D,* how will the grandchildren inherit? Same as in (b).

Subsection 2. — RIGHT OF REPRESENTATION

Art. 970. Representation is a right created by fiction of law, by virtue of which the representative is raised to the place and the degree of the person represented, and acquires

the rights which the latter would have if he were living or if he could have inherited. (924a)

COMMENT:

(1) Right of Representation

Representation exists in case of:

(a) predecease (testate and intestate)

(b) incapacity (testate and intestate)

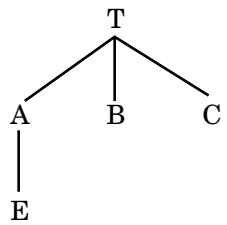
(c) disinheritance (this happens only in the case of testate succession)

NOTE:

(a) In *intestate* succession, the right of representation when proper covers all that the person being represented would have inherited.

(b) In *testate* succession, the right of representation covers only the *legitime*. There is no right to represent a *voluntary heir*. The legitime can be received by representation, for after all, it goes to the heirs by operation of law. *(See Arts. 856 and 1035).*

Example:



Estate is P900,000. *T* gave each child P300,000. But *A* is incapacitated. Divide the estate.

ANS.: E gets P150,000 (the legitime of *A*); *B* and C get P375,000 each. *Reason*: *E* is not allowed to get the extra P150,000 because in this respect, his father, *A* was a voluntary heir. Said extra amount will go by accretion to *B* and *C*, who will then receive a total of P375,000 each.

(c) Is the right of representation an exception to the rule of nearer excludes the farther?

ANS.: Not necessarily, for in fact, by virtue of representation, the "farther" becomes just as *near* as the "nearer."

(d) The representation is *"degree by degree."* Of course, *two, three,* or more degrees nearer may be reached, thus, it is possible for a person and his great-grandnephew to inherit *together,* but the reaching of the nearer degree must be *"step by step"* or "degree by degree." *(See 7 Manresa 63).* This rule, however, applies only to representation in the *direct line.*

(2) Rules in Adoption

(a) An adopted child *cannot* represent.

(b) Neither may an adopted child be *represented.*

Reasons: 1) Reason for the principle that "an adopted child *cannot* represent" — there is no filiation (whether by blood or by law) between the adopted child and the *parent* of the adopter.

[NOTE: The *legal filiation* is only between the adopted child and the adopter.*].*

[NOTE: It has also been reasoned out that while a person thru his legal actuations can give himself an heir, he *cannot* by the same actuations give his relatives an heir. *(See Wilson v. Bass, 118 N.E. 397).].*

2) Reason for the principle that "an adopted child cannot be represented" — same as the reasons pointed out in (1), particularly the *non-legal relationship* between the adopter and the children of the adopted. *(Castan).*

[NOTE: The conclusion reached above seems self-evident despite the fact that *ordinarily,* the adopted child has all the rights of legitimate children.*].*

[NOTE: See Art. 39 of Presidential Decree 603, *"The Child and Youth Welfare Code."].*

(3) Effects of Adoption

The adoption shall:

(1) Give to the adopted person the same rights and duties as if he were a legitimate child of the adopter: *Provided*, That an adopted child cannot acquire Philippine citizenship by virtue of such adoption;

(2) Dissolve the authority vested in the natural parent or parents, except where the adopter is the spouse of the surviving natural parent;

(3) Entitle the adopted person to use the adopter's surname; and

(4) Make the adopted person a legal heir of the adopter: *Provided*, That if the adopter is survived by legitimate parents or ascendants and by an adopted person, the latter shall not have more successional rights than an acknowledged natural child: *Provided, further*, That any property received gratuitously by the adopted from the adopter shall revert to the adopter should the former predecease the latter without legitimate issue unless the adopted has, during his lifetime, alienated such property: *Provided, finally*, That in the last case, should the adopted leave no property other than that received from the adopter, and he is survived by illegitimate issue or a spouse, such illegitimate issue collectively or the spouse shall receive one-fourth of such property; if the adopted is survived by illegitimate issue and a spouse, then the former collectively shall receive one-fourth and the latter also one-fourth, the rest in any case reverting to the adopter, observing in the case of the illegitimate issue the proportion provided for in Article 895 of the Civil Code.

The adopter shall not be a legal heir of the adopted person, whose parents by nature shall inherit from him, except that if the latter are both dead, the adopting parent or parents take the place of the natural parents in the line of succession, whether testate or intestate.

[NOTE: Under the Family Code, we have the following provisions of Article 189.

Adoption shall have the following effects:

(1) For civil purposes, the adopted shall be deemed to be a legitimate child of the adopters and both shall acquire the reciprocal rights and obligations arising from the relationship of parent and child, including the right of the adopted to use the surname of the adopters;

(2) The parental authority of the parents by nature over the adopted shall terminate and be vested in the adopters, except that if the adopter is the spouse of the parent by nature of the adopted, parental authority over the adopted shall be exercised jointly by both spouses; and

(3) The adopted shall remain an intestate heir of his parents and other blood relatives. (39{1}a, {2}a, {3}a, PD 603).*]*.

Art. 190. Legal or intestate succession to the estate of the adopted shall be governed by the following rules:

(1) Legitimate and illegitimate children and descendants and the surviving spouse of the adopted shall inherit from the adopted, in accordance with the ordinary rules of legal or intestate succession;

(2) When the parents, legitimate or illegitimate, or the legitimate ascendants of the adopted concur with the adopters, they shall divide the entire estate, one-half to be inherited by the parents or ascendants and the other half, by the adopters;

(3) When the surviving spouse or the illegitimate children of the adopted concur with the adopters, they shall divide the entire estate in equal shares, one-half to be inherited by the spouse or the illegitimate children of the adopted and the other half, by the adopters;

(4) When the adopters concur with the illegitimate children and the surviving spouse of the adopted, they shall divide the entire estate in equal shares, one-third to be inherited by the illegitimate children, one-third by the surviving spouse, and one-third by the adopters;

(5) When only the adopters survive, they shall inherit the entire estate; and

(6) When only collateral blood relatives of the adopted survive, then the ordinary rules of legal or intestate succession shall apply. *(39[4]a, PD 603).*

N.B.:

(1) The Article applies only in *legal* or *intestate* succession.

(2) Example of par. 1 —

An adopted child died intestate survived by his wife and by five (5) legitimate children. If the estate is P1.2 million, how should it be distributed?

ANS.: The wife shall have the same right as each of the 5 legitimate children. Hence, the estate will be divided into 6 equal shares with each child inheriting P200,000. The wife shall also inherit P200,000.

(4) Example of par. 2

X and *Y* are the parents by nature of *Z,* who is eventually adopted by *A.* If *Z* dies intestate leaving an estate of P1.8 million, how will the estate be divided?

ANS.: Half will go to the legitimate parents, so *X* and *Y* will get a total of P900,000 (that is half of the estate). So *X* and *Y* will get P450,000 each. *A,* the adopter, will inherit P900,000.

(5) Representation Covers Rights and Obligations

The representative succeeds not only to the properties and rights of the decedent, but also to all the latter's *transmissible* obligations. *(7 Manresa 16).*

(6) The Case of Bagunu

Bagunu v. Piedad
GR 140975, Dec. 8, 2000

By *right of representation*, a more distant blood relative of a decedent is, by operation of law, raised to the same place and degree of relationship as that of a closer blood relative of the

same decedent. The representative thereby steps into the shoes of the person he represents and succeeds, not from the latter, but from the person to whose estate the person representated would have succeeded.

The right of representation does NOT APPLY to "others — *i.e.*, collateral relatives within the 5th civil degree" (to which group both petitioner and respondent belong) who are 6th in the order of preference following: *firstly*, the legitimate children and descendants; *secondly,* the legitimate parents and ascendants; *thirdly*, the legitimate children and descendants; *fourthly*, the surviving spouse, and *fifthly*, the brothers and sisters/nephews and nieces, of the decedent.

Among collateral relatives, except only in the case of nephews and nieces of the decedent concurring with their uncles or aunts, the rule of proximity, expressed in Art. 962, is an absolute rule. In determining the degree of relationships of the collateral relatives to the decedent, Art. 966 gives direction.

(7) In Whose Favor Is the Right of Representation in the Cultural Line?

It takes place only in favor of the children of brothers and sisters (nephews and nieces). It cannot be exercised by grandnephews and grandnieces. *(Delgado Vda. de Dela Rosa v. Heirs of Marciana Rustia Vda. de Damian, 480 SCRA 334 [2006]).*

Art. 971. The representative is called to the succession by the law and not by the person represented. The representative does not succeed the person represented but the one whom the person represented would have succeeded. (n)

COMMENT:

Person from Whom Representative Inherits

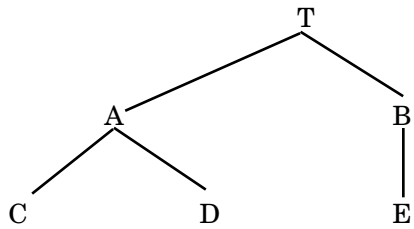
(a) *Example:* If a child represents his predeceased father in the succession to the grandfather's estate, he inherits from the *grandfather*.

(b) Property received by *representation cannot* be taken by or be held responsible for the *debts* of the person represented.

Reason: Same is not part of his estate; it is part of the decedent's estate. *(TS, June 25, 1905).*

(c) Even if by institution, compulsory heirs may inherit *unequally;* still by representation, they would get *equally* or *per capita,* as long as they are *members of one group*.

Example: T has two children, *A* and *B*. *A* has two children, *C* and *D*. *B* has a child *E*.



A dies after giving *C* 2/3 of his estate and *D* 1/3. (This is all right since *D's* legitime has not been impaired.) If later *T* dies, *C* and *D* will inherit from *T* in representation of *A*. Will they get *equal* shares?

ANS.: Yes, since their right to represent depends not upon *A's* will, but upon the provisions of law. (In the problem given, if *E* will also represent *B*, it is understood that *E* will get more than *C* or *D* individually, for after all, *E* gets the share of *B*. Thus, the total share of *C* and *D* (one group) equals the share of *E*.

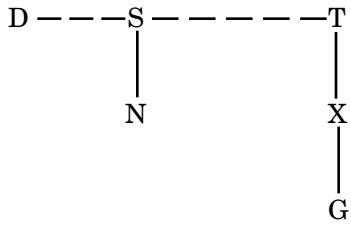
Art. 972. The right of representation takes place in the direct descending line, but never in the ascending.

In the collateral line, it takes place only in favor of the children of brothers or sisters, whether they be of the full or half blood. (925)

COMMENT:

(1) Where Right of Representation Takes Place

Example:



S and *T* were *D's* sisters; *N*, is the child of *S; X*, the child of *T; G,* the child of *X. D* died intestate. *S, T*, and *X* are all dead. *G* claims a share by the right of representation. *N* says *G* can have no share. Decide.

ANS.: G cannot inherit by right of representation, because she is only a grandniece. Hence, only *N* gets the estate. In the collateral line, the right of representation takes place only in favor of the children of brothers or sisters (that is to say, nephews and nieces). *(Art. 972, 2nd par.; Linart y Pavia v. Ugarte, 5 Phil. 176).*

(Note the *emphasis* that the law makes when it says that the right of representation *NEVER* takes place in the ascending line.)

(2) Problem

A has a child *B* who has a child *C*. *C* dies. One day later, *B* dies. Can *A* share in the estate of *C*?

ANS.: A can intervene in the adjudication of *C's* estate, not because he represents *B*, but because *A* can get his share *in the estate of B* (which in the meantime is still included in *C's* estate). Note that in the problem, *B* did not predecease *C*. *B* died later, hence, *B* really inherited. It is this portion that *A* can get. Hence, also, *A* does not inherit by representation here; he inherits in his own right, not from *C's* estate, but from *B's* estate (which in the meantime is still included in *C's* estate).

(3) Case

Salao, et al. v. Salao
L-26699, Mar. 16, 1976

FACTS: If a person dies intestate survived by a nephew (child of a brother), a grandniece, and great grandnephews, who will inherit?

HELD: Only the nephew, since in the collateral lines, representation (in intestate succession) takes place only in favor of the children of brothers and sisters, whether they be of the full or half blood. *(Art. 972, Civil Code).* The nephew excludes a grandniece or great grandnephews. *(Pavia v. Iturralde, 5 Phil. 176).*

Art. 973. In order that representation may take place, it is necessary that the representative himself be capable of succeeding the decedent. (n)

COMMENT:

(1) Capacity of Representative to Inherit

(a) Note that the representative must himself be capable of inheriting from the deceased.

(b) Capacity to succeed is governed, from the viewpoint of private international law, not by the national law of the representative nor of the person represented, but of the decedent. *(See Art. 1039).*

(2) Problem

A has a child *B* who has a child *C*. If *B* disinherits *C*, is it still possible for *C* to represent *B* in the succession from *A*?

ANS.: Yes, so long as *C* is not incapacitated to inherit from *A*. For after all, all we have to determine is *C's capacity to succeed* from *A,* not from *B*. *(See Art. 973).*

Art. 974. Whenever there is succession by representation, the division of the estate shall be made *per stirpes,* in such manner that the representative or representatives shall not inherit more than what the person they represent would inherit, if he were living or could inherit. (926a)

COMMENT:

(1) Inheritance "Per Stirpes"

"Per stirpes" means inheritance by group, all those within the group inheriting in *equal shares*.

(2) Two Ways of Inheriting

(a) *per stirpes* or *per capita*

(b) by *representation* or by *one's own right*.

[NOTE: 1) The first answers the question: HOW MUCH? (Of course those within the stirpes inherit *per capita*).

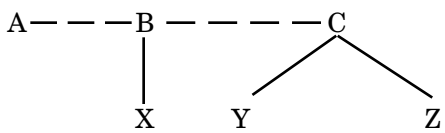
2) The second answers the question: HOW?*]*.

Art. 975. When children of one or more brothers or sisters of the deceased survive, they shall inherit from the latter by representation, if they survive with their uncles or aunts. But if they alone survive, they shall inherit in equal portions. (927)

COMMENT:

(1) Inheritance by Nephews and Nieces

Example:



B and *C* are *A's* brothers: *X* is the child of *B; Y* and *Z,* the children of *C*. Estate is P900,000. *A* is the decedent. If *C* predeceases *A,* divide the estate.

ANS.: *B* gets P450,000; and *Y* and *Z* each gets P225,000.

Another question: If *B* and C predecease *A,* divide the estate.

ANS.: X, Y, and *Z* each get P300,000. They inherit in their own right, and therefore, *per capita* and not by right of representation.

[NOTE: Although apparently Art. 975 applies only to predecease, such is not the case. The word *"survive"* is used here to mean *"concur."* Hence, this Article applies in all cases where representation is proper. *(7 Manresa 66).].*

(2) BAR QUESTION

A died intestate leaving an estate worth P240,000. He is survived by his wife *S*; his nephew *T*, a son of his full blood brother *B*; and his nieces *X* and *Y,* children of another full blood brother *C*. Determine the share of those who are entitled to participate in the estate of the deceased.

[NOTE: The reader will please try to solve this easy problem himself.*].*

Art. 976. A person may represent him whose inheritance he has renounced. (928a)

COMMENT:

Right of Renouncer to Represent

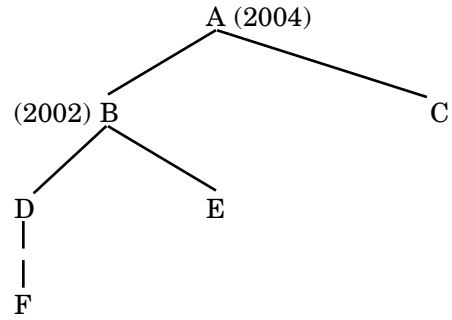
(See Comment under next Article.)

Art. 977. Heirs who repudiate their share may not be represented. (929a)

COMMENT:

Renouncer Cannot Be Represented

(a) *Example:*



A has 2 children *B* and *C*. *B* has 2 children, *D* and *E*. *D* has a child *F*. *B* dies in 2002 but *D* repudiates his share. Later, *A* dies in 2004. *D* can still inherit from *A* by representing *B*. *(Art. 976)*. *F* cannot represent *D* in the inheritance from *B* because heirs who repudiate their share (like *D*) may not be represented. *(Art. 977)*.

(b) *Principle* — A RENOUNCER MAY REPRESENT *(Art. 976)* BUT MAY NOT BE REPRESENTED. *(Art. 977)*.

[NOTE: Why does the law not allow a *renouncer* to be represented, although it allows an incapacitated or disinherited person to be represented?

ANS.: Because the circumstances are different. A *renouncer* for motives of his own, does so voluntarily. His act of repudiation takes away his *right to dispose of the property* — dispossesses indeed his children of that which could have gone down to them. Note that repudiation is an *act of disposition*. In cases of incapacity or disinheritance however, the loss is involuntary. The children of the incapacitated or disinherited person should not be deprived of the right of representation. They should not suffer for having an unworthy parent. They should indeed be sympathized with. *(6 Sanchez Roman, 1708; 7 Manresa 7981).]*.

Section 2

ORDER OF INTESTATE SUCCESSION

Subsection 1. — DESCENDING DIRECT LINE

Art. 978. Succession pertains, in the first place, to the descending direct line. (930)

COMMENT:

(1) Reason for Preference of the Descending Direct Line

(a) descends (descendants)

(b) ascends (ascendants)

(c) then spreads (collaterals)

Thus, the descendants are *preferred*.

[NOTE: Although descendants are mentioned as No. 1, two rules must be borne in mind:

(a) the nearer excludes the farther

(b) Art. 978 does not mean that other compulsory heirs (like the surviving spouse, and the illegitimate children) are *excluded*. In fact, they are, together with the legitimate descendants, CONCURRENT INTESTATE HEIRS.*]*.

(2) Order of Intestate Succession to the Estate of a Legitimate Child

(Here the deceased was a *legitimate* child):

(a) Legitimate children and their legitimate descendants. *(Art. 979)*. (This group includes the legitimated and the adopted children and descendants). *(See also Art. 992)*.

(b) Legitimate parents and other legitimate ascendants. *(Art. 986)*. (There is no right of representation in the ascending line.) (If no legitimate parents, the adopting parents, if any, will take their place — Art. 39, PD 603).

(c) Illegitimate children and their descendants, whether legitimate or illegitimate. *(Arts. 988, 990 and 992).*

(d) Surviving spouse, without prejudice to the rights of brothers and sisters, nephews and nieces should there be any. *(Art. 995).*

(e) Collateral relatives up to the *fifth* degree of relationship. *(Art. 1011).*

(f) The State. *(Art. 1011).*

[NOTE: The order just given is successive and exclusive, but the primary compulsory heirs are never excluded. These are the legitimate children and descendants, the illegitimate children and descendants and the surviving spouse. They are called CONCURRING INTESTATE HEIRS.

Hence:

1) The presence of legitimate children and descendants will not exclude the illegitimate children and descendants. "If illegitimate children survive with legitimate children, the share of the former shall be in the proportions prescribed by Art. 895." *(Art. 983).*

2) The presence of legitimate children and descendants will not exclude the surviving spouse. "If the widow or widower and legitimate children or descendants are left, the surviving spouse has in the succession the same share as that of each of the children." *(Art. 996).*

3) The presence of illegitimate children and descendants will not exclude the surviving spouse. "If a widow or widower survives with illegitimate children such widow or widower shall be entitled to one-half of the inheritance, and the illegitimate children or their descendants, whether legitimate or illegitimate, to the other half." *(Art. 998).].*

(3) Order of Intestate Succession to the Estate of an Illegitimate Child (Here, the deceased was an illegitimate child):

(a) Legitimate children and other legitimate descendants. *(Art. 979).*

(b) Illegitimate children and other descendants (whether legitimate or illegitimate). *(Arts. 988, 989, 990).*

(c) Illegitimate parents. *(Art. 993).*

[NOTE: An illegitimate decedent has no legitimate ascendants.*].* (If no legitimate parents, the adopting parents, if any, will take their place — Art. 39, PD 603).

(d) Surviving spouse. *(Art. 994).* Illegitimate brothers and sisters; nephews and nieces. *(By inference, from Art. 994, 2nd par.)*

(e) The State. *(Art. 1011.).*

Art. 979. Legitimate children and their descendants succeed the parents and other ascendants, without distinction as to sex or age, and even if they should come from different marriages.

An adopted child succeeds to the property of the adopting parents in the same manner as a legitimate child. (931a)

COMMENT:

(1) Succession by Legitimate and Legitimated Children

The term *"legitimate"* includes *"legitimated."* Children who are legitimated by subsequent marriage shall enjoy the same rights as legitimate children. *(See Arts. 178 and 179, Family Code).* The effects of legitimation shall retroact to the time of the child's birth. *(Art. 180, Family Code).* The effects of legitimation of children who died before the celebration of the marriage shall benefit their descendants. *(Art. 181, Family Code).*

(2) Rules For Adopted Children

(a) There is an exception to the 2nd paragraph of Art. 979 of the Civil Code. The law provides that "If the adopter is survived by legitimate parents or ascendants, and by

an adopted person, the latter shall not have more successional rights than an acknowledged natural child." *(Art. 343, Civil Code).*

[NOTE: As long as there are legitimate children or descendants, the adopted child has the SAME share as one legitimate child.*]. (See also comments under Art. 970 re PD 603.).*

(b) The adoption shall make the adopted person a legal heir of the adopter. *(Art. 341).* The adopter shall not be a legal heir of the adopted person, whose parents by nature shall inherit from him. *(Art. 342). (See also comments under Art. 970 re PD 603).*

(c) The presence of adopted children excludes a sister of the deceased from the inheritance, hence, said sister cannot even successfully file a petition for letters of administration. This is more so if the surviving spouse and the adopted children object to such grant. *(Saguinsin v. Lindayag, et al., L-17759, Dec. 17, 1962).*

NOTE: See Arts. 183-193 of the Family Code.

Art. 980. The children of the deceased shall always inherit from him in their own right, dividing the inheritance in equal shares. (932)

COMMENT:

Inheritance by Children

Example: Estate is P1 million. There are 5 legitimate children. Each gets P200,000.

[NOTE: This is true even if the children come from different marriages, for after all, the dead parent is the *common* parent.*]*.

Art. 981. Should children of the deceased and descendants of other children who are dead, survive, the former shall inherit in their own right, and the latter by right of representation. (934a)

COMMENT:

Inheritance by Children Concurring With Grandchildren

Example: Estate is P1 million. Surviving relatives are *A,* a legitimate child; *B* and *C,* legitimate children of *X,* a deceased legitimate child of the decedent. *A* gets P500,000. *B* and *C* each gets P250,000.

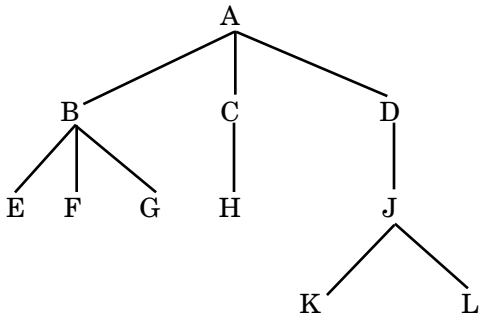
Art. 981 applies also to cases of *incapacity*.

Art. 982. The grandchildren and other descendants shall inherit by right of representation, and if any one of them should have died, leaving several heirs, the portion pertaining to him shall be divided among the latter in equal portions. (933)

COMMENT:

(1) Inheritance by Grandchildren

(a) *Example:*



A is the decedent. *B, C, D* are his children. *E, F, G, H* and *J* are the grandchildren. *K* and *L* are *J's* children. Estate is P900,000. *B, C, D,* and *J* predeceased *A*. Divide the property.

ANS.: (a) *E, F* and *G* will each get P100,000 (a total of P300,000 which would have been *B's* share).

(b) *H* gets P300,000 (which would have been *C's* share).

(c) *K* and *L* will each get P150,000 (a total of P300,000 which should have been *J's* share had *J* been alive to represent *D*).

(b) When the children are all dead, the grandchildren inherit by right of *representation (Art. 982)*, provided that representation is proper. *(NOTE* that representation is not proper in case of repudiation.*)*.

(c) When all the children repudiate, there is no right of representation; and therefore the grandchildren inherit in their own right, *per capita* and in equal portions. *(Art. 969)*.

(2) Inheritance by Nephews and Nieces

When nephews and nieces alone survive (to the exclusion of brothers and sisters), they inherit in equal portions, that is *per capita* and in their own right. *(Art. 975)*.

Antonio Armas y Calisterio v.
Marietta Calisterio
GR 136467, Apr. 6, 2000

The successional right in intestacy of a surviving spouse over the net estate of the deceased, concurring with legitimate brothers and sisters or nephews and nieces (the latter by right of representation), is one-half of the inheritance, the brothers and sisters or nephews and nieces, being entitled to the other half.

Nephews and nieces, however, can only succeed by right of representation in the presence of uncles and aunts; upon the other hand, nephews and nieces can succeed in their own right which is to say that brothers or sisters exclude nephews and nieces except only in representation by the latter of their parents who predecease or are incapacitated to succeed.

Art. 983. If illegitimate children survive with legitimate children, the shares of the former shall be in the proportions prescribed by Article 895. (n)

COMMENT:

(1) Shares of Illegitimate Children Concurring With Legitimate Children

The shares of the illegitimate children are to be taken only from the half, which is the free portion. *(11 Capistrano, Civil Code, 467).* This is so otherwise legitimate children would be prejudiced if there were so many illegitimate children.

(2) Rules

(a) Follow the proportion of 10-5 (10 for every legitimate child, 5 for every illegitimate child), PROVIDED that the legitime of the legitimate children is NOT IMPAIRED.

(b) Otherwise, give the legitime of the legitimate children *first,* then whatever is left is given to the illegitimate children.

Art. 984. In case of the death of an adopted child, leaving no children or descendants, his parents and relatives by consanguinity and not by adoption, shall be his legal heirs. (n)

COMMENT:

(1) Estate of Adopted Children

Example: A has a child *B* who was adopted by *C*. If *B* dies without issue, *A* will be the legal heir and not *C*. It goes without saying that had *B* made a will, he would have been allowed to give something to *C*.

(2) Reversion Adoptiva

"SEC. 5. *Hearing and judgment.* — Upon satisfactory proof in open court on the date fixed in the order that such order has been published as directed, that the allegations of the petition are true, and that it is a proper case for adoption and the petitioner or petitioners are able to bring up and educate the child properly, the court shall adjudge that thenceforth, the child is free from all legal obligations of obedience and main-

tenance with respect to its natural parents, except the mother when the child is adopted by her husband, and is, to all legal intents and purposes, the child of the petitioner or petitioners, and that its surname is changed to that of the petitioner or petitioners. The child shall thereupon become the legal heir of adopted person or parents by adoption, and shall also remain the legal heir of his natural parents. In case of the death of the adopted person or child, his parents and relatives by nature, and not by adoption, shall be his legal heirs." *(Sec. 5, Rule 99, Rules of Court).*

Banawa v. Mirano
L-24750, May 16, 1980

The rule with respect to *reversion adoptiva* prescribed in Sec. 5, Rule 100, of the former Rules of Court applies only to property that had been received by a *judicially* adopted child. Extrajudicial adoption is not within the contemplation and spirit of the rule. It is an elementary rule of construction that when the language of the law is clear and unequivocal, the law must be taken to mean exactly what it says.

[NOTE: This *reserva adoptal* is believed to have been abolished by the Civil Code in view of the desire of the Code Commission to abolish all reservas. As has been said before, the retention of *"reserva troncal"* was not intended by the Code. Besides, according to the Civil Code, "the proceedings for adoption shall be governed by the Rules of Court insofar as they are not in conflict with this Code." *(Art. 345).* It follows therefore that all the *substantive provisions* on adoption in the Rules of Court have been repealed by the new Civil Code. HOWEVER, this *reserva adoptal* has been REVIVED under Art. 39 of PD 603. *(see comments under Art. 970).].*

Subsection 2. — ASCENDING DIRECT LINE

Art. 985. In default of legitimate children and descendants of the deceased, his parents and ascendants shall inherit from him, to the exclusion of collateral relatives. (935a)

COMMENT:

Inheritance by Parents and Ascendants

(a) "Parents and ascendants" referred to in this Article should be *legitimate. (7 Manresa 108).*

(b) *A* died intestate leaving P1 million. Surviving relatives are *B,* his father, and *C (A's*) brother. The whole estate goes to *B* to the exclusion of *C. (Art. 985).*

Art. 986. The father and mother, if living, shall inherit in equal shares.

Should only one of them survive, he or she shall succeed to the entire estate of the child. (936)

COMMENT:

Shares of Parents

(a) Reason *for the 1st par.* — both are equally entitled to the gratitude of the children.

(b) *Reason for the 2nd par.* — There is no right of representation in the ascending line. *(Art. 972).*

(c) *A* died intestate leaving P1 million. Surviving him are his father, *B;* his grandfather, *C* (the father of *B*); and his grandfather, *D* (the father of *A's* mother). Divide the estate. *B* gets the whole P1 million. *(Art. 986, 2nd par.)*

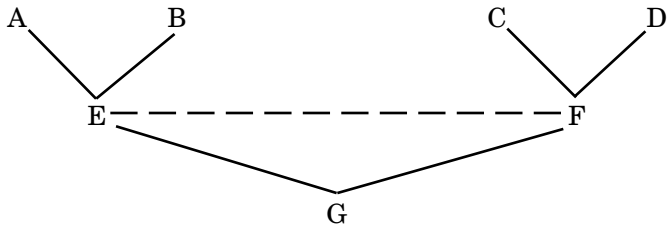
Art. 987. In default of the father and mother, the ascendants nearest in degree shall inherit.

Should there be more than one of equal degree belonging to the same line they shall divide the inheritance *per capita;* should they be of different lines but of equal degree, one-half shall go to the paternal and the other half to the maternal ascendants. In each line the division shall be made *per capita*. (937)

COMMENT:

Inheritance by Other Ascendants

Example:



A and *B* are the parents of *E*. *C* and *D* are the parents of *F*. *E* and *F* are married to each other, and *G* is their child. Estate of *G* who dies without a will is P1 million.

(a) If *A, B, C, D, E* and *F* survive, how will the estate be divided? *E* and *F* gets P500,000 each. *(Art. 986, par. 1).* The others are excluded. *(Art. 962, par. 1).*

(b) If *A, C, D,* and *F* survive, how will the estate be divided? *F* gets P1 million *(Art. 986, par. 2), A* cannot represent *E,* because there is no right of representation in the ascending line. *(Art. 972, par. 11). C* and *D* are excluded by *F. (Art. 962, par. 1).*

(c) If *A* and *B* survive, how will the estate be divided? Each gets P500,000. "Should there be more than one of equal degree belonging to the same line, they shall divide the inheritance *per capita*." *(Art. 987, par. 2, 1st clause).*

(d) If *A, B,* and *C* survive, how will the estate be divided? *C* gets P500,000. *A* and *B* gets P250,000 each. "Should they be of different lines but of equal degree, one-half shall go to the paternal, and the other half to the maternal ascendants. In each line, the division shall be made *per capita*." *(Art. 987, par. 2, 2nd clause).*

Subsection 3. — ILLEGITIMATE CHILDREN

Art. 988. In the absence of legitimate descendants or ascendants, the illegitimate children shall succeed to the entire estate of the deceased. (939a)

COMMENT:

The article explains itself.

Art. 989. If, together with illegitimate children, there should survive descendants of another illegitimate child who is dead, the former shall succeed in their own right and the latter by right of representation. (940a)

COMMENT:

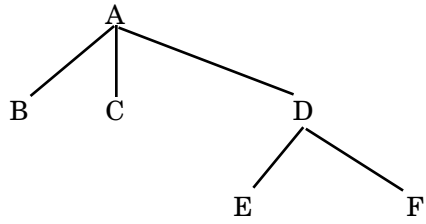
(1) Illegitimate Children Concurring With Descendants of Another Illegitimate Child

(a) This rule is similar to the rule for legitimate children and grandchildren.

(b) The grandchildren inherit by right of representation in order not to prejudice the children left.

(c) Art. 989 applies also in case of INCAPACITY.

(2) Example:



A has 3 illegitimate children, *B, C,* and *D*. *E* and *F* are the illegitimate children of *D*. Estate is P900,000. *D* predeceases *A*. Divide the estate.

ANS.: *B* and *C* each gets P300,000. *E* and *F* each gets P150,000.

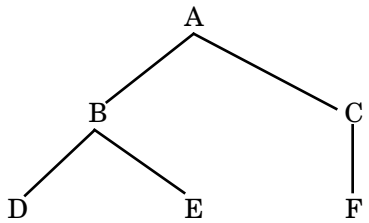
Another Problem: Suppose *E* and *F* were the legitimate children of *D*, would the answer be the same? YES. "Descendants" in this Article refer to legitimate and illegitimate descendants, since the law does not distinguish. *(See Arts. 993 and 995).*

Art. 990. The hereditary rights granted by the two preceding articles to illegitimate children shall be transmitted upon their death to their descendants, who shall inherit by right of representation from their deceased grandparent. (941a)

COMMENT:

(1) Transmission of Hereditary Rights of Illegitimate Children

Example:



B and *C* are *A's* illegitimate children. *D* and *E* are the legitimate children of *B*. *F* is the legitimate child of *C*. *B* and *C* predeceased *A*, who later died leaving an estate of P1 million. Divide the property.

ANS.: F gets P500,000 in representation of *C*. *D* and *E* each gets P250,000 because together they represent *B*.

[NOTE: It is believed that Arts. 990 and 989 apply not only to predecease but also to incapacity and disinheritance. In repudiation, there is no right of representation.*]*.

(2) Descendants Referred To

"Descendants" as used in Art. 990 refers to legitimate or illegitimate descendants. *Reason:* Under Art. 902, rights of illegitimate children (to the *legitime,* and therefore, also to the intestate shares) are transmitted upon their death to their descendants, whether legitimate or illegitimate. (This is the RIGHT OF REPRESENTATION, among others.)

(For another discussion on the right of illegitimate children to represent, see Comment on Art. 992.)

Art. 991. If legitimate ascendants are left, the illegitimate children shall divide the inheritance with them, taking one-half of the estate, whatever be the number of the ascendants or of the illegitimate children. (942, 841a)

COMMENT:

(1) Illegitimate Children Concurring With Legitimate Ascendants

Example: A dies leaving *B*, his legitimate father, and *C* and *D,* his *(A's)* illegitimate children. Estate is P1 million. Divide.

ANS.: B gets P500,000. *C* and *D* each gets P250,000.

[NOTE: This rule in intestate succession is different from the legitimes mentioned in Art. 896 which states that "Illegitimate children who may survive with legitimate parents or ascendants of the deceased shall be entitled to one-fourth of the hereditary estate to be taken from the portion at the free disposal of the testator." Art. 889, par. 1, states: "The legitime of legitimate parents or ascendants consists — of one-half of the hereditary estates of their children and descendants."*].*

[NOTE: Observe that when there are illegitimate children (and no legitimate children), the legitimate ascendants inherit half in intestate succession. When there are legitimate children, legitimate ascendants are excluded. *(Arts. 979 and 986).* Notice also that although illegitimate children are placed third

in the order of intestate succession, the presence of the first two (legitimate descendants and ascendants) does not exclude said illegitimate children. They are indeed *concurring* intestate heirs, since they cannot be deprived of their shares.*]*.

(2) Question on Partial Intestacy

Question: Suppose there is partial *intestacy* in that a part of the inheritance has been given to strangers, but surviving are *legitimate parents* and *illegitimate children,* how should the remainder be disposed of?

ANS.: Charge the part given to the stranger to the *intestate share* of the illegitimate children, without however impairing the legitime of the latter.

Example: A man had an estate of P1 million. He made a will giving a legacy of P200,000 to a friend. There are NO provisions about the rest of the estate. Surviving are *one legitimate father* and one *illegitimate child*. How will the P800,000 left be divided?

ANS.: This is a case of partial intestacy. There is no doubt that the legacy is NOT inofficious. Now then, if following the literal wording of the law we give the P800,000 equally to the survivors (P400,000 each), the *legitime* of the legitimate parent would be impaired. This should NOT be done, otherwise a testator could easily decrease his compulsory heir's legitime by the simple expedient of dying *without a* will. Hence, the rule is this: *the intestate share is either EQUAL TO, or MORE than the legitime; it can NEVER be less.*

Therefore, the proper solution would be this: Give to the father his legitime of P500,000 (1/2); charge the P200,000 to the share of the illegitimate child, who will now receive only P300,000. This is all right, since after all, he has received even more than his legitime.

Resume:

(a)	Stranger	—	P200,000
(b)	Legitimate father	—	P500,000

(c)	Illegitimate child	—	P300,000
	Total	=	P1,000,000

[QUERY: Why not give to the legitimate father his legitime of P500,000 and to the illegitimate child his legitime of P250,000, and then divide equally the remaining P50,000?

ANS.: This would seem to be all right for after all, the legitimes are preserved, BUT THEN this would be rather unfair to the illegitimate child since it is CLEARLY the intent of the law to as much as possible give to him a share equal to that of the legitimate father. *(See Art. 991).].*

(3) General Rule on Partial Intestacy

We can now formulate a general rule for *all* cases of PARTIAL INTESTACY:

"Charge the legacies, etc. to the intestate shares of those given by the law (on intestate succession) MORE than their respective legitimes, without however impairing said legitimes. Moreover, the charging must be PROPORTIONATE to the amount in the intestate share *over and above* that given by law as LEGITIME."

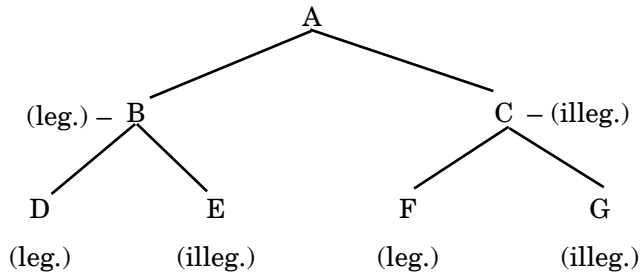
Art. 992. An illegitimate child has no right to inherit *ab intestato* from the legitimate children and relatives of his father or mother; nor shall such children or relatives inherit in the same manner from the illegitimate child. (943a)

COMMENT:

(1) The Barrier Between the Legitimate and the Illegitimate Families

This Article creates a BARRIER between the legitimate family on the one hand, and the illegitimate family on the other hand.

(2) Example:



A has a legitimate child *B,* and an illegitimate child *C*. *B* has a legitimate child *D*, and an illegitimate child *E*. *C* has a legitimate child *F*, and an illegitimate child *G*.

Problem: If *B* and *C* predecease *A*, and surviving are the four grandchildren, will they inherit intestate from *A*?

ANS.:

(a) *D* can represent his father *B*, because a legitimate child *B* can be represented by his own legitimate child *D*.

(b) *E* cannot represent *B* in the succession from *A's* estate. *Reason:* An illegitimate child *(E)* has *no right* to inherit *ab intestato* from *the legitimate* children and relatives *(A)* of his father *(B) or vice versa. (Art. 992).* There is INDEED A BARRIER.

Reason for the Barrier:

The illegitimate child is disgracefully looked down upon by the legitimate family; the legitimate family is in turn, hated by the illegitimate child; the latter considers the privileged condition of the former, and the resources of which it is thereby deprived; the former, in turn, sees in the illegitimate child nothing but the product of sin, palpable evidence of a blemish broken in life; the law does no more than recognize this truth, by avoiding further grounds of resentment. *(7 Manresa 110 cited in Grey v. Fabie, 40, O.G. [1st S] No. 3, p. 196.).*

Diaz, et al. v. IAC, et al.
L-66574, June 17, 1987

Art. 992 of the Civil Code provides a barrier or iron curtain in that it prohibits absolutely a succession *ab intestato* between the illegitimate child and the legitimate children and relatives of the father or mother of said legitimate child. They may have a natural tie of blood, but this is not recognized by law for the purposes of Art. 992.

Between the legitimate family and the illegitimate family, there is presumed to be an intervening antagonism and incompatibility. The illegitimate child is disgracefully looked down upon by the legitimate family; the legitimate family is in turn, hated by the illegitimate child; the latter considers the privileged condition of the former, and the resources of which it is thereby deprived; the former, in turn, sees in the illegitimate child nothing but the product of sin, palpable evidence of a blemish broken in life; the law does no more than recognize this truth, by avoiding further grounds of resentment. Thus, petitioners herein cannot represent their father Pablo Santero in the succession of the latter to the intestate estate of his legitimate mother Simona Pamut Vda. de Santero because of the barrier provided for under Art. 992 of the Civil Code.

Leonardo v. Court of Appeals
GR 51263, Feb. 28, 1983

A great grandson cannot inherit by right of representation if he is illegitimate. *(Art. 992, Civil Code).*

Corpus v. Administrator
L-22469, Oct. 23, 1978

Legitimate daughter cannot inherit *ab intestato* from illegitimate daughter of deceased because of barrier under Art. 992. So the son of the legitimate daughter cannot participate in said intestate estate. The rule is premised on the theory that the legitimate family looks down on the illegitimate family, and the latter hates and resents the former. To avoid further

grounds of resentment, the law prefers to ignore the existing blood tie.

(c) *F* and *G* can represent *C* in the succession from *A*, because the rights granted an illegitimate child *(C)* are transmitted upon his death to his descendants, whether legitimate *(F)* or illegitimate *(G)*. *(See Arts. 990 and 902).*

[NOTE:

1) It will be noticed that while *G* can represent *C, E* cannot represent *B*. This results in the *unfair* rule in this case that the heirs of a legitimate child *(B)* are granted LESS rights than the heirs of an illegitimate child *(C)*. But the law is *the law, no matter how hard it may be. (DURA LEX SED LEX).*

2) It will be observed furthermore that when this question — "Is an illegitimate child allowed to represent?" — is asked, the following should be the answer: "It depends. If the illegitimate child is going to represent a person who is a *legitimate* child of the decedent, the answer is NO, because of the BARRIER in Art. 992. But if he is going to represent a person who is an *illegitimate child* of the decedent, the answer is YES, for this time, there is *no barrier* since the whole line is illegitimate. Moreover, the hereditary rights of an *illegitimate* child are transmitted to his descendants, whether *legitimate or illegitimate.*"

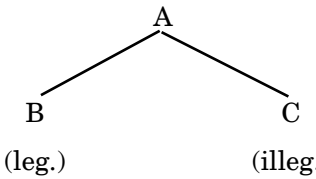
3) The Code Commission is of the belief that an *illegitimate child can represent* a person who is a *legitimate child,* and it gives as reason Art. 982, which states that "the *grandchildren* and other *descendants* shall inherit by right of *representation*." The Commission further states that the terms "grandchildren and descendants," if correctly understood, refer to both *legitimate* and *illegitimate* offspring. *(Memorandum to the Joint Congressional Committee on Codification, Feb. 22, 1951).* This is WRONG, because such an answer *contradicts* the clear provisions of Art. 992.

4) What has been discussed about the barrier applies not only to intestate succession, but also to testamentary succession, insofar as the *legitime* is concerned because succession to the legitime is *also* succession by *operation of law*.

5) Notice too that Art. 992 is reciprocal, therefore just as the illegitimate child cannot inherit *ab intestato* from the legitimate relatives of his parents, so also the legitimate relatives cannot inherit *ab intestato* from said illegitimate child. This rule is *just.]*.

(3) Problem

A has a legitimate child *B*, and an illegitimate child *C*.

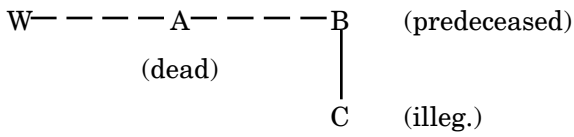


If *B* dies survived by nobody except *C*, will *C* inherit intestate from *B*?

ANS.: No, because of the barrier. *(See Art. 992).*

(4) Anuran v. Aquino, 38 Phil. 32

A and *B* are brothers. *W* is *A's* wife. *B* has an illegitimate child *C*. *A* dies without a will leaving as claimant heirs, *W* and *C*. Who will inherit?



HELD: W inherits the entire estate to the exclusion of *C*, because of the barrier in Art. 992.

(5) Llorente v. Rodriguez, 10 Phil. 585

A (decedent)
|
B (leg.) (predeceased)
|
C (illeg.)

A has a legitimate child *B* who had an illegitimate child *C*. *A* dies, leaving as only survivor, *C*. Will *C* inherit intestate from *A*?

HELD: No, because of the barrier. An illegitimate daughter whose deceased mother was a legitimate daughter has *no right* whatever in the intestate succession of the grandmother, even if the latter died without legitimate descendants surviving her.

(6) Director of Lands v. Aguas, 63 Phil. 279

An illegitimate relative, even if within the 3rd degree from the *propositus*, is not entitled to the benefits of *reserva troncal*. This conclusion is a logical conclusion from Art. 992.

(7) BAR QUESTION

A, an illegitimate son of *B*, dies intestate without any descendants, but leaves a widow *C*. He also leaves several brothers, *legitimate* children of his deceased natural father. Who should receive the inheritance left by him?

ANS.: Only the widow inherits.

REASON: The brothers do not inherit because of the barrier in Art. 992.

(8) BAR

Does an illegitimate child have the right to represent his predeceased natural father to claim a portion of the inheritance left by the latter's father?

ANS.: (See answer to comment No. 2[c], note No. 2 under this article.)

If the predeceased natural father is a legitimate child of the decedent, NO because of the BARRIER; if also an illegitimate child, YES, for there would be no barrier. *(Arts. 990 and 902). (See also Reose v. Rabe, O.G. July 19, 1941).*

(9) BAR

If a person dies intestate, leaving no relatives except a nephew *(sobrino carnal)*, the son of a deceased legitimate brother, and a half-brother on his father's side, who is an illegitimate child of the latter, who is entitled to the inheritance? Explain your answer.

ANS.: Only the nephew, because the half-brother is excluded by the barrier in Art. 992.

(10) BAR

Nieves Vidal, widow of Ambrosio Briones, dies, leaving 2 legitimate children, Natalia and Felix. Another son, Antonio, died before his parents. Felix dies also after some time, and Natalia is left with all the property of the deceased Nieves. Then one Emilia comes up, alleging that she is a natural daughter of Antonio, and claims part of the inheritance that should appertain to Antonio. What right has Emilia to the property now in possession of Natalia?

ANS.: None, even if she proves acknowledgment — because of the existence of the barrier under Art. 992.

(11) Case

Daya Maria Tol-Noquera v. Hon.
Adriano R. Villamor and Diosdado Tol
GR 84250, July 20, 1992

FACTS: Questioned in this action is the dismissal of a petition filed by Daya Maria-Tol Noquera for appointment as administratrix of the property of the absentee Remigio Tol. In Special Proceedings No. P-056, which was filed in Dec. 1986, Daya Maria-Tol alleged that she was the acknowledged natural child of Remigio Tol, who had been missing since 1984. She

claimed that a certain Diosdado Tol had fraudulently secured a free patent over Remigio's property and had obtained title thereto in his name. She was seeking the administration of the absentee's estate in order that she could recover the said property. The petition was opposed by Diosdado Tol, who argued that Daya Maria Tol was not an acknowledged natural child of the absentee and that the property sought to be administered was covered by an original certificate of title issued in his name. On Mar. 31, 1987, the trial court dismissed the petition on the ground that it was a collateral attack on a Torrens title. The court also declared in effect that it was useless to appoint an administrator in view of the claim of a third person that he was the owner of the absentee's property. The petitioner's motion for reconsideration having been denied, she filed a notice of appeal with this Court on June 4, 1984. However, inasmuch as only questions of law were involved, we resolved to require the petitioner to seek review on *certiorari* under Rule 45 of the Rules of Court within 15 days from notice.

It is argued that the original petition in the trial court was not intended as a collateral attack on a Torrens Title; hence, Art. 389 of the Civil Code was not applicable. The private respondent, on the other hand, contends that since the petitioner claims she is an illegitimate child of Remigio Tol, she is prohibited under Art. 992 of the Civil Code from inheriting *ab intestato* from the relatives of her father. The private respondent likewise questions the necessity of her appointment for the purpose only of having the title annulled. He adds that in view of her allegations of fraud, she should have sued for the annulment of the title within a period of one year, which had already expired. Lastly, the decision of the trial court had already become final and executory because 76 days had already elapsed from the date of receipt of the said decision on May 21, 1987, to the date the petition was filed before this Court on Aug. 5, 1987.

HELD: A study of the record reveals that the lower court was rather hasty in dismissing the petition. As we see it, the petition was not a collateral attack on a Torrens title. The petitioner did say there was a need to appoint an administrator to prevent the property from being usurped, but this did not

amount to a collateral attack on the title. The alleged fraudulent issuance of title was mentioned as a justification for her appointment as administrator. But there was nothing in the petition to indicate that the petitioner would attack the title issued to Diosdado in the same proceeding. In fact, the petitioner declared that whatever remedy she might choose would be pursued in another venue, in a proceeding entirely distinct and separate from her petition for appointment as administratrix. Regarding the Torrens certificate of title to the disputed property which was presented to defeat the petitioner's appointment, we feel that the position of trial court was rather ambivalent. For while relying on such title to justify the dismissal of the petition, it suggested at the same time that it could be attacked as long as this was not done in the proceeding before it. The private respondent's arguments that the petitioner cannot inherit *ab intestato* from the legitimate parents of the absentee is immaterial to this case. Her disqualification as an heir to her supposed grandparents does not inhibit her from petitioning for a declaration of absence or to be appointed as an administratrix of the absentee's estate.

It is not necessary that a declaration of absence be made in a proceeding separate from and prior to a petition for administration. Thus, the court may declare that the petition to declare the husband an absentee and the petition to place the management of the conjugal properties in the hands of the wife can be combined and adjudicated in the same proceeding. The purpose of the cited rules is the protection of the interests and property of the absentee, not of the administrator. Thus, the question of whether the administrator may inherit the property to be administered is not controlling. What is material is whether she is one of those allowed by law to seek the declaration of absence of Remigio Tol and whether she is competent to be appointed as administratrix of his estate. The issue of whether or not the property titled to Diosdado Tol is really owned by him should be resolved in another proceeding. The right of Daya Maria Tol to be appointed administratrix cannot be denied outright by reason alone of such issue. Even if it be assumed that the title obtained by Diosdado Tol is already indefeasible because of the lapse of the one-year period for attacking it on the ground of fraud, there are still other remedies

available to one who is unjustly deprived of his property. One of these is a claim for reconveyance, another is a complaint for damages. The petitioner can avail herself of such remedies if she is appointed administratrix of the estate of the absentee.

Finally, we find that the appeal was perfected seasonably. Notice of appeal was filed on June 4, 1987, within the 15-day extension of the period to appeal as granted by this Court in its resolution dated July 8, 1987. WHEREFORE, the petition is GRANTED. This case is hereby REMANDED to the court of origin for determination of the legal personality of Daya Maria-Tol to petition the declaration of Remigio Tol's absence and of her competence to be appointed as administratrix of his estate.

Manuel v. Ferrer
63 SCAD 764
(1995)

Article 992 of the Civil Code enunciates what is so commonly referred to in the rules on succession as the "principle of absolute separation between the legitimate family and the illegitimate family."

When the law speaks of brothers and sisters, nephews and nieces as legal heirs of an illegitimate child, it refers to illegitimate brothers and sisters as well as to the children, whether legitimate or illegitimate, of such brothers and sisters.

Art. 993. If an illegitimate child should die without issue, either legitimate or illegitimate, his father or mother shall succeed to his entire estate; and if the child's filiation is duly proved as to both parents, who are both living, they shall inherit from him share and share alike. (944a)

COMMENT:

(1) Inheritance by the Illegitimate Parents

Example: A has an illegitimate child *B*, who has no issue. *A* succeeds to the entire estate, unless *B* is proved to be the

child also of *C*. In such case, *A* and *C*, if both living, will inherit from *B*, in equal portions.

Art. 994. In default of the father or mother, an illegitimate child shall be succeeded by his or her surviving spouse, who shall be entitled to the entire estate.

If the widow or widower should survive with brothers and sisters, nephews and nieces, she or he shall inherit one-half of the estate, and the latter the other half. (945a)

COMMENT:

(1) Intestate Shares of Surviving Spouse

(a) *Survivor:* surviving spouse only — ALL

(b) *Survivors:* surviving spouse, brothers, sisters (the *illegitimate* brothers and sisters) — 1/2

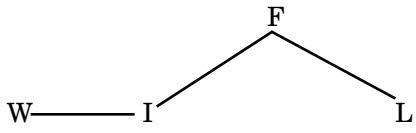
[NOTE: If there are nephews and nieces who concur with the brothers or sisters, the former inherit by right of representation.*]*.

(c) *Survivors*: brothers, sisters, nephews, and nieces

THEY GET ALL.

[NOTE: Though there is no express provision on this point, it is understood that they get the whole estate, for if they share when there is a surviving spouse *(Art. 994, 2nd paragraph),* why should they not inherit if they *alone survive*?*]*.

(2) Example:



F has an illegitimate child *A*, and a legitimate child *L*. *A* is married to *W*. *F* dies. Later, *A* dies intestate leaving an estate of P1 million. Divide the estate.

ANS.: W gets everything. *L* gets nothing because the legitimate child of the father of an illegitimate child, has no right to inherit from said illegitimate child. *(Art. 992).*

[NOTE: It is evident therefore that the "brothers and sisters" spoken of in the 2nd paragraph of Art. 994 are illegitimate. "Nephews and nieces" are the children of deceased or incapacitated *illegitimate* brothers or sisters of the decedent.*]*.

(3) Resume of the Order of Intestate Succession to the Estate of an Illegitimate Child

(a) Legitimate children and legitimate descendants. *(Arts. 979, 992).*

(b) Illegitimate children and descendants (whether legitimate or illegitimate). *(Arts. 988, 989, 902, 990).*

(c) Illegitimate parents. *(Art. 993).*

[NOTE: That an illegitimate decedent has no legitimate ascendants.*]*.

(d) Surviving spouse. *(Art. 994).*

Illegitimate brothers and sisters; nephews and nieces. *(By inference, from Art. 994, 2nd par.).*

(e) The State. *(Art. 1011).*

[NOTE: With the exception of the relatives mentioned in Arts. 993 and 994 *(formerly Arts. 944, 945 under the old Civil Code)* no other relative of the illegitimate child has any right to succeed it intestate. *(De Guzman v. Sevilla, 47 Phil. 991.).*

Subsection 4. — SURVIVING SPOUSE

Art. 995. In the absence of legitimate descendants and ascendants, and illegitimate children and their descendants, whether legitimate or illegitimate, the surviving spouse shall

inherit the entire estate, without prejudice to the rights of brothers and sisters, nephews and nieces, should there be any, under Article 1001. (946a)

COMMENT:

Inheritance by Surviving Spouse

(a) The surviving spouse must be *legitimate,* for common law marriages are *not* recognized in the Philippines.

(b) Even if the surviving spouse had married in good faith a man already married to another, the marriage is void and bigamous just the same, and therefore she does not inherit as an intestate (or even as compulsory) heir.

(c) If the surviving spouse was the guilty party in the case of a legal separation, she does not inherit as an intestate heir. *(Art. 1002).*

(d) It will be observed that *unlike* in the law of the legitimes, there is no provision *in intestate succession* for the share of a surviving spouse who married the decedent, when the latter was in *articulo mortis*. And evidently, whether or not the marriage is in *articulo mortis,* the share of surviving spouse, if she alone survives, is the SAME. On this point, the Code Commission, explaining the difference in rules for the legitime and the intestate *share,* says:

"The purpose of Art. 900, par. 2, which provides for the legitime of the surviving spouse in case of marriage in *articulo mortis* where the testator died within three months after the marriage, is to *forestall* the possibility of marriage with *some ulterior motive*. In other words, a person may marry another who is on the verge of death, and take advantage of that circumstance. In intestate succession, however, the law makes no distinction with respect to the circumstances surrounding the celebration of the marriage, because the *possibility of undue pressure and influence* in the making of a will is eliminated, and the surviving spouse inherits by operation of law." *(Memorandum to the Joint Congressional Committee on Codification, Feb. 22, 1951).*

[NOTE: The Commission is WRONG in making a different rule because —

(a) in both the *legitime* and *intestate share,* succession is by operation of law, and not by virtue of a will;

(b) in both cases, the possibility of having married for monetary considerations is present.*]*.

Tolentino v. Paras
GR 43905, May 3, 1983

If a wife alleges she is the surviving legitimate wife, and presents a decision convicting her late husband of bigamy for having married a second girl, the certificate of death filed with the Civil Registry (with the bigamous wife listed as the surviving spouse) may be corrected accordingly, and the *publication* required by Rule 108, Rules of Court, is not absolutely necessary.

Art. 996. If a widow or widower and legitimate children or descendants are left, the surviving spouse has in the succession the same share as that of each of the children. (834a)

COMMENT:

(1) Share of Surviving Spouse Concurring With Children

Example: A decedent is survived by his widow and three legitimate children. If the succession is intestate and the property is P1 million, how will the inheritance be divided?

ANS.: The widow and each of the three children will get P250,000.

(2) Query

How much is the intestate share of the surviving spouse if there is only *one legitimate* child?

ANS.: As will be noticed, Art. 996 speaks of "children," and *does* not expressly provide for a case when there is only *one* legitimate child unlike in the case of the *legitime*.

It is submitted that in the absence of any express provision on the matter, the rule is this:

"If there is only one legitimate child concurring with the surviving spouse, and there are no other relatives — both will *get equal intestate* shares, in accordance with the clear intent of the law to consider the spouse as a child. After all, the plural word "children" must be deemed to include the singular word "child." If there be other intestate heirs who are ALSO compulsory heirs, aside from the *lone* legitimate child, each of the heirs must get their respective legitimes, and whatever is left must be given to the *surviving spouse,* instead of dividing the balance proportionately among all the intestate compulsory heirs. This is because insofar as possible, the intestate share of the surviving spouse must equal the intestate share of the lone legitimate child."

In the precedent-setting case of *Eusebio Erazo v. Ana Julia Hansen (CA-GR 30036-R, June 24, 1963),* the Court of Appeals held that in intestate succession, if the heirs be the surviving spouse and ONE legitimate child, they will get EQUAL shares, the clear intent of the law being to consider the surviving spouse as a child. Anent the fact that Art. 996 says "children," and *not* "one legitimate child," the court applied the rule of statutory construction to the effect that the *plural* includes the *singular.* This ruling was in effect upheld by the Supreme Court in *Claro Santillon v. Perfecta Miranda, et al., L-19281, June 30, 1966.* The Court in this case also held that the article on the *legitime (Art. 892)* cannot apply in this particular case of intestate succession.

Examples:

(a) Estate = P1 million

Survivors:

Surviving spouse	—	P500,000
One legitimate child	—	P500,000
		P1,000,000

(b) Estate = P1 million

Survivors:

One legitimate child	—	P500,000
Surviving spouse	—	P250,000
One illegitimate child	—	P250,000
		P1,000,000

(c) Estate = P1 million

Survivors:

One legitimate child	—	P500,000
Surviving spouse	—	P300,000
One recognized spurious child	—	P200,000
		P1,000,000

[NOTE: Although the legitime of the surviving spouse is only P250,000, the balance of P50,000 is given to her in accordance with the rule given above.*]*.

(d) Estate = P360,000

Survivors:

One legitimate child	—	P180,000
One surviving spouse	—	P 90,000
One acknowledged natural child	—	P 50,000
One acknowledged spurious child	—	P 40,000
		P360,000

[NOTE: In this particular case, the intestate shares are *exactly equal* to the legitimes.*]*.

Arcenas v. Cinco
L-29288, Nov. 29, 1976

FACTS: A man died intestate leaving his wife and one legitimate child. Distribute the man's estate.

HELD: The wife gets 1/2 and the legitimate child gets the other half. *(See also Santillon v. Miranda, June 30, 1965; Art. 996, Civil Code).*

Heirs of the Late Mario V. Chanliongco
Adm. Matter 190-RET
Oct. 18, 1977

FACTS: A Supreme Court attorney died intestate leaving as his heirs his widow, a legitimate son, and two recognized illegitimate children. Distribute his estate.

HELD: The legitimate son gets 1/2, the widow 1/4, and the two recognized illegitimate children (whether natural or spurious) 1/8 each. (Note that ordinarily each recognized natural child should get 1/2 of the share of each legitimate child, and each recognized spurious child should get 2/5 of the share of each legitimate child, but if this sharing would be followed, the estate would not be enough).

[NOTE: Under Art. 165 of the Family Code, there is no mention of the natural child nor the spurious child.*]*.

Art. 997. When the widow or widower survives with legitimate parents or ascendants, the surviving spouse shall be entitled to one-half of the estate, and the legitimate parents or ascendants to the other half. (836a)

COMMENT:

(1) Share of Surviving Spouse With Legitimate Parents or Ascendants

Example:

Estate = P1 million

Surviving:

Legitimate father	—	P500,000
Surviving spouse	—	P500,000
		P1,000,000

Another example:

Estate = P1,000,000

Surviving:

Legitimate father	—	P250,000

Legitimate mother	—	P250,000
Surviving spouse	—	P500,000
		P1 million

(2) Problem in Partial Intestacy

Estate = P1,000,000
Legacy = P100,000

Survivors:

1 legitimate father
1 surviving spouse

Divide the estate.

ANS.:

(a)	legacy	—	P100,000
(b)	legitimate father	—	P500,000
(c)	surviving spouse	—	P400,000
			P1,000,000

[NOTE: The legacy was taken from the intestate share of the surviving spouse; after all, her legitime has not been impaired. To get it from the intestate share of the father, or to make him share the legacy proportionately with the surviving spouse would impair his legitime.*]*.

[NOTE: The *plural* "parents" or "ascendants" must be deemed to include the *singular* "parent" or "ascendant."*]*.

Art. 998. If a widow or widower survives with illegitimate children, such widow or widower shall be entitled to one-half of the inheritance, and the illegitimate children or their descendants, whether legitimate or illegitimate, to the other half. (n)

COMMENT:

Intestate Shares of Surviving Spouse Concurring With Illegitimate Children

(a)	Surviving spouse	—	1/2
(b)	Illegitimate children or descendants	—	1/2

Art. 999. When the widow or widower survives with legitimate children or their descendants and illegitimate children or their descendants, whether legitimate or illegitimate, such widow or widower shall be entitled to the same share as that of a legitimate child. (n)

COMMENT:

(1) Share of Surviving Spouse Concurring With Children or Other Descendants

Three classes are surviving in this Article:

(a) Legitimate children or descendants (legitimate)

(b) Illegitimate children or descendants (legitimate or illegitimate)

(c) Surviving spouse

(2) Example

Intestate Estate — P700,000

Surviving: Widow, 2 legitimate children, 1 illegitimate child. Divide.

ANS.:

1st Legitimate child	—	P200,000
2nd Legitimate child	—	P200,000
Widow	—	P200,000
Illegitimate child	—	P100,000
		P700,000

NOTE: The solution is this:

Let x = share of 1st leg. child

Let x = share of 2nd leg. child

Let x = share of widow

Let 1/2 x = share of illegitimate child

$$x + x + x + \frac{1}{2}\,x = P\ 700{,}000$$

$$3x + \frac{x}{2} = P\ 700{,}000$$

$$\frac{6x}{2} + \frac{2}{2} = P\ 700{,}000$$

$$\frac{7x}{2} = P\ 700{,}000$$

$$7x = P1{,}400{,}000$$

ANS.: $x = P200{,}000$

$$\frac{x}{2} = P100{,}000$$

(3) Problem

Intestate Estate — P1,600,000

Surviving: Widow, 2 legitimate children, and *ten* (10) illegitimate children. Divide.

ANS.:

(a) If we follow the general rule:

Each legitimate child gets P200,000	— P 400,000
Each illegitimate child gets P100,000	— P1,000,000
Widow	— P 200,000
	P1,600,000

BUT this is clearly not the correct solution for the legitimes of the legitimate children and the surviving spouse are *impaired*. This should not be allowed.

(b) THEREFORE, the *correct* solution would be to confine the total share of the *illegitimate* children to the free portion of the estate, after respecting the widow's legitime (and also the legitime of the legitimate children). *(Art. 895).*

HENCE:

1) each legitimate child gets P400,000 —P 800,000
2) widow —P 400,000

3)	each acknowledged natural	— P 400,000
	child gets P4,000	P1,600,000

[NOTE: In this problem, the intestate shares are exactly equal to the legitimes.*]*.

[NOTE: No mention is made today of the *natural* child nor the *spurious* child under Art. 165 of the Family Code.*]*.

Art. 1000. If legitimate ascendants, the surviving spouse, and illegitimate children are left, the ascendants shall be entitled to one-half of the inheritance, and the other half shall be divided between the surviving spouse and the illegitimate children so that such widow or widower shall have one-fourth of the estate, and the illegitimate children the other fourth. (841a)

COMMENT:

(1) Share of Surviving Spouse Concurring With Legitimate Ascendants and Illegitimate Children

Here, three classes are surviving:

(a)	Legitimate ascendants	— 1/2
(b)	Surviving spouse	— 1/4
(c)	Illegitimate children	— 1/4

Example:

Intestate of P1,000,000

Surviving:

(a)	Legitimate father	—	P250,000
(b)	Legitimate mother	—	P250,000
(c)	Widow	—	P250,000
(d)	One illegitimate child	—	P250,000
			P1,000,000

Del Rosario v. Conanan
L-37903, Mar. 30, 1977

FACTS: The deceased died *intestate* leaving his wife, his legitimate mother, and an *adopted* daughter. Divide the estate.

HELD: Wife gets 1/4, the adopted daughter 1/4, and the legitimate mother 1/2. Note that the adopted child here gets the rights of an acknowledged natural child *(Arts. 343, 341, and 1000 of the Civil Code),* not that of a legitimate child, otherwise the legitimate ascendant (the mother) would be excluded. (Note also that the presence of the adopted child here does not exclude the legitimate parent or ascendant.)

(2) Problem in Case of Partial Intestacy

Estate — P1,000,000

Legacy — P 100,000

Survivors:

(a) Legitimate father
(b) Surviving spouse
(c) One illegitimate child

Divide the estate.

ANS.:

(a)	Legacy	—	P100,000
(b)	Legitimate father	—	P500,000
(c)	Surviving spouse	—	P150,000
(d)	One illegitimate child	—	P250,000
			P1,000,000

[NOTE: The legacy is charged to the intestate share of the surviving spouse but her legitime is preserved (1/8). She also gets the remaining P25,000 because of the intent of the law to give to her (if possible) *one-fourth* of the whole estate.*]*.

Art. 1001. Should brothers and sisters or their children survive with the widow or widower, the latter shall be entitled to one-half of the inheritance and the brothers and sisters or their children to the other half. (953, 837a)

COMMENT:

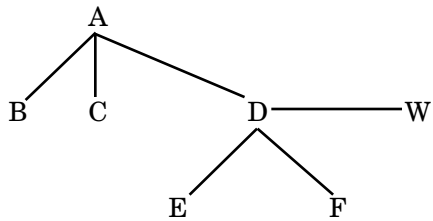
(1) Share of Surviving Spouse Concurring With Brothers, Sisters, Nephews, and Nieces

This Article speaks of two classes of survivors:

(a) Surviving spouse — 1/2

(b) Brothers and sisters (and their children) — 1/2

(2) Example



A has 3 legitimate children, *B, C,* and *D*. *D* has a wife *W*. *E* is *D's* legitimate child, while *F* is *D's* illegitimate child. *D* dies intestate leaving an estate of P1,000,000.

(a) If the only surviving relative is *W*, she gets the whole P1,000,000. *(Art. 995, par. 1).*

(b) If the surviving relatives are *B, C,* and *W,* how much, if any, will each get? *W* gets P500,000. *B* and *C* each gets P250,000. *(Art. 1001).*

(c) If the surviving relatives are *E* and *W*, how much, if any, will each get? Each gets P500,000. *(Art. 996).* (True, *W's* legitime is only one-fourth but to give her one-half will not in this case impair *E's legitime.*).

(d) If the surviving relatives are *A* and *W,* how much, if any, will each get? *A* and *W* each gets P500,000. *(Art. 997).*

(e) If the surviving relatives are *F* and *W*, how much, if any, will each get? *F* and *W* will get P500,000 each. *(Art. 998)*.

(f) If the surviving relatives are *E, F,* and *W*, how much, if any, will each get?

ANS.:

1) At first glance, the answer, applying Art. 999, would seem to be this: *W* gets as much as *E,* and *F* gets half of *E's* share. Hence, *W* gets P400,000; *E* gets P400,000; and *F* gets P200,000.

2) But this would clearly prejudice the legitime of *E,* who as the only legitimate child, should be entitled to one-half of the estate, which is P500,000. To apply Art. 999 to the case where there is only one legitimate child would be to impair his legitime, so that all a person would have to do, if he wants to decrease the legitime of his lone heir is to die intestate as in this case. It is submitted therefore that in a case like this, Art. 892, par. 1, 1st sentence, and Art. 895, par. 3, should be applied by analogy. Under Art. 892, par. 1, 1st sentence, "If only one legitimate child or descendant of the deceased survives, the widow or widower shall be entitled to one-fourth of the hereditary estate." Under Art. 895, 3rd par., "the legitime of the illegitimate children shall be taken from the portion of the estate at the free disposal of the testator, *provided,* that in no case shall the total legitime of such illegitimate children exceed the *free portion,* and that the legitime of the surviving spouse must *first* be fully satisfied." HENCE, the correct answer should be:

E gets	—	P500,000
W gets	—	P250,000
F gets	—	P250,000
		P1,000,000

(g) If the surviving relatives are *A, W*, and *F,* how much, if any, will each get?

ANS.: A gets P500,000, *W* gets P250,000 and *F* gets P250,000. *(Art. 1000).*

(h) If the surviving relatives are *B, C*, and *W*, how much, if any, will each get?

ANS.: B and *C* will get P250,000 each; *W* gets P500,000. *(Art. 1001).*

(3) Brothers and Sisters Excluded by Illegitimate Children of the Deceased

Brothers and sisters do *not* concur with recognized illegitimate children of the deceased. In fact, the former are EXCLUDED by the latter. *(See also Arts. 1003 and 988; Cacho v. Udan, L-19996, Apr. 30, 1965).*

Art. 1002. In case of a legal separation, if the surviving spouse gave cause for the separation, he or she shall not have any of the rights granted in the preceding articles. (n)

COMMENT:

Rules in Case of Legal Separation

(a) This Article presupposes a legal separation (decreed by the court) and not a mere separation *de facto.*

(b) It would seem that under this Article, giving cause for legal separation is *not sufficient;* there must be LEGAL SEPARATION.

(c) A reconciliation puts aside the effects of legal separation.

Subsection 5. — COLLATERAL RELATIVES

Art. 1003. If there are no descendants, ascendants, illegitimate children, or a surviving spouse, the collateral relatives shall succeed to the entire estate of the deceased in accordance with the following articles. (946a)

COMMENT:

Inheritance by Collaterals

(a) The collaterals referred to in this Article are *intestate,* but not compulsory heirs.

(b) Among said collaterals, the nearer excludes the farther.

(c) A sister, even if only a half-sister, in the absence of other sisters or brothers, or of children of brothers or sisters, EXCLUDES all other collateral relatives, regardless of whether or not the latter belong to the line from which the property of the deceased came. *(Lacerna, et al. v. Paurillo Vda. de Corcino, L-14603, Apr. 29, 1961).* Upon the other hand, collaterals cannot inherit in the presence of descendants. Hence, if there be a recognized natural child, the sister of the deceased is *excluded. (See Pasion v. Pasion, L-15757, May 31, 1961).*

[NOTE: There is no mention of the natural child nor of the *spurious* child under Art. 165 of the Family Code*.].*

Art. 1004. Should the only survivors be brothers and sisters of the full blood, they shall inherit in equal shares. (947)

COMMENT:

(1) Shares of Brothers and Sisters

The Article is self-explanatory.

(2) Presence of a 'Brother'

Filomena Abellana de Bacayo v.
Gaudencio Ferraris de Borromeo, et al.
L-19382, Aug. 31, 1965

FACTS: In an administrative complaint against a Judge, it was alleged among other things that the Judge, in an intestate case, had ruled that a 68-year-old wife (the husband was 64 years old) had at said age given birth to one Solomon Diño,

thus enabling Diño to inherit as a brother of the deceased in said intestate case. The records however showed that such ruling was questioned before the Court of Appeals by way of *certiorari*. The Court of Appeals dismissed the case on the ground that the proper remedy was *appeal,* not *certiorari*. Should said ruling be counted against the respondent Judge?

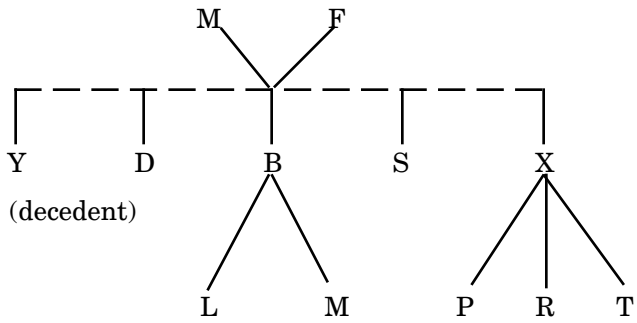
HELD: The Court did not rule on this issue because the matter had after all been raised before the Court of Appeals and because the complaint against the Judge was eventually withdrawn.

Art. 1005. Should brothers and sisters survive together with nephews and nieces, who are the children of the decedent's brothers and sisters of the full blood, the former shall inherit *per capita,* and the latter *per stirpes*. (948)

COMMENT:

(1) Shares of Brothers and Sisters Concurring With Nephews and Nieces

Example:



M and *F* are legally married and *Y, D, B, S,* and *X* are their legitimate children. *L* and *M* are the legitimate children of *B*. *P, R,* and *T* are the legitimate children of *X*. *D* dies intestate leaving an estate of P240,000. Surviving are *Y, S, L, M, P, R,* and *T*. Divide the estate.

ANS.:

Y			P60,000 (per capita)
S			P60,000 (per capita)
B's children			P60,000 (per stirpes)
	L	— P30,000	
	M	— 30,000	
		P60,000	
X's children			P60,000 (per stirpes)
	P	— P20,000	
	R	— 20,000	
	T	— 20,000	
		P60,000	P240,000

(2) Right of Representation in the Collateral Line

The right of representation in the collateral line does not extend to grandnephews and grandnieces. Hence, if a sister and nephews of the deceased appeared to claim the inheritance, they, as the nearest of kin, exclude such remote relatives as grandnephews and grandnieces. *(Sarita v. Candia, 23 Phil. 443; Fuentes v. Cruz, 36 O.G. No. 103, p. 1813).*

[NOTE: Although it is a fact that brothers and sisters of a decedent, and their children, are collateral heirs, they are not given any share in the inheritance if there is a will instituting the widow as the sole heir of the estate. *(Fuentes v. Cruz, 35 O.G. No. 103, p. 1813).].*

Gov't Service Insurance System v. Susana, Romualdo, Julian, Macario A., Moises, Macario C., Adriano, Celestina, and Luisa, all surnamed Custodio
L-26170, Jan. 27, 1969

FACTS: Proceedings were initiated on June 10, 1958 by the GSIS to determine (thru a complaint in interpleader) who among the heirs of Simeon Custodio, deceased were entitled to his retirement benefits (P8,339.36). The deceased who died

without a will (and who apparently had no other undisposed property except said retirement benefits, was survived by the following:

1. Susana Custodio (sister)
2. four children of *a predeceased* brother Vicente
3. Macario C (child of *a predeceased* brother Crispin)
4. Luisa, David and four (4) others (children of a *predeceased* brother Jacinto)

Susana, the four children of Vicente, and four of the six children of Jacinto signed an extrajudicial agreement whereby they recognized Susana as the *only beneficiary* of the deceased. (Incidentally, in an unsigned application for retirement accomplished by the deceased, he had named said Susana, his sister, as the *beneficiary* — but said application form was *never submitted* during his lifetime to the GSIS.) Macario C., Luisa, and David DID NOT SIGN the extrajudicial agreement. *Issue:* Who should get the retirement benefits?

HELD:

1. The three who did *not* sign the extrajudicial agreement should inherit *per stirpes* (by groups), (because this is what the law provides in case brothers and sisters *survive* with children of brothers and sisters), hence:
    a. Macario C. gets, by representation — the 1/4 shares of his father.
    b. Luisa and David, being two of the six children of Jacinto, are each entitled to 1/6 of 1/2 (1/6 x 1/4), equivalent to 1/24 (each) of the retirement benefits.
2. All the nephews and nieces who *signed* the extrajudicial agreement cannot get their share because of the waiver in favor of Susana.
3. Susana will get the rest of the retirement benefits, not because of her having been designated as beneficiary (in view of the non-filing of the application),

but because of the *waiver* in her favor by those who signed the application (coupled with the fact that she is also an intestate heir).

Filomena Abellana de Bacayo v.
Gaudencio Ferraris de Borromeo, et al.
L-19382, Aug. 31, 1965

FACTS: Melodia Ferraris was declared by the lower court to be presumptively dead for the purpose of opening the succession to her estate. She was survived by an *aunt,* and by several *nephews* and *nieces* (children of a predeceased brother). Who will inherit in this case of intestate succession?

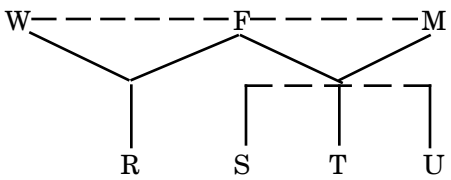
HELD: While the aunt is a relative of the 3rd degree, and while the nephews and nieces are also relatives of the 3rd degree, still it is the latter who should inherit the estate to the exclusion of the aunt, for the former is No. 4 in the order of intestate succession, while the aunt is only No. 5 in said order. *(See also Art. 1009).*

Art. 1006. Should brothers and sisters of the full blood survive together with brothers and sisters of the half blood, the former shall be entitled to a share double that of the latter. (949)

COMMENT:

Full Blood Concurring With Half Blood

Example:



F was married to *W* and *R* was their legitimate child. When *W* died, *F* married *M* with whom he has 3 legitimate children, *S, T*, and *U*. If *S* dies and *R, T,* and *U* survive him, and if the estate is P500,000, how will the inheritance be divided?

ANS.: R gets P100,000 while *T* and *U* get P200,000 each. *R* is the half brother of *S* but *T* and *U* are *S's* brothers of the full blood. Suppose it was *R* who died, how will *S, T,* and *U* inherit? They will inherit in equal portions since they are all brothers of the *half* blood of the decedent. Suppose it was *F* whose estate is open to succession, and *R, S, T*, and *U* survive him, how will the inheritance be divided? Each will get an equal portion as the others. Hence, if the estate is P500,000, *R, S, T,* and *U* will get P125,000 each. "Legitimate children and their descendants succeed the parents and other ascendants, without distinction as to sex or age, and *even* if *they should come from different marriages*." *(Art. 979).*

Bicomong v. Almanza
L-37365, Nov. 29, 1977

FACTS: The deceased had a sister of the full blood and a brother and two sisters of the half-blood, all of whom had predeceased her. Surviving were: (a) a daughter of her sister of the full blood, and (b) ten children of her brother and two sisters of the half-blood. Distribute the estate.

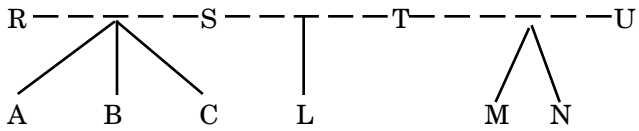
HELD: The niece of the whole blood gets a share double that of each of the nephews and nieces of the half-blood. Note that all of them inherit in their own right, and not by the right of representation because the nephews and nieces here *do not concur* with any brother or sister of the deceased. Note also that the relative of the full blood *does not exclude* the relatives of the half-blood.

Art. 1007. In case brothers and sisters of the half blood, some on the father's and some on the mother's side, are the only survivors, all shall inherit in equal shares without distinction as to the origin of the property. (950)

COMMENT:

Half Blood Brothers and Sisters From Both Sides

Example:



R and *S,* lawfully married, have 3 legitimate children, *A, B* and *C*. *T* and *U*, lawfully married, have 2 legitimate children *M* and *N*. *R* and *U* eventually die, and *S* and *T* get married. *L* is the legitimate child of *S* and *T*. If *L* dies intestate leaving P500,000 and the survivors are *A, B, C, M,* and *N,* how much will each get? Each gets P100,000 because each is a half-brother of *L*.

Art. 1008. Children of brothers and sisters of the half blood shall succeed *per capita* or *per stirpes,* in accordance with the rules laid down for brothers and sisters of the full blood. (915)

COMMENT:

How Children of Brothers and Sisters of the Half Blood Inherit

The Article is self-explanatory.

Art. 1009. Should there be neither brothers nor sisters nor children of brothers or sisters, the other collateral relatives shall succeed to the estate.

The latter shall succeed without distinction of lines or preference among them by reason of relationship by the whole blood. (954a)

COMMENT:

Inheritance by Other Collateral Relatives

(a) In every inheritance, the relative nearest in degree excludes the more distant ones, saving the right of representation when it properly takes place. *(Art. 962, par. 1).* Thus, the presence of a half-sister excludes a collateral of a more remote degree. *(See Lacerna v. Paurillo, L-14603, Apr. 29, 1961).*

(b) If the deceased is survived by children of a predeceased FULL BLOOD sister, and by children of a predeceased HALF BLOOD brother, each of the *first* group gets TWICE the share of each of the second group. *(Padura v. Baldovino, L-11960, Dec. 27, 1958).*

(c) A decedent's aunt may not succeed *ab intestato* so long as nephews and nieces of the decedent survive, and are willing and qualified to succeed. *(Filomena Abellana de Bacayo v. Gaudencio Ferraris de Borromeo, et al., L-19382, Aug. 13, 1965).* The reason is simple: although the aunt and the nephews (or nieces) are both relatives of the *third degree,* still the latter are *preferred* over the former in the order of intestate succession. *(Ibid.).*

(d) Children of first cousins are not entitled to represent. Therefore, if first cousins (4th degree) *concur* with children, of predeceased or incapacitated first cousins, said children do *not* inherit even if they belong to the *fifth degree*. The nearer (4th degree relatives) excludes the farther (5th degree relatives).

Tioco De Papa v. Camacho
GR 28032, Sep. 24, 1986

Under Art. 1009 of the Civil Code, the absence of brothers, sisters, nephews, and nieces of the decedent is a precondition of the other collaterals (uncles, cousins, etc.) being called to the succession. This was also and more clearly the case under the Spanish Civil Code of 1889 that immediately preceded the Civil Code now in force. Thus, under our laws of succession, a decedent's

uncles and aunts may not succeed *ab intestato* so long as nephews and nieces of the decedent survive and are willing and qualified to succeed.

Art. 1010. The right to inherit *ab intestato* shall not extend beyond the fifth degree of relationship in the collateral line.

COMMENT:

(1) Succession Limited to the Fifth Degree

Another change in this section on the order of intestate succession in the interest of national economy and social welfare, and in keeping with the underlying philosophy of socialization of ownership of property, is to limit the right of succession to the collateral relatives within the fifth degree of relationship from the decedent instead of the sixth degree. *(Comment of the Code Commission).*

(2) Case

Ofelia Hernando Bagunu v.
Pastora Piedad
GR 140975, Dec. 8, 2000

The law (Arts. 1009-1010) means only that among the *other collateral relatives* (the 6th in the line of succession), no preference or distinction shall be observed "by reason of relationship by the whole blood."

In fine, a maternal aunt can inherit equally with a first cousin of the half blood but an uncle or an aunt, being a 3rd degree relative, excludes the cousins of the decedent, being in the 4th degree of relationship, the latter, in turn, would have priority in succession to a 5th degree relative.

Subsection 6. — THE STATE

Art. 1011. In default of persons entitled to succeed in accordance with the provisions of the preceding Sections, the State shall inherit the whole estate. (956a)

COMMENT:

Inheritance by the State

In the absence of any relative within the fifth degree, it would not be a wise policy to leave the property ownerless, hence, the State (Republic of the Philippines) is considered as the last intestate heir, but the Rules of Court must of course be observed. *(See Art. 1012).*

Art. 1012. In order that the State may take possession of the property mentioned in the preceding article, the pertinent provisions of the Rules of Court must be observed. (958a)

COMMENT:

How the State Inherits

See Rule 91 (Rules of Court).

ESCHEATS

"SECTION 1. *When and by whom petition filed.* — When a person dies intestate, seized of real or personal property in the Philippines, leaving no heir or person by law entitled to the same, the Solicitor General or his representative in behalf of the Republic of the Philippines, may file a petition in the Court of First Instance of the province where the deceased last resided or in which he had estate, if he resided out of the Philippines, setting forth the facts, and praying that the estate of the deceased be declared escheated.

[NOTE: "Escheat" is of French-Norman derivation, meaning accident or chance; the word as used today refers to succession by the State to property considered "ownerless" *(bona vacantia)* for lack of competent legal heirs. Escheat, being an attribute of sovereignty, rests on the principle that ultimately it is the State that owns all property within its territorial jurisdiction. *(See 7 Manresa 169, In Re Links Estate, 319 Pa. 513).].*

"SEC. 2. *Order for hearing.* — If the petition is sufficient in form and substance, the court, by an order reciting the pur-

pose of the petition, shall fix a date and place for the hearing thereof, which date shall be not more than six (6) months after the entry of the order, and shall direct that a copy of the order be published before the hearing at least once a week for six (6) successive weeks in some newspaper of general circulation published in the province, as the court shall deem best."

"SEC. 3. *Hearing and judgment.* — Upon satisfactory proof in open court on the date fixed in the order that such order has been published as directed and that the person died intestate, seized of real or personal property in the Philippines, leaving no heir or person entitled to the same, and no sufficient cause being shown to the contrary, the court shall adjudge that the estate of the deceased in the Philippines, after the payment of just debts and charges, shall escheat..." *(The rest of the section is repeated in Art. 1013 of the Civil Code).*

Art. 1013. After the payment of debts and charges, the personal property shall be assigned to the municipality or city where the deceased last resided in the Philippines, and the real estate to the municipalities or cities, respectively, in which the same is situated.

If the deceased never resided in the Philippines, the whole estate shall be assigned to the respective municipalities or cities where the same is located.

Such estate shall be for the benefit of public schools, and public charitable institutions and centers, in such municipalities or cities. The court shall distribute the estate as the respective needs of each beneficiary may warrant.

The court, at the instance of an interested party, or on its own motion, may order the establishment of a permanent trust, so that only the income from the property shall be used. (956a)

COMMENT:

How Estate Inherited by the State is Distributed

(a) Note that always the debts and charges must first be paid.

(b) The law distinguishes the disposition of real and *personal* properties. Observe that while the State actually inherits, still assignment of the properties to the proper municipalities must be made.

(c) The law also makes a distinction as to whether or not the deceased resided in the Philippines.

Art. 1014. If a person legally entitled to the estate of the deceased appears and files a claim thereto with the court within five years from the date the property was delivered to the State, such person shall be entitled to the possession of the same, or if sold, the municipality or city shall be accountable to him for such part of the proceeds as may not have been lawfully spent. (n)

COMMENT:

(1) Rule If Legal Heir Files a Claim

(a) *Reason for the law:* It may be that a relative, like a brother, who has priority over the estate, appears only after the proper escheat proceedings have been made.

(b) Period within which to file a *claim — within 5 years* from the date the *property was delivered* to the State.

(c) The Article is practically reproduced in Sec. 4, Rule 91 of the Rules of Court. Thus, under said Sec. 4, if a claim is *not* made within a period of 5 years from the date the judgment in the escheat proceedings is made, the claim shall be barred forever.

(2) Some Cardinal Principles of Intestate Succession

(a) Even if there is an order of intestate succession, the compulsory heirs are never excluded. Moreover, the Civil Code follows the theory of "concurrence," not the theory of "exclusion."

(b) The nearer excludes the farther, without prejudice to the right of representation (because by virtue of representation, the farther becomes just as "near" as the "nearer").

(c) There is NO right of representation in the ascending line.

(d) There is right of representation in the descending line.

(e) In the collateral line, the right of representation is given only to *children of brothers and sisters*.

[NOTE:

(1) Hence, grandchildren of brothers and sisters cannot represent in the succession of the decedent; neither can children of first cousins.

(2) This right of representation in the collateral line is true only in legal succession, never in testamentary succession, because a voluntary heir CANNOT be represented.*]*.

(f) The intestate shares are either *equal* to or *greater* than the legitime (otherwise a good way to decrease the legitime would be by dying intestate).

(g) In case of partial intestacy, the legacies and devises or institutions to the free portion must be charged PROPORTIONATELY against the intestate heirs who are given intestate shares greater than their legitimes, *insofar as said excess is concerned, but* in no case should the legitime be impaired.

(h) Grandchildren ALWAYS inherit by right of *representation, provided* representation is *proper*. (This is true whether they concur with children of the deceased or not.)

(i) Therefore, whenever all the children repudiate, the grandchildren inherit *in their own right,* for here, representation is NOT PROPER.

(j) Nephews and nieces inherit either by right of *representation* or in *their own right*.

(1) By right of representation, when they *concur* with aunts and uncles (provided that representation is proper, that their own parents should *not* have repudiated).

(2) In their own right, whenever they do *not* concur with aunts and uncles.

(k) Illegitimates of legitimates cannot represent because of the BARRIER, but illegitimates (and legitimates) of illegitimates can represent.

(l) There is barrier between the LEGITIMATE and the ILLEGITIMATE family.

(m) There can be *reserva troncal* in legal succession.

(n) A renouncer can represent, but cannot be represented.

(o) A person who cannot represent a near relative (such as a father who has renounced) cannot also represent a relative farther in degree. After all, the right to represent is by itself also a successional right, which is of course governed by legal provisions.

SURVIVORS	Leg. C. and Desc.	Illeg. C. and Desc.	Surviving Spouse	Leg. Parents and Ascendants	Ill. Parents	Brothers Sisters Nephews Nieces	Other Collaterals	State
Leg. C. and Desc. alone	ALL	X	X	X	X	X	X	X
Leg. C., Ill. C.	Proportion of 10-5 provided legitimes of leg. children are not impaired		X	X	X	X	X	X
Leg. C., Ill. C and S.S.	Same	Same	Same as 1 Leg. C.	X	X	X	X	X
Ill. C. alone	X	ALL	X	X	X	X	X	X
Ill. C. and S. S.	X	1/2	1/2	X	X	X	X	X
S.S. ALONE	X	X	ALL	X	X	X	X	X
Ill. C., S. S. and Leg. Parents	X	1/4	1/4	1/2	X	X	X	X
Leg. Parents and S. S.	X	X	1/2	1/2	X	X	X	X
Leg. Parents alone	X	X	X	ALL	X	X	X	X
S. S. and Illeg. Parents	X	X	1/2	X	1/2	X	X	X
Ill. Parents alone	X	X	X	X	ALL	X	X	X
S. S., B., S., N., N.	X	X	1/2	X	X	1/2	X	X
B. S., N., N. alone	X	X	X	X	X	ALL	X	X
Other Collaterals	X	X	X	X	X	X	ALL	X
State	X	X	X	X	X	X	X	ALL

SIMPLER TABLE OF INTESTATE SHARES

Ill. Children	—	1/2
Surv. Spouse	—	1/2
Ill. Children	—	1/4
Surv. Spouse	—	1/4
Leg. Parents	—	1/2
Ill. Children	—	1/2
Leg. Parents	—	1/2
Leg. Parents	—	1/2
Surv. Spouse	—	1/2
Ill. Parents	—	1/2
Surv. Spouse	—	1/2
Surv. Spouse	—	1/2
Brothers, Sisters, Nephews and Nieces	—	1/2
Surv. Spouse	—	ALL
Leg. Parents Alone	—	ALL
Ill. Parents Alone	—	ALL
Surv. Spouse Alone	—	ALL
Leg. Child Alone	—	ALL
1 Leg. Child	—	1/2
Surv. Child	—	1/2
2 or more Leg. Child } Surv. Spouse }		Consider Spouse as 1 Leg. Child and divide estate by total number

Chapter 4

PROVISIONS COMMON TO TESTATE AND INTESTATE SUCCESSIONS

Section 1

RIGHT OF ACCRETION

Art. 1015. Accretion is a right by virtue of which, when two or more persons are called to the same inheritance, devise or legacy, the part assigned to the one who renounces, or cannot receive his share, or who died before the testator, is added or incorporated to that of his co-heirs, co-devisees, or co-legatees.

COMMENT:

(1) Reason for Accretion

Accretion is a right based on the *presumed will* of the deceased that he prefers to give certain properties to certain individuals, *rather than* to his legal heirs.

Policarpio v. Salamat
L-218091, Jan. 31, 1966

FACTS: In her will, a testatrix constituted a usufruct (over her properties) in favor of the children of her three cousins. The will also provided that the said children are *the only ones* to enjoy the same as long as they live. Now then, if any of them subsequently dies,who will get his share?

HELD: From the above-cited proviso in the will, it can be inferred that the share of the heir who subsequently dies shall ACCRUE to the surviving ones. Said proviso is clear enough, and does not admit of any other interpretation.

(2) How Accretion May be Avoided

Accretion, which follows the decedent's *implied* desires may be *avoided* by the deceased himself —

(a) By expressly designating a *substitute* (naturally, the *express* desire is superior to the *implied desire*).

(b) By expressly providing that although accretion may take place, *still he does not want accretion to occur,* that is, he desires no accretion in favor of those who ordinarily would be entitled to it. *(Castan).*

(3) Requisites for Accretion

(a) unity of object (one inheritance)

(b) plurality of subjects (two or more to inherit ordinarily)

(c) vacant portion example — repudiation of his share by one of those called to inherit

(d) acceptance (of the portion accruing — by the person entitled)

[NOTE: Accretion is a RIGHT *(Art. 1015),* not an obligation, and may therefore be accepted or repudiated by those entitled. This is true in both testate and legal succession. *(6 Manresa 335-336; See also Ynza v. Rodriguez, et al., 50 O.G. 3054).].*

(4) Example of Accretion

T makes a will giving a particular car to *A* and *B*. If *A* repudiates his share, the whole car goes to *B*.

[NOTE: Even if by law, accretion cannot take place, still the testator is allowed to expressly provide in his will for accretion, but this would really be a reciprocal substitution.

Example:

T, in his will, gives the first floor of his house to *A*, and the second floor to *B*. If *A* repudiates, *B* ordinarily does not get the first floor, because here, there has been an earmarking or specification of determinate property. *(See Art. 1017).* However, if *T* in his will provided that in case of repudiation

of either *A* or *B*, the other gets the property, this "accretion" is perfectly alright although this is really a case of reciprocal substitution.*]*.

(5) Accretion in Both Testamentary and Legal Succession

Testamentary

(a) in case of predecease. *(Art. 1016).*
(b) in case of incapacity. *(Art. 1016).*
(c) in case of repudiation. *(Art. 1016).*

[NOTE: In *incapacity* and *predecease, representation to the legitime* takes precedence over accretion.*]*.

Legal Succession

(a) in case of repudiation. *(Art. 1015).*
(b) in case of incapacity *(Art. 1015)* although Art. 1018 mentions only *repudiation,* without prejudice to the right of representation.

[NOTE: In case of *predecease* in legal succession, there is really *no vacant* portion, and hence, *no accretion* for the survivors inherit in their *own right;* but whether or not there is accretion is really immaterial for the effect is the same, namely, the part affected is given to the *intestate heirs*. *(See 7 Manresa 322).]*.

Example:

A has three brothers. *A* dies intestate leaving P300,000 but only two brothers survive him. Each gets P150,000 in his own right. It cannot be said that each gets P100,000 in his own right, and P50,000 by accretion (though the total be the same), for the predeceased brother never had a chance to inherit. This is so because the very theory of intestate succession presupposes the *survival* of the intestate heirs.

(6) Additional Instances When Accretion May Take Place

Aside from the three causes (predecease, incapacity, repudiation) mentioned by the law, accretion may take place also:

(a) If a suspensive condition is *not* fulfilled (this is a form of "incapacity").

(b) if there is failure to identify one particular heir, devisee, or legatee (ineffectiveness of institution) but the others can be identified.

Art. 1016. In order that the right of accretion may take place in a testamentary succession, it shall be necessary:

(1) That two or more persons be called to the same inheritance, or to the same portion thereof, *pro indiviso;* and

(2) That one of the persons thus called die before the testator, or renounce the inheritance, or be incapacitated to receive it. (982a)

COMMENT:

Accretion in Testamentary Succession

(a) *Example:*

T instituted *A* and *B* as his own heirs. If *A* predeceases *T*, the share of *A* accrues to *B*. Thus, *B* inherits *half by institution,* and *half by accretion.*

(b) *Pro indiviso* — means *undivided* (into determinate or specific properties).

(c) *BAR*

(1) What is meant by accretion?

ANS.: See Art. 1015.

(2) What are the indispensable requisites for the right of accretion to exist?

ANS.:

(a) *for testamentary succession* — See Art. 1016.

(b) *for legal succession* — the repudiation or incapacity of some of the co-heirs of the same degree. *(See Arts. 1015 and 1018).*

Art. 1017. The words "one-half for each" or "in equal shares" or any others which, though designating an aliquot part, do not identify it by such description as shall make each heir the exclusive owner of determinate property, shall not exclude the right of accretion.

In case of money or fungible goods, if the share of each heir is not earmarked, there shall be a right of accretion. (983a)

COMMENT:

(1) Non-Earmarking

Example of Par. 1:

(a) *T* gave *A* and *B one half each* of a particular house. There can be accretion here. But if *A* had been given the first floor, and *B*, the second floor, there will be no accretion.

(b) *T* gave *A* 1/3 of a car, and *B* the other 2/3. Can there be accretion here even if the parts be unequal?

ANS.: Under the old Civil Code, no, because the fact that the portion are unequal shows more or less "a special designation of parts" implying the intent of the testator to *exclude accretion. (CASTAN).*

Under the *new* Civil Code however, it is believed that there *can be accretion,* since the mere fixing of *aliquot parts does not* necessarily make the property "determinate" or *specific,* for we still cannot ascertain which particular section or portion of the car, *A* and *B* were being made the exclusive owners thereof.

Examples of Par. 2. (money or fungible goods):

Rules — (a) if EARMARKED — *no accretion*

(b) if *not earmarked* — there can be accretion

Examples:

(a) *T* gave *A* his money in the *left* hand drawer of his desk, and *B,* his money in the right hand drawer. There is earmarking, therefore no *accretion.*

(b) *T* gave P200,000 as legacy to *A* and *B* such that *A* is going to get 3/4 and *B* 1/4. There can be accretion for there is no earmarking.

(c) *T* gave *A* a legacy of P30,000 and *B*, a legacy of P40,000. Can there be accretion if for example *A* repudiates?

ANS.: Yes, because there has been *no earmarking*. For out of the total cash of P70,000 for example, no one can definitely pinpoint which particular money bills were being given to *A*, and which, to *B*.

(2) BAR QUESTION

Mariano Reyes, in his last will and testament among other things, provided as follows: "I bequeath to my nephews *A, B* and *C* whatever credit balance there may be in my current account in the Citibank at the time of my death, in the proportion of one-third for each of them." A died before the testator leaving *X,* his only son as heir. When Mariano Reyes died, there was a credit balance of P30,000 in his account. Now, the P10,000 that would have corresponded to *A* under the will had he survived, is claimed:

(a) by *X* as *A's* heir

(b) by *B* and *C* as accretion of their legacies

(c) by the children of the testator, as the latter's legal heirs.

If you were the judge, to whom would you adjudicate the said sum and why?

ANS.: Applying the formula of ISRAI (discussed in previous chapters), and assuming that the legitime of the testator's children have not been impaired, our answer is this:

(a) *Institution* cannot apply, for *A* is dead.

(b) Neither can *substitution* apply for no substitute has been expressly appointed.

(c) Is representation by *X* as *A's* heir proper? NO, because a *voluntary heir* or *legatee* who predeceases the testator cannot be represented; *i.e.*, he transmits no rights to his own heirs. (For that matter, any voluntary heir cannot be represented.)

(d) Inasmuch as the requirements of *accretion* are present here (gift of a portion of the inheritance pro indiviso; predecease of one), *B* and *C* can claim in equal shares the share of *A*.

(e) It follows therefore that the intestate heirs cannot claim by intestacy said share, for *accretion* is *preferred* over intestacy. As has been stated by the Supreme Court, intestate succession to a vacant portion *can only occur when accretion is impossible. (Torres v. Lopez, 49 Phil. 504).*

Torres v. Lopez
49 Phil. 504

FACTS: Testator instituted as his only heirs his cousin, and the latter's daughter. But the cousin was incapacitated. Should his share go to the testator's legal heirs, or should it go to the co-heir, namely, the cousin's daughter?

HELD: The co-heir gets the share by accretion, for intestacy will take place here only when accretion is not possible.

(3) BAR QUESTION

A executed a will which was duly probated, wherein he bequeathed one-half of his property to his full brother *B*; and the other to *C*, his half-brother and to the children of a deceased half-sister, named *D, E* and *F* at the rate of one-fourth to the former and one-fourth to the latter, in equal shares. *F* died before the testator *A,* leaving only one child *G*.

(a) Can *G* inherit the share by his father *F* under the circumstances of this case? Why?

(b) If your answer is in the negative, who shall inherit the portion left by *F*, and in what proportions? *Reason*.

Art. 1018. In legal succession the share of the person who repudiates the inheritance shall always accrue to his co-heirs. (981)

COMMENT:

(1) Accretion in Intestate Succession

(a) This treats of accretion in *intestacy*.

(b) Note that the Article speaks of *repudiation only*. It is believed however that the Article applies also in case of incapacity, *without* prejudice to the right of representation. *(Manresa: see also Art. 1015)*. But whether it applied to incapacity or not, is really immaterial, for whether there will be accretion or inheritance in their own right by intestacy, the net answer or result would be the SAME. Remember too that Art. 1018 does not speak of "predecease," for in such a case, there is no vacant portion. *(See discussion under Art. 1015)*.

(2) Examples of Art. 1018

A and *B* are the decedent's (no will) brothers and only surviving relatives. If *A* repudiates his share, *B* will get it.

Question: Suppose in the above example, *A* has a child *C*, should *C* get *A's* portion?

ANS.: No, for one who renounces cannot be represented.

Problem:

A and *B* are the decedent's (no will) brothers. *A* has a child *C*. If *A* is incapacitated, will his share accrue to *B*?

*ANS.: N*o, there will be no accretion, because *C* will get said share by representation. In the collateral line (intestate), children of brothers or sisters are entitled to represent.

[NOTE: It would have been different had this been a case of testamentary succession, for here, the nephew cannot represent. *Reason:* A voluntary heir *cannot* be represented.*]*.

Art. 1019. The heirs to whom the portion goes by the right of accretion take it in the same proportion that they inherit. (n)

COMMENT:

Proportional Sharing of Property Received by Accretion

(a) *Example:* A testator gave *X*, 1/2 of an undivided house, *Y*, 1/3, and *Z*, 1/6. If *X* repudiates his share, *Y* and *Z* will share in *X's* portion in the proportion of 1/3 to 1/6 (2 to 1) because this was the proportion in which they had been instituted.

(b) This rule is similar to the rule of sharing in a substitution. *(Art. 861).* Note that aside from this similarity, accretion and substitution are similar in that both refer only to the FREE PORTION; both refer to a vacancy caused by predecease, incapacity, or repudiation; and in both cases, the portion is generally received with the same charges and conditions.

Art. 1020. The heirs to whom the inheritance accrues shall succeed to all the rights and obligations which the heir who renounced or could not receive it would have had. (984)

COMMENT:

Effect of Accretion and Exceptions Thereto

An exception to the effects of this Article occurs when there is a *contrary express provision* in the will, or when the rights and obligations referred to are *personally* applicable only to the original heir, legatee, or devisee.

Art. 1021. Among the compulsory heirs the right of accretion shall take place only when the free portion is left to two or more of them, or to any one of them and to a stranger.

Should the part repudiated be the legitime, the other co-heirs shall succeed to it in their own right, and not by the right of accretion. (985)

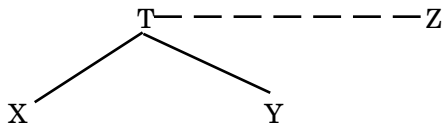
COMMENT:

(1) Accretion Among Compulsory Heirs

It is CLEAR under this Article that there can be NO accretion insofar as the legitime is concerned; accretion, if it takes place, concerns only the free portion.

(2) Example

Estate is P600,000. *T* institutes as his heirs his two legitimate children *(X and Y)*, and a friend *(Z)*.



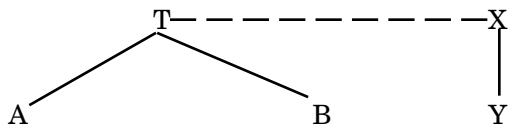
Ordinarily therefore, since institution concerns only the free portion, *X* and *Y* are first given their respective legitimes (P150,000 each or a total of P300,000). The free portion is then divided equally among the three instituted heirs *(X, Y, Z)*. Thus, ordinarily —

X gets	P250,000
Y gets	P250,000
Z gets	P100,000
	P600,000

Now then suppose *X* predeceases *T* how will the share of *X* be divided?

ANS.: P150,000 of *X's* shares goes to *Y* in the latter's own right (since this is the legitime). The remaining P100,000 will go equally to *Y* and *Z* by accretion since this is the proportion in which they were instituted to the free portion.

(3) Problem



T has two legitimate children, *A* and *B*. His estate was worth P1 million. In his will, *T* gave *A* and *B* one-fourth each, and *X* was given *one-half*. *X* has a child *Y*.

(a) If *X* predeceases *T*, who gets his share?

ANS.: Not *Y*, for a voluntary heir *(X)* cannot be represented. On the other hand, *A* and *B* cannot get it by accretion for they were not given any part of the free portion. Intestacy then results, and *A* and *B* will get *X's* share as intestate heirs.

(b) If *B* on the other hand predeceases *T,* who gets *B's* share?

ANS.: *A* alone; not by accretion, but in his own right for the same is his legitime.

Art. 1022. In testamentary succession, when the right of accretion does not take place, the vacant portion of the instituted heirs, if no substitute has been designated, shall pass to the legal heirs of the testator, who shall receive it with the same charges and obligations. (986)

COMMENT:

Rules When Accretion Does Not Take Place

(a) This illustrates the order of preference (ISRAI).

(b) *Example: T* gave P10 million (deposited at the Citibank) to *A* and P10 million (deposited at the Bank of the Philippine Islands) to *B*. *A* and *B* are *T's* friends. No substitute was appointed. *S,* a sister of the testator, was given nothing. If *A* repudiates his share, who will get it?

ANS.: B will not get, there being no accretion since there was an earmarking of share. Therefore, *S*, the sole intestate heir, gets *A's* share.

Art. 1023. Accretion shall also take place among devisees, legatees and usufructuaries under the same conditions established for heirs. (987a)

COMMENT:

Accretion Among Devisees, Legatees, and Usufructuaries

Note that the rules for accretion among heirs should be followed.

Section 2

CAPACITY TO SUCCEED BY WILL OR BY INTESTACY

Art. 1024. Persons not incapacitated by law may succeed by will or *ab intestato*.

The provisions relating to incapacity by will are equally applicable to intestate succession. (744, 914)

COMMENT:

(1) 'Capacity to Succeed' Defined

It is the ability to inherit and retain property obtained *mortis causa*. (It is also termed *passive testamentary capacity*.).

[NOTE:

The provisions relating to incapacity by will are equally applicable to intestate succession *(Art. 1024)* except —

(a) Art. 1027 (nos. 1-5);

(b) and Art. 1028.

(Said articles and provisions can *only apply* to testamentary succession.)*.]*.

The general rule is that "persons *not incapacitated* by law may succeed by will or *ab intestato*."

[NOTE:

(a) Persons — the term here refers to both *natural* and *juridical* persons.

(b) Insane persons — though incapacitated to enter into contracts or to make wills or to otherwise dispose of their

properties are nevertheless entitled or capacitated to inherit. (As a matter of fact, they are usually more deserving of the testator's generosity.)*.]*.

(2) Kinds of Incapacity to Succeed

(a) ABSOLUTE — (can never inherit from anybody regardless of circumstances)

(b) RELATIVE — (cannot inherit only from certain persons or certain properties, but can inherit from others or certain other properties)

[NOTE: There are three kinds of *relative* incapacity:

1) because of possible undue influence. *(Art. 1027).*

2) because of public policy and morality. *(Art. 1028 read together with Art. 739).*

3) because of unworthiness. *(Art. 1032).].*

Art. 1025. In order to be capacitated to inherit, the heir, devisee or legatee must be living at the moment the succession opens, except in case of representation, when it is proper.

A child already conceived at the time of the death of the decedent is capable of succeeding provided it be born later under the conditions prescribed in Article 41. (n)

COMMENT:

(1) Persons Absolutely Incapacitated

There are two classes who are *absolutely incapacitated* to succeed:

(a) Individuals, associations, and corporations not permitted by law to inherit. *(Art. 1027, no. 6).*

(b) Those who lack juridical personality (such as abortive infants, or those who do not comply with the requirements of Arts. 40 and 41 of the new Civil Code).

(2) Requisite for Capacity to Inherit

(a) To be capacitated to inherit, it is essential to be either *already living,* or at least *conceived* at the moment the succession opens. (In the case of the conceived child, Art. 41 must be complied with.)

[NOTE: For civil purposes, the foetus is considered born if it is alive at the time it is completely delivered from the mother's womb. However, if the foetus had an intra-uterine life of less than seven months, it is not deemed born if it dies within twenty-four hours after its complete delivery from the maternal womb. *(Art. 41, Civil Code).].*

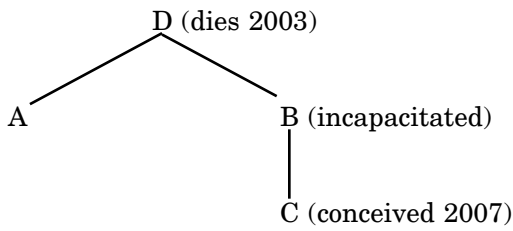
(b) There is *no exception* to the rule enunciated in (a), even if the law says "*except* in case of representation, when it is proper."

Reason: Even in case of representation, the representative must already be *alive* or at *least* conceived at the time the succession opens. He himself must be capable of succeeding the decedent. *(Art. 973).*

If the law were to be *strictly* and *grammatically* followed, an absurdity in *uncertain* or *unstable* or *suspended ownership* can arise.

Example:

D has two children, *A* and *B*. *B* is however incapacitated.



At the time of *D's* death (2003), only *A* and *B* are alive. Inasmuch as *B* is incapacitated, *A* inherits the

whole by intestacy. Suppose in 2007, *B* has a conceived child *C*, will *C* share in the succession from *D* in view of the fact that he wants to inherit by representation, and apparently, under the law, he does *not* have to be alive or even conceived at the time the succession opens?

ANS.: As has been stated before, construed strictly and grammatically, the law *(Art. 1025, par. 1)* would allow *C* to inherit by representation, but this is absurd for it would result in suspended ownership by *A* of *B's* share. Suppose for example, *B* will have a child only 30 or 40 years after the decedent's death, certainly this would be unduly burdensome, and certainly, too, this could not have been the intention of the Code Commission or of Congress. THEREFORE, what must have been in the mind of the Code Commission in inserting the clause "except in case of representation when it is proper?"

ANS.: The Code Commission apparently thru defective grammatical phraseology, failed to state that what it meant was "In case of representation, if proper, the *person represented* need not be alive at the time the succession opens."

[NOTE: Even this, of course, is useless because same is already implicit in the various articles on representation and "predecease."*]*.

[NOTE: A legacy made in favor of a legatee who was already dead at the time the will was made is *VOID*. *(Resurreccion v. Javier, 62 Phil. 599).]*.

Art. 1026. A testamentary disposition may be made to the State, provinces, municipal corporations, private corporations, organizations, or associations for religious, scientific, cultural, educational, or charitable purposes.

All other corporations or entities may succeed under a will, unless there is a provision to the contrary in their charter or the laws of their creation, and always subject to the same. (746a)

COMMENT:

Dispositions in Favor of Entities

(a) Some of the organizations referred to in this Article are juridical persons; others are not. In the case of the latter, they are allowed to inherit, not because they have juridical existence, but because of this Article — precisely.

(b) In the case of juridical persons, it is not enough that they have been conceived by certain individuals; it is essential that they have complied with all the requirements for the existence of juridical persons. *(See 6 Sanchez Roman 268).*

(c) Comment of the Code Commission: "The purposes enumerated in the above-mentioned Article are in accord with the civic spirit and philantrophy of modern times."

(d) Private juridical persons cannot of course inherit in *legal succession*.

Art. 1027. The following are incapable of succeeding:

(1) The priest who heard the confession of the testator during his last illness, or minister of the gospel who extended spiritual aid to him during the same period;

(2) The relatives of such priest or minister of the gospel within the fourth degree, the church, order, chapter, community, organization, or institution to which such priest or minister may belong;

(3) A guardian with respect to testamentary dispositions given by a ward in his favor before the final accounts of the guardianship have been approved, even if the testator should die after the approval thereof; nevertheless, any provision made by the ward in favor of the guardian when the latter is his ascendant, descendant, brother, sister, or spouse, shall be valid;

(4) Any attesting witness to the execution of a will, the spouse, parents, or children, or any one claiming under such witness, spouse, parents, or children;

(5) Any physician, surgeon, nurse, health officer or druggist who took care of the testator during his last illness;

(6) Individuals, associations and corporations not permitted by law to inherit. (745, 752, 753, 754a)

COMMENT:

Incapacity Because of Possible Undue Influence

(1) Paragraph 1 — Priest or Minister

(a) Reason for the law — to safeguard the rights of the heirs who may be defrauded by the *sinister and undue* influence which may be exercised by some priests or ministers over a dying man. *(TS, Dec. 22, 1884).*

(b) The exercise of undue influence insofar as the disposition in their favor is concerned is CONCLUSIVELY PRESUMED, that is, the disqualification exists *without* the necessity of proving actual undue influence. Thus, the incapacity cannot be cured by proof that undue influence was *not* indeed exercised.

[NOTE: Same conclusive presumption attaches to all the disqualifications mentioned in Art. 1027*.]*.

(c) In view of the reasons for the law, it is evident that the will must have been made DURING the "last illness," for it is there that undue influence could have been exercised.

Therefore:

1) If the testamentary disposition was made BEFORE, same is valid for there could not have been any undue influence. *(6 Manresa 39).*

2) If the testamentary disposition was made LONG AFTER the "last illness," such that there was time to reflect on the wisdom of the testamentary provision, the disqualification does NOT apply. *(13 Scaevola 244).*

[NOTE: For the disqualification to attach, not only must the will have been made during the "last illness." It must also have been made *after* the confession. If therefore it was made *during* the last illness but *before* the confession, the reason for the law does not exist. *(13 Scaevola 244).]*.

*[NOTE: W*hile the "illness" must be the last, the "confession" need not be the last.*]*.

(d) *"Last illness"* is that of which the testator died, or the one immediately preceding it (as when death came because of an accident), if the testator did *not* have any opportunity to revoke the testamentary dispositions concerned. *(See TS, Dec. 22, 1884)*. It does not matter whether the illness was chronic or acute, or whether it was long or short. What is important is the great possibility of death. *(6 Manresa 39)*.

(e) The disqualification *DOES NOT EXTEND* —

1) to the LEGITIME

2) to INTESTACY

3) to dispositions which do not extend a TESTAMENTARY BENEFIT (like appointment as executor; or payment of debts or obligation). *(See 6 Sanchez Roman 267)*. After all, the Rules of Court provide that the executor must have the court's approval.

Examples:

1) A testator during his last illness confessed to a priest who happened to be his only son. In his will, made shortly after the confession, the testator gave his son-priest P600,000 out of an estate worth P1 million. The remaining P400,000 was given to a friend. Then the testator died. How much, if any, will the son-priest inherit?

ANS.: He gets P500,000 as legitime, but not the P100,000 which is part of the free portion. It is unfair to deprive him of the legitime since he is entitled to this, not by virtue of

the will, but by operation of law. *(13 Scaevola 237-238).* The P100,000 will accrue in favor of the friend, since the requirements for accretion are present. Hence, the friend gets a total of P500,000.

2) Suppose the deceased who had confessed to his son-priest had died intestate, how much will the son inherit?

ANS.: The whole P1 million, not as a voluntary or testamentary heir, but as an intestate heir. Note that in the problem given, he is the only legal heir. He inherits in this capacity, for after all, intestacy goes by operation of law. Of course, if the son had *prevented* the father from making any will, he would be incapacitated, not because of this provision, but because of unworthiness. *(Art. 1032, no. 7).*

(f) The law says "heard the confession." Therefore, a priest who extends spiritual aid other than confession like "extreme unction," is *not* disqualified.

(g) In the case of "minister of the gospel" other than priests, the extension of "spiritual aid" disqualifies them.

(2) Paragraph 2 — "Relatives of such priest or minister within the fourth degree, the church, organization, etc."

(a) The relatives here are those by consanguinity.

(b) Note that although 5th degree relatives inherit by intestacy, the disqualification in this paragraph extends only to the *fourth* degree.

(3) Paragraph 3 — Guardians

(a) The guardian referred to may be the guardian of the *person* or of the *property* since both can exercise undue influence.

(b) Said guardians are *disqualified* to inherit unless:

1) The will was made AFTER the approval of the "final accounts."

2) The guardian is a relative *(ascendant, descendant, brother, sister, or spouse).*

(c) *Reason for disqualifying guardians* — they are conclusively presumed to have exercised undue influence. *(6 Manresa 42).*

(d) *Meaning of final accounts*

They are those that terminate the financial responsibility of the guardian. They are given to the court when the guardian is *removed,* or when he *resigns,* or when there is no need for the guardianship to continue. *(15 Sanchez Roman 268).*

(e) In his will, *T* gave *G*, his guardian, a legacy. At the time the will was executed, the final accounts of the guardianship had not yet been approved. Three months afterwards, the final accounts were approved. Two months later, *T* died. Will *G* get the legacy?

ANS.: No, because the law disqualifies him *(G)* "even if the testator should die after the approval of the final accounts." The exception is when *G* is one of the relatives mentioned in the law.

(f) A testator gave a legacy to his guardian's daughter. At the time the will was made, the final accounts had not yet been approved. Is the legacy valid?

ANS.: Yes, the legacy is valid, for the law does not disqualify the guardian's relatives (unlike the rule in the case of the priest and the minister). But of course, if the legacy had been given to the daughter only to enable the guardian to later on get the benefit of the inheritance, said legacy would be null and void not because of Art. 2027, no. 3, but because of Art. 1031 which says that "a testamentary provision in favor of a disqualified person, even though made under the guise of an onerous contract, or *made thru an intermediary,* shall be VOID."

(4) Paragraph 4 — Attesting Witnesses

(a) See comment under Art. 823.

(b) Though Par. 4 does not state so, it is understood that the exception referred to in Art. 823 applies, namely, the witness is qualified to inherit if there are three other competent and disinterested (not given anything) witnesses to the will.

(c) The notary public before whom the will is acknowledged is NOT disqualified by the law to inherit. (Incapacities should be construed strictly). Observe however that the notary public should have been disqualified, for he stands in the same position as the attesting witnesses. After all, under Sec. 22 of the 1889 Notarial Law, he was disqualified to inherit.

(d) If the witnesses is not given any testamentary disposition, but instead burdened with a duty, such as that of selling or encumbering, the burden can properly be made, provided that the witness accepts the responsibility.

(5) Paragraph 5 — Physicians, surgeons, etc.

(a) To disqualify these people from inheriting as testamentary heirs, legatees, or devisees, it is essential that:

1) the will or disposition in their favor was made during the last illness and after the "care" by them had commenced

2) they "took care" of the testator — (this presupposes a continuing or regular caring, and not an isolated service)

(b) *Query:* Suppose the physician (etc.) is a relative of the deceased, is the testamentary disposition valid?

ANS.: It would seem that the answer is NO, for the law makes no distinction, unlike in the case of the guardian (Justice J.B.L. Reyes, however, believes otherwise for afterall, near relatives are naturally required to take care of the sick person). *(Reyes and Puno, An Outline of Civil Law, Vol. III, p. 184).*

(c) The physician (etc.) is not disqualified to inherit by intestacy because:

1) the law uses the term "testator";

2) intestacy takes place by operation of law.

(6) Paragraph 6 — Individuals, associations, and corporations not permitted by law to inherit.

(a) This refers to absolute, not relative incapacity.

(b) "Individuals" — like abortive infants.

(c) The prohibition must have been imposed by law. Note the phrase *"not permitted by law to inherit."*

Art. 1028. The prohibitions mentioned in Article 739, concerning donations *inter vivos* shall apply to testamentary provisions.

COMMENT:

(1) Incapacity by Reason of Public Morality

The following donations shall be void:

(a) Those made between persons who were guilty of adultery or concubinage at the time of the donation;

(b) Those made between persons found guilty of the same criminal offense, in consideration thereof;

(c) Those made to a public officer or his wife, descendants and ascendants, by reason of his office.

In the case referred to in (a), the action for declaration of nullity may be brought by the spouse of the donor or donee; and the guilt of the donor and donee may be proved by preponderance of evidence in the same action. *(Art. 739, Civil Code).*

(Reason for Art. 1028 — public morals)

(2) Examples

(a) "*Guilty* of adultery or concubinage at the *time* of the making of the *will*."

There need not be any criminal conviction for this guilt can be proved *civilly*. *(Last par. of Art. 739).*

Nepomuceno v. CA
GR 62952, Oct. 9, 1985

The very wordings of a will may invalidate the legacy, such as where the testator admits in the will that he is disposing the properties to a person with whom he has been living in concubinage. Thus, the prohibition mentioned in Art. 739 of the Civil Code concerning donations *inter vivos* apply to testamentary provisions.

(b) *A* and *B* committed murder and were duly imprisoned. In *A's* will, he gave *B* a legacy in consideration of *B's* cooperation in their mutual, if infamous, undertaking. Is *B* qualified to receive the legacy?

ANS.: No. *(Art. 1028; Art. 739).*

(c) A cabinet official, because he had already gained prestige in his office, gave *L*, a friend, a legacy. Is the legacy valid?

ANS.: Yes, provided that *L* is not otherwise incapacitated. Notice here that the legacy was made by, and not to, the cabinet member. The prohibition therefore does not apply.

[NOTE: Under the Revised Penal Code, the penalties of *arresto mayor*, suspension in its maximum and medium periods and public censure shall be imposed upon any public officer who shall accept gifts offered to him by reason of his office. *(Art. 211, RPC).].*

Art. 1029. Should the testator dispose of the whole or part of his property for prayers and pious works for the benefit of his soul, in general terms and without specifying its application, the executor, with the court's approval shall deliver one-half thereof of its proceeds to the church or denomination to which the testator may belong, to be used for such prayers and pious works, and the other half to the State, for the purposes mentioned in Article 1013. (747a)

COMMENT:

Disposition for Prayers and Pious Works

For the Article to apply (50-50 disposition), the following requisites are essential:

(a) disposition is for PRAYERS and PIOUS WORKS

(b) disposition is in GENERAL TERMS

(c) disposition does NOT SPECIFY its application. (Therefore, if a particular heir, devisee, legatee, or stranger is burdened with the duty, or if a definite place or date is fixed for the prayers, the Article does not apply.) *(6 Sanchez Roman 245-246).*

(If testator says: "I want my children to give P100,000 every year to the church for masses for my soul," will half of the amount go to the State?

ANS.: No, for here the disposition is not in general terms. *[13 Scaevola 188-189].*).

[NOTE:

Art. 1029 really refers to the INSTITUTION of the SOUL. Such an institution is recognized as valid, though the soul is not a person. *(Castan).].*

Art. 1030. Testamentary provisions in favor of the poor in general, without designation of particular persons or of any community, shall be deemed limited to the poor living in the domicile of the testator at the time of his death, unless it should clearly appear that his intention was otherwise.

The designation of the persons who are to be considered as poor and the distribution of the property shall be made by the person appointed by the testator for the purpose; in default of such person, by the executor; and should there be no executor, by the justice of the peace, the mayor, and the municipal treasurer, who shall decide by a majority of votes all questions that may arise. In all these cases, the approval of the Court of First Instance shall be necessary.

The preceding paragraph shall apply when the testator has disposed of his property in favor of the poor of a definite locality. (749a)

COMMENT:

(1) Dispositions in Favor of the Poor

The Article applies if the disposition is in favor of:

(a) the poor in general *(par. 1)*.

(b) the poor of a definite locality *(par. 3)*.

(2) The Poor in General

Unless clearly appearing otherwise, only the poor in the testator's domicile *at death* should be considered.

(3) Who Designates the Poor?

ANS.:

(a) First, the person appointed for the purpose

(b) If none — the executor

(c) If no executor — then *three people* (by *majority* vote):

1) justice of the peace (now a municipal or metropolitan trial court judge)

2) mayor

3) municipal treasurer

(Query: Under the Rules of Court, should not the court appoint an *administrator with a will annexed* in the absence of an executor, for the purpose stated in this article?*)*.

(All questions, even if already decided by the people concerned, are subject ultimately to final determination by the Court. The law uses the word *"approval."* Therefore, the question — as to who really are the poor — is a judicial question.).

Art. 1031. A testamentary provision in favor of a disqualified person, even though made under the guise of an onerous contract, or made through an intermediary, shall be void.

COMMENT:

(1) Dispositions in Favor of a Disqualified Person

(a) *Purpose of the Article* — to prohibit the testator from violating indirectly what he cannot violate directly. *(6 Manresa 49).*

(b) How the interposition of a third party may be done:

1) if the disposition is disguised as an *onerous* contract.

2) if fictitious debts are ordered paid. *(6 Manresa 49).*

3) if an intermediary is interposed (for him later on to give to the incapacitated person).

(2) Problems

(a) *T* wants to give a legacy to *L* whom the testator knew had attempted to kill him. So *T* interposed *F* with instruction to give to *L*. Is *L* qualified to get the legacy?

ANS.: Yes, because even a direct legacy to *L* is valid, considering that this act of giving is an implied condonation of the unworthy act. *See Art. 1033* which in part provides that "the causes of unworthiness shall be without effect if the testator had knowledge hereof at the time he made the will."

[NOTE: Therefore, the phrase *"disqualified person"* refers not to one incapacitated by reason of unworthiness *(Art. 1032)* but one incapacitated either absolutely, or by reason of possible undue influence *(Art. 1027),* or by reason of morality. *(Art. 1028).].*

(b) *T* wanted to give a legacy to *W,* an attesting witness to his will, but because he knew *W* would be incapacitated, he gave the legacy to *F,* a mutual friend, with secret instructions to later on give the property to *W*.

1) To disqualify *W*, is it essential to prove that *F* was secretly instructed to give to *W*?

ANS.: No, for as a matter of fact, how can secret instructions be proved?

2) To disqualify *W*, what should therefore be done?

ANS.: It should be proved that *F* really did not benefit and that *W* really is supposed to enjoy or is now enjoying the property (either as full owner or as usufructuary with the right to receive income or fruits). *(See 6 Sanchez Roman 288).*

3) Suppose *F* keeps the property for himself, is this legal and proper?

ANS.: It depends. If *F* was really made legatee in the will, this would be all right to teach the testator a lesson for attempting to violate the law. *(See 6 Sanchez Roman 288).* If, upon the other hand, *F* was expressly designated only as a middleman or agent for an unnamed person, *F* will not get anything. Here we can apply Art. 867(4) which makes void, testamentary dispositions "which leave to a person (F*)* the whole or part of the hereditary property in order that he may apply or invest the same according to secret instructions communicated to him by the testator."

(c) *T* wanted to give the father of an *attesting* witness a legacy, and so he interposed *F,* a mutual friend, so that the latter may later on give the legacy to said father. Is the father allowed to inherit the legacy?

ANS.: Strictly construed, and following the letter of the law, the father is a "disqualified person" and should therefore not be allowed to get the legacy. *(Art. 823; Art. 1027, no. 3).* But it would seem that for the purpose of Art. 1031, said father should not be considered "a disqualified person" because the person *really sought* to be disqualified by Arts. 823 and 1027 is the attesting witness *himself* (being the person in a *position to exercise undue influence*), and the only reason for disqualifying the father

(etc.) is precisely the fear that said father is being merely interposed for the attesting witness. In view of this, the father should be entitled to the legacy, unless he himself is also interposed only for the attesting witness. *(See 13 Scaevola 272; 6 Sanchez Roman 289).*

Art. 1032. The following are incapable of succeeding by reason of unworthiness:

(1) Parents who have abandoned their children or induced their daughters to lead a corrupt or immoral life, or attempted against their virtue;

(2) Any person who has been convicted of an attempt against the life of the testator, his or her spouse, descendants, or ascendants;

(3) Any person who has accused the testator of a crime for which the law prescribes imprisonment for six years or more, if the accusation has been found groundless;

(4) Any heir of full age who, having knowledge of the violent death of the testator, should fail to report it to an officer of the law within a month, unless the authorities have already taken action; this prohibition shall not apply to cases wherein, according to law, there is no obligation to make an accusation;

(5) Any person convicted of adultery or concubinage with the spouse of the testator;

(6) Any person who by fraud, violence, intimidation, or undue influence should cause the testator to make a will or to change one already made;

(7) Any person who by the same means prevents another from making a will, or from revoking one already made, or who supplants, conceals, or alters the latter's will;

(8) Any person who falsifies or forges a supposed will of the decedent. (756, 673, 674a)

COMMENT:

Incapacity by Reason of Unworthiness

(1) Par. 1

(a) See also comment in Art. 920 (No. 1).

(b) The law says "*induced* their *daughters* to live a corrupt or immoral life."

1) May this apply to granddaughters and sons?

ANS.: YES, in view of the parent's moral perversity.

2) Suppose the parent had tried to persuade the daughter to become a prostitute, but she did *NOT* become one, should the parent still be incapacitated?

ANS.: YES, in view again of the moral perversity of the parent as revealed by his act of *persuasion*.

(c) The law says "*attempted* against their virtue." It would seem that no criminal conviction is needed here.

(2) Par. 2

(a) See also comment under *Art. 919 (No. 1).*

(b) This paragraph requires a "conviction by final judgment." Hence, an acquittal on any ground, even that of "reasonable doubt," does *not* result in *incapacity*.

(c) But the conviction need *not* be done before the testator's or decedent's death. It is enough that the heir be *convicted later on*. Thus, the law states that to determine the qualification of the heir, the rendition of the final judgment must be awaited. *(See Art. 1034, par. 2)*. In other words, although conviction be after the death, the fact of conviction and its effects *retroact* to the time of the decedent's death.

(d) If the heir be pardoned by the Chief Executive, he is still incapacitated, for what is important is that he had been

convicted by final judgment. But if the heir has been given an *amnesty* (before final judgment), he would be qualified.

(e) If the heir should die before final judgment is pronounced, the fact remains that he is NOT convicted, hence, he should still be capacitated (as long as he does *not* predecease the testator).

(f) If the heir made the *attempt* or even the *killing* itself only AFTER the death of the testator (as when he attempted to kill or actually killed the *testator's father one day after the testator's death*) the heir would still be capacitated to inherit from the testator. *Reason:* He was not incapacitated at the time of the testator's death. It does *not* matter — in this case — even if he would be subsequently convicted by final judgment.

[NOTE: The "attempt" must be BEFORE, not AFTER the testator's death.*]*.

(3) Par. 3

(a) See also Comment under *Art. 919(a).*

(b) For the accusation to be groundless, there must be a *definite acquittal,* and not one which is based merely on "reasonable doubt." Thus, if the acquittal is because of reasonable doubt, there was some ground for the accusation, and therefore *incapacity does not arise. (Javier v. Lucero, L-6706, Mar. 29, 1954).*

(4) Par. 4 — Failure to Report Violent Death

(a) *Requirements:*

1) The heir (legatee or devisee) must be of FULL AGE (at least 21).

2) He must have knowledge of the VIOLENT DEATH (one that is caused by crime) of the testator (or decedent).

3) There is *failure to report* such death *within a month* UNLESS the authorities have already *taken action.*

4) There is an OBLIGATION to make the accusation.

[Under the Spanish law of Criminal Procedure of 1882, the following are exempted from making the accusation:

a) the spouse of the offender
b) the offender's ascendants and descendants (by blood or by affinity)
c) the offender's brothers and sisters
d) the offender's natural children. *(Arts. 259-261 of said law).*].

[NOTE: Is this law applicable to the Philippines now? It would seem that the answer is NO, that is, under our present laws, there is *no one* really obliged to make any accusation unless it be the state officials concerned.*]*.

[NOTE: Purpose of the law is to consider unworthy the heir who should have made the report so that the criminal might be brought to justice. Violent death caused accidentally *(force majeure)* or by the testator's own fault are not required to be reported, since no one is supposed to be accused thereof.*]*.

(5) Par. 5

(a) *Conviction by final judgment* is essential, since the law says "convicted."

(b) The spouse himself who is guilty is *not incapacitated* by this Article, although he may be incapacitated if Art. 106 is brought into play.

[NOTE:

(a) Art. 1032 applies to both testate and intestate succession.

(b) An heir incapacitated by reason of unworthiness, even if he be a compulsory heir, loses ALL rights to inherit from the deceased. Thus, he loses *not only* the legitime, but also that which would have appertained

to him had he been capacitated. This is of course without prejudice to the right of representation, when proper.*]*.

Art. 1033. The causes of unworthiness shall be without effect if the testator had knowledge thereof at the time he made the will, or if, having known of them subsequently, he should condone them in writing. (757a)

COMMENT:

(1) Rules for Condonation

(a) If at the time he made the will, testator ALREADY KNEW of the causes of unworthiness, the mere fact of instituting the person concerned, or giving him a devise or legacy, is an IMPLIED CONDONATION. *(See 6 Manresa 64).*

(b) If knowledge comes ONLY AFTER the execution of the will, CONDONATION must be in WRITING *(public or private).*

(2) Example:

A son tried to kill his father, and went to prison for the crime. Knowing this, the father made a will giving said son the entire estate. There were no other compulsory heirs. Will the son inherit the whole estate? Yes, the cause of his unworthiness shall be without effect since the father had knowledge thereof at the time the will was made. Here, we have an instance of a pardon by implication.

[NOTE:

(a) In the preceding example, if the father had made the will prior to the crime, the son will not inherit anything. He loses even his right to the legitime. *(Art. 1035, par. 1).* The only way to erase the effect of the incapacity would be for the testator (the father) to condone the act in writing.

(b) Suppose the father had died without a will, will the son inherit?

ANS.: No, inasmuch as the incapacity also obtains in intestate succession. *(1 Gomez, 354).* Had the father desired his son to inherit, he should have condoned the act in writing. *(Art. 1033).].*

(3) Reason for Allowing Condonation

The decedent's intention should be given effect because after all, the act of unworthiness had been committed against him. *(6 Sanchez Roman 284).*

(4) Effect of Presidential Pardon

If an unworthy heir is pardoned by the President, he is still incapacitated to inherit, unless the pardon was given because of proven innocence (as when somebody else turns out, after final judgment, to have been the guilty party). *[NOTE:* Service of sentence does not erase incapacity.*].*

(5) Problem

After his son had attempted to kill him and had been duly convicted therefor, a testator instituted his friends in a will, without providing anything for his son.

(a) Is there an implied pardon?

ANS.: No, because the son was not given anything in the will. It is *not* the making of the will that condones; it is the fact of *providing something* in the will in favor of the unworthy son that works as an implied condonation. *(See 6 Manresa 64).*

(b) Is there a "preterition" inasmuch as there was *no* express disinheritance?

ANS.: While *technically,* there might be a "preterition" (unless the son had received something previously by way of *donations inter vivos* or had been the grantee of a *remission*), it is submitted that this situation is similar to a case of preterition where the *preterited heir predeceases* the testator. Thus, it is believed that the institution of

heirs in this case will remain effective without prejudice to the right of representation.

[NOTE:

(a) If an *implied* condonation is made in a VOID or REVOKED will, it is as if there was *no* condonation. Therefore, the incapacity remains. *(See 6 Sanchez Roman 285).*

(b) An *express* revocation is *irrevocable* provided, there was *no vitiated consent*. A contrary rule would be contrary to good morals. *(See 6 Sanchez Roman 285).*

(c) Art. 1033 is applicable only to incapacity by reason of UNWORTHINESS, and, therefore, does *not* apply to Arts. 1027 and 1028.*]*.

Art. 1034. In order to judge the capacity of the heir, devisee or legatee, his qualification at the time of the death of the decedent shall be the criterion.

In cases falling under Nos. 2, 3, or 5 of Article 1032, it shall be necessary to wait until final judgment is rendered, and in the case falling under No. 4, the expiration of the month allowed for the report.

If the institution, devise or legacy should be conditional, the time of the compliance with the condition shall also be considered. (758a)

COMMENT:

(1) How to Judge the Capacity of the Heir

(a) *Reason for par. 1:* The rights to the succession are transmitted from the moment of the death of the decedent. *(Art. 777).* It logically follows that as a rule, capacity must be determined as of that time.

(b) A son is accused of having killed his father. Subsequently, the son was convicted. He now claims the right to inherit on the ground that at the time his father died, he, the son, was still capacitated. Should he inherit?

ANS.: No. The law provides that to find out whether or not he was capacitated, final judgment should be awaited. Had he been acquitted, he would have been entitled to inherit unless otherwise disqualified.

(c) In case of a suspensive *conditional institution,* the heir must be capacitated BOTH:

1) at the time of the testator's death

2) at the time the condition is fulfilled (For example — he must still be *alive* at that time.)

[NOTE: The condition must of course be complied with.*]*.

(2) Problem

T institutes *A* as his heir on condition that *B* (*A's* brother) passes the bar of 2006. In 2003, *T* dies. In 2005, *A* dies. In 2006, *B* passes the bar. Does *A* inherit?

ANS.: No, because at the time the condition was fulfilled, *A* was already dead, and therefore incapacitated. *(See Art. 1036, par. 1).* Therefore, *A* does not transmit any rights in the inheritance from *T* to his *(A's)* own heirs.

(If in the preceding problem *A did not die,* but was insane at the time *B* passed the bar, would *A* inherit?

ANS.: Yes, because insanity does not incapacitate for purposes of succession.).

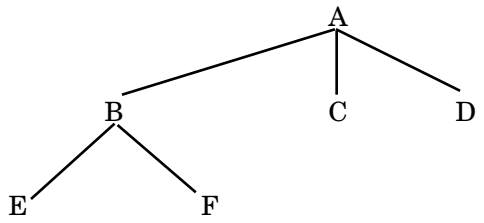
Art. 1035. If the person excluded from the inheritance by reason of incapacity should be a child or descendant of the decedent and should have children or descendants, the latter shall acquire his right to the legitime.

The person so excluded shall not enjoy the usufruct and administration of the property thus inherited by his children. (761a)

COMMENT:

(1) Incapacitated Compulsory Heir Can Be Represented

Example:



A has 3 legitimate children, *B, C,* and *D*. *B* has 2 children *E* and *F*. *A* made a will giving each of his 3 children equal shares in his estate of P600,000. If *B* attempts to kill *A* and is convicted therefor, how much, if any, will *E* and *F* get?

ANS.: B's legitime is only P100,000 (1/3 of half of the estate). Hence, *E* and *F* will each get P50,000. There is no right of representation with reference to the free portion. *(Art. 970; Art. 856, par. 2). B* cannot enjoy the usufruct and administration of the P100,000 given to his children. *(Art. 1035, par. 2).*

[Observe that a living person may be represented. This is so in case of:

(a) incapacity *(Art. 1035)*
(b) disinheritance *(Art. 923)*.].

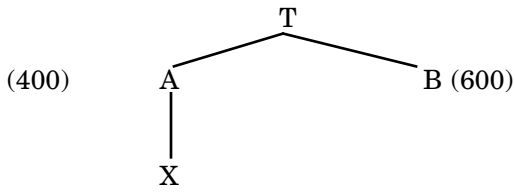
[Note that Art. 1035 says that the representatives get the unworthy heir's *legitime*. This is because there is no representation in this case with reference to the free portion. The free portion may be given:

(a) to the substitute, if any
(b) to the co-heirs, in case of intestacy, if accretion is NOT proper.

Upon the other hand, in case of complete intestacy, the right of representation covers the entire intestate share of the unworthy heir.].

(2) Problems

(a) *T* has two children *A* and *B*. *A* has a child *X*. *T* left an estate worth P1 million and a will where he gave *A* P400,000 and *B,* the remaining P600,000. If *A* turns out later to be incapacitated, how will the inheritance be divided?



ANS.: A's legitime of P250,000 will go to *X* by representation; the remaining P150,000 will go to *B* by accretion. Hence, *B* inherits a total of P750,000.

(b) Same problem as (a) except that there has been an *earmarking,* that is, *A* was given the P400,000 deposited in the Citibank and *B* was given the P600,000 deposited in the BPI. How will the inheritance be divided?

ANS.: A's legitime of P250,000 goes to *X* by representation. The remaining P150,000 will go to the *intestate heirs (B* and *X,* in representation of *A)* because accretion is NOT proper. Therefore, *X* gets a total of P325,000 (P250,000 as legitime, P75,000 as intestate heir); *B* gets a total of P675,000 (P250,000 as legitime, P350,000 by institution to the free portion, P75,000 as intestate heir).

(3) Cross-Reference to the Law of Persons under the Family Code

Art. 225. The father and the mother shall, jointly exercise legal guardianship over the property of their unemancipated common child without the necessity of a court appointment. In case of disagreement, the father's decision shall prevail, unless there is a judicial order to the contrary.

Where the value of the property or the annual income of the child exceeds P50,000, the parent concerned shall be

required to furnish a bond in such amount as the court may determine, but not less than ten per centum (10%) of the value of the property or annual income, to guarantee the performance of the obligations prescribed for general guardians.

A verified petition for approval of the bond shall be filed in the proper court of the place where the child resides, or, if the child resides in a foreign country, in the proper court of the place where the property or any part thereof is situated.

The petition shall be docketed as a summary special proceeding in which all incidents and issues regarding the performance of the obligations referred to in the second paragraph of this Article shall be heard and resolved.

The ordinary rules on guardianship shall be merely suppletory except when the child is under substitute parental authority, or the guardian is a stranger, or a parent has remarried, in which case the ordinary rules on guardianship shall apply.

NOTE:

(1) Legal Guardianship by the Father

(a) No need of a court appointment as guardian of the property of the child.

(b) If the father is *absent* or *incapacitated,* it is the mother who shall be the legal guardian.

(2) Bond Requirement

If the child's property exceeds P50,000.

(3) Amount of the Bond

At least 10% of the value of the property or annual income.

Art. 226. The property of the unemancipated child earned or acquired with his work or industry or by onerous or gratuitous title shall belong to the child in ownership and shall be devoted exclusively to the latter's support and education, unless the title or transfer provides otherwise.

The right of the parents over the fruits and income of the child's property shall be limited primarily to the child's support and secondarily to the collective daily needs of the family.

N.B.:

(1) This refers to property acquired by the child

(a) with his work, or industry, OR

(b) by onerous or gratuitous title

(2) Owner (naked-owner) — the child

(3) Use — for the *support* and *education* of the child UNLESS provided otherwise by

(a) the title, or

(b) the transfer (transferor).

(4) Dual Limitations in a Judicial Action for Compulsory Acknowledgment

These refer to:

1. the lifetime of the child; and
2. the lifetime of the putative parent. *(Delgado Vda. de Dela Rosa v. Heirs of Marciana Rustia Vda. De Damian, 480 SCRA 334 [2006]).*

Art. 1036. Alienations of hereditary property, and acts of administration performed by the excluded heir, before the judicial order of exclusion, are valid as to third persons who acted in good faith; but the co-heirs shall have a right to recover damages from the disqualified heir. (n)

COMMENT:

(1) Judicial Order of Exclusion

By the judicial order of exclusion, the court declares which of the heirs are disqualified or incapacitated.

(2) Effect of Acts or Alienations by the Excluded Heir

A has a son *B* and a brother *C*. *A* in his will gave *B* and *C* houses worth P5 million each out of an estate worth P10 million. After the death of *A, B* immediately sold his apparent rights as heir to *X,* an innocent purchaser for value. Later came a judicial order declaring *B* incapacitated for having been convicted by final judgment of an attempt to kill *A* while the father was still alive. Should the sale to *X* be respected?

ANS.: Yes, since this was done before the judicial order of exclusion. *C's* rights, as the nearest qualified intestate heir, would be to recover damages from *B*.

[Note that insofar as Art. 1036 is concerned, it is the *good or bad faith* of the third person that is important, not the good or bad faith of the incapacitated heir.].

[Art. 1036 speaks of two kinds of actuations:

(a) alienation of hereditary property

(b) acts of administration.].

(3) Alienations Before Death of Deceased

Alienations of *"hereditary property"* by the unworthy heir are of course VOID if made before the death of the decedent, since properly speaking, there is no *"hereditary property"* as yet. This is true, regardless of the good or bad faith of the third person.

Art. 1037. The unworthy heir who is excluded from the succession has a right to demand indemnity for any expenses incurred in the preservation of the hereditary property, and to enforce such credits as he may have against the estate. (n)

COMMENT:

(1) Indemnities to be Reimbursed Excluded Heir

This Article speaks of two rights:

(a) to collect necessary expenses (for preservation, regardless of good or bad faith)

(b) to collect credit (because while he is incapacitated to inherit, he still is a *creditor*)

(2) Useful and Luxurious Expenses

Useful and luxurious expenses are deemed governed by the rules on *possession,* and, therefore, in this case, the good or bad faith is important.

(3) Problem

A was incapacitated to inherit from his father's estate. But the father owed him P100,000 before he (the father) died. May *A* still enforce this credit of his?

ANS.: Yes, he is allowed to do so, although he is incapacitated to inherit. A credit is not an inheritance. He can get the credit therefore not as an heir, but as a creditor.

Art. 1038. Any person incapable of succession, who, disregarding the prohibition stated in the preceding articles, entered into the possession of the hereditary property, shall be obliged to return it together with its accessions.

He shall be liable for all the fruits and rents he may have received, or could have received through the exercise of due diligence. (760a)

COMMENT:

(1) Incapacitated Heir Who Disregards Prohibition

Example:

An incapacitated heir entered into the possession of a piece of land belonging to the estate of the decedent. If the land should increase by alluvium, he should return not only the land but also the accessions thereon. If he had built a house thereon, he is considered a possessor in bad faith, and can therefore lose said house. "He who builds, plants or sows in bad faith on the land of another, loses what is built, planted, or sown, without right to indemnity." *(Art. 449).*

[NOTE: For the purpose of Art. 1038, the good or bad faith of the heir is not important. Moreover, we can say he is

conclusively presumed to have acted in BAD FAITH, when we consider that the liability being imposed on him is the liability ordinarily imposed on possessors in BAD FAITH. Note that he is being made liable for all the "fruits and rents he *may have received,* or could have received thru the exercise of due diligence." *(Art. 1038, par. 2).].*

(2) Query

Suppose there were improvements introduced or there were losses or deteriorations, would Art. 1038 apply?

ANS.: No, since the Article speaks only of three things: *accessions, fruits,* and *rents*. Therefore, the rules on possession must be applied, and when we do this, his *good* or *bad* faith must be considered. *(6 Manresa 75).*

Art. 1039. Capacity to succeed is governed by the law of the nation of the decedent. (n)

COMMENT:

(1) Capacity from Viewpoint of Private International Law

Note that capacity to inherit is *not* governed by the national law of the heirs, devisees, or legatees, but by the national law of the decedent. (This is true whether the succession be testate or intestate.)

(2) What the National Law of the Deceased Governs

Because of this Article read together with Art. 16, four things are governed by the national law of the decedent namely:

(a) order of succession
(b) amount of successional rights
(c) intrinsic validity of the provisions of the will
(d) capacity to succeed

Art. 1040. The action for a declaration of incapacity and for the recovery of the inheritance, devise or legacy shall be brought within five years from the time the disqualified person took possession thereof. It may be brought by any one who may have an interest in the succession. (762a)

COMMENT:

(1) Prescriptive Period for Declaration of Incapacity and for Recovery of the Inheritance

The action —

(a) for *declaration* of incapacity

(b) and for the recovery of the *inheritance* (devise or legacy) SHALL be *brought* WITHIN 5 YEARS from the time the DISQUALIFIED heir *took* POSSESSION thereof.

[NOTE: If one brings the action only for a declaration of *incapacity,* he cannot recover possession; the action must be for BOTH *declaration* and *recovery*. Of course, an action for recovery is sufficient for after all, there can be no recovery unless a declaration of incapacity is first made.*]*.

[NOTE: The action must include recovery of accessions, rentals, fruits.*]*.

[NOTE: If there be administration and settlement proceedings, the residue (after debts) will be distributed AFTER *due hearing* on the rights of the parties involved. *(Torres v. Javier, 34 Phil. 382)*. Of course, the judgment is conclusive only on those who had NOTICE of the proceedings. *(Quion v. Claridad, 74 Phil. 100).]*.

(2) Who Can Bring the Action

Anyone who may have an *interest* in the succession (that is, the person who would inherit in place of the incapacitated heir).

[NOTE: The judicial declaration of incapacity is *different* from the conviction required by *Art. 1032, Nos. 2, 3 and 5.]*.

Section 3

ACCEPTANCE AND REPUDIATION OF THE INHERITANCE

Art. 1041. The acceptance or repudiation of the inheritance is an act which is purely voluntary and free. (988)

COMMENT:

Voluntary and Free Acceptance and Repudiation

(a) Because acceptance and repudiation are free and voluntary acts, the presence of *vitiated consent* gives rise to their revocability.

(b) It is more usual to accept than to repudiate, therefore, while acceptance may be presumed, repudiation requires more formalities. *(See Arts. 1044, 1045, 1047).*

(c) There can be partial acceptance and partial repudiation, since the law does not prohibit this, Art. 990 of the old Civil Code having been eliminated.

(d) Even the legitime may be repudiated.

(e) Reason for allowing repudiation: No one can be compelled to accept the generosity of another.

(f) Acceptance or repudiation *cannot* be made during the lifetime of the testator or decedent, except insofar as collationable donations *inter vivos* and remissions are concerned.

(g) The rule enunciated in Art. 1041 also applies to *donations inter vivos* and to *remission of debts.*

Art. 1042. The effects of the acceptance or repudiation shall always retroact to the moment of the death of the decedent. (989)

COMMENT:

(1) Retroactive Effect of Acceptance and Repudiation

Purpose of the law — to prevent any stage where the property will be without an owner and possessor. *(See 7 Manresa 354).*

(2) Pure and Absolute Acceptance or Repudiation

Acceptance or repudiation must be pure and absolute, that is, there must be no term or condition otherwise the purpose

referred to in No. (1) may be frustrated, and there would be uncertainty as to whether the properties or rights are being transmitted or not.

Art. 1043. No person may accept or repudiate an inheritance unless he is certain of the death of the person from whom he is to inherit, and of his right to the inheritance. (991)

COMMENT:

(1) When Acceptance or Repudiation May Be Made

The acceptance or repudiation must be made in DUE TIME; therefore, the law requires two requisites before acceptance or repudiation is done:

(a) The heir must be CERTAIN of the *death* of the decedent. (Hence, the act must not be made during the decedent's, lifetime; however, *presumed* death for purposes of succession is enough, although of course in such case, there may be a RETURNING).

(b) The heir must be certain of his RIGHT to the inheritance. (Thus, acceptance by a legatee, when the will is void, is useless.)

(2) Presumptions of Death

(a) After an absence of seven years, it being unknown whether or not the absentee still lives, he shall be presumed dead for all purposes except for those of succession.

The absentee shall not be presumed dead for the purpose of opening his succession till after an absence of ten years. If he disappeared after the age of seventy-five years, an absence of five years shall be sufficient in order that his succession may be opened. *(Art. 390, Civil Code).*

(b) The following shall be presumed dead for all purposes, including the division of the estate among the heirs:

1) A person on board a vessel lost during a sea voyage, or an aeroplane which is missing, who has not been

heard of for four years since the loss of the vessel or aeroplane;

2) A person in the armed forces who has taken part in war, and has been missing for four years;

3) A person who has been in danger of death under other circumstances and his existence has not been known for four years. *(Art. 391, Civil Code).*

(3) Effect if Absentee Reappears

If the absentee appears, or without appearing his existence is proved, he shall recover his property in the condition in which it may be found, and the price of any property that may have been alienated or the property acquired therewith; but he cannot claim either fruits or rents. *(Art. 392, Civil Code).*

Art. 1044. Any person having the free disposal of his property may accept or repudiate an inheritance.

Any inheritance left to minors or incapacitated persons may be accepted by their parents or guardians. Parents or guardians may repudiate the inheritance left to their wards only by judicial authorization.

The right to accept an inheritance left to the poor shall belong to the persons designated by the testator to determine the beneficiaries and distribute the property, or in their default, to those mentioned in Article 1030. (992a)

COMMENT:

Who May Accept or Repudiate

(a) *Acceptance* — mere acceptance by those in charge (guardians, parents), in behalf of incapacitated person (one incapacitated to dispose of his property, such as an insane man) — SUFFICIENT. (Therefore, no judicial authorization is needed, UNLESS there be *burdens*.)

[NOTE: An insane person cannot of course accept all by himself, unless it be proved that he acted during a lucid interval.*]*.

(b) Repudiation (being an act of alienation) — COURT APPROVAL IS NEEDED.

Art. 1045. The lawful representatives of corporations, associations, institutions and entities qualified to acquire property may accept any inheritance left to the latter, but in order to repudiate it, the approval of the court shall be necessary. (993a)

COMMENT:

Rules for Juridical Entities

(a) *Acceptance* — does not need court approval. (*Reason:* A benefit is presumed). *(7 Manresa 387).*

(b) *Repudiation* — requires court approval. (*Reason:* Such approval may be demanded by public policy and interest because the act can result in loss of patrimony.)

Art. 1046. Public official establishments can neither accept nor repudiate an inheritance without the approval of the government. (994)

COMMENT:

Rules for Public Official Establishments

(a) Note that the rule for *acceptance* or *repudiation* is the same in this Article, namely, approval of the Government (proper Executive Head or Department Head) is required.

[NOTE: This approval by the government is NEEDED even when the bequest or gift is *not condi-tional.].*

(b) "Public official establishments" — those devoted to *public* purposes (like charity, education) and supported by public money. *(Examples:* University of the Philippines; Philippine National Red Cross*.) (See 7 Manresa 386).*

Art. 1047. A married woman of age may repudiate an inheritance without the consent of her husband. (995a)

COMMENT:

Repudiation by Married Woman of Age

(a) Under the old Civil Code, Art. 995, a married woman could not repudiate an inheritance without the consent of the husband. But in Art. 1047 of the new Civil Code, such consent is no longer required. *(Comment of the Code Commission).*

(b) Why is the married woman allowed to repudiate an inheritance without the consent of the husband?

ANS.: Because after all, if she gets the inheritance, it becomes her separate property.

Art. 1048. Deaf-mutes who can read and write may accept or repudiate the inheritance personally or through an agent. Should they not be able to read and write, the inheritance shall be accepted by their guardians. These guardians may repudiate the same with judicial approval. (996a)

COMMENT:

Rule For Deaf-Mutes

Observe that in acceptance, no judicial approval is required, unlike in the case of repudiation. This is so — to protect the ward's interest. If a deaf-mute who can read and write has no guardian, he may accept OR repudiate even without the necessity of judicial approval.

Art. 1049. Acceptance may be express or tacit.

An express acceptance must be made in a public or private document.

A tacit acceptance is one resulting from acts by which the intention to accept is necessarily implied, or which one would have no right to do except in the capacity of an heir.

Acts of mere preservation or provisional administration do not imply an acceptance of the inheritance if, through such acts, the title or capacity of an heir has not been assumed. (999a)

COMMENT:

Kinds of Acceptance

While *repudiation* can only be done expressly, acceptance may be:

(a) *express (Art. 1049)*

(b) *implied or tacit (Art. 1049)* — thru actions which one would have no right to do *except* in the capacity of an heir.

(c) *presumed (Art. 1067)* — if within 30 days after the court has *issued* an order for the distribution of the estate, the people concerned have *not* signified their acceptance or repudiation.

[NOTE: Acts of mere preservation (like harvesting fruits, collecting income, repairing houses) — do NOT necessarily imply an acceptance. But neither do they signify a repudiation.*]*.

Art. 1050. An inheritance is deemed accepted:

(1) If the heir sells, donates, or assigns his right to a stranger, or to his co-heirs, or to any of them;

(2) If the heir renounces the same, even through gratuitously, for the benefit of one or more of his co-heirs;

(3) If he renounces it for a price in favor of all his co-heirs indiscriminately; but if this renunciation should be gratuitous, and the co-heirs in whose favor it is made are those upon whom the portion renounced should devolve by virtue of accretion, the inheritance shall not be deemed as accepted. (1000)

COMMENT:

(1) Instances of Implied Acceptance

This Article enumerates some instances of implied acceptance. Acceptance is indeed implied because although the term *"acceptance"* may not be used, still when a person receives SOMETHING *else* for himself, or CONFERS AN EXTRA ADVANTAGE on others, he does so only because he is, in REALITY, DISPOSING off what he has already ACCEPTED.

(2) Par. 1 — Here the inheritance is deemed accepted because one is not supposed to dispose of what he does not own

(a) *Example: A* died, leaving *B* as the instituted heir. *B* sold his hereditary rights to *C*. This action of *B* is deemed to be an acceptance of the inheritance. It should be remembered that an heir becomes entitled to the inheritance not merely because he was named in the will but also because of his acceptance of the inheritance. If therefore, without expressly stating his acceptance thereof, he sells or disposes of said property, it is clear that he does so because he regards the inheritance as his very own. No clearer example can be given of an implied acceptance.

(b) *A Decided Case:* Crispulo Martinez owed a husband and the latter's wife P25,000. When Crispulo inherited certain properties, he "renounced" the same in favor of the couple in order that the debt might be extinguished. The word "renounce" used in the document, does not, under the terms of the document, constitute the repudiation of an inheritance. The entire document should be read as a whole. *(See Ignacio v. Martinez, 33 Phil. 576).*

(3) Par. 2 — Renouncing, whether gratuitously or for a consideration in favor of one or more of his co-heirs

Example: A instituted *B, C,* and *D* as his heirs. *B* renounced his share in favor of *C* gratuitously. *B* is deemed to have accepted the inheritance insofar as his share is concerned. This "repudiation" is really a disposition of property rights,

because he is giving *C* an *advantage* over the others. (Same principles applies even if the renouncing were to be in favor of a stranger).

(4) Par. 3 — Renouncing, whether gratuitously or for a consideration

(a) *A* instituted *B, C,* and *D* as his heirs. *B* renounced his share in favor of *C* and *D,* each of whom gave *B* P500,000. *B* is deemed to have accepted. This is really not renunciation at all for he received something in exchange for his share.

(b) According to Manresa, even if the law states "co-heirs" merely, whenever an heir renounces for a consideration in favor of the following, there is also implied acceptance:

1) persons called to the inheritance by virtue of intestacy

2) substitutes

3) persons called to the inheritance by virtue of the right of accretion. *(7 Manresa 411).*

Example: A instituted *B* and *C,* his friends, to his *(A's)* inheritance. *D* who is *A's* brother was completely left out. If for, say, P500,000, *B* renounces his share in favor of *D, B* is deemed to have accepted the inheritance.

(c) *A* instituted *B, C*, and *D* to his inheritance. The estate consisted of one house. *B* renounced his share in favor of *C* and *D*. This was made by *B* gratuitously. In this case, *B* is not deemed to have accepted the inheritance. The law says that "if the renunciation should be gratuitous, and the co-heirs in whose favor it is made are those upon whom the portion renounced should revolve by virtue of accretion, the inheritance shall not be deemed as accepted." *[Reason for the law:* This act of *B* is really an absolute repudiation because the effect of an absolute repudiation is really (in this case) to give *B's* share to *C* and *D*. Hence, this act of *B* should not be considered as an implied acceptance*.]. (7 Manresa 415).*

Art. 1051. The repudiation of an inheritance shall be made in a public or authentic instrument, or by petition presented to the court having jurisdiction over the testamentary or intestate proceedings. (1008)

COMMENT:

(1) Why Repudiation Must Be Made Expressly

Repudiation should always be EXPRESS because:

(a) It is an act of disposing of property rights.

(b) It is unnatural and resultantly disturbs juridical relations.

(c) Creditors of the renouncer should be more or less informed, hence, the need for an *express* renouncing.

(2) How Repudiation Is Made

(a) by a *public* instrument

(b) by an *authentic* (genuine, not forged) instrument

(c) by a petition to the court having jurisdiction over the testamentary or intestate proceedings but must be presented within 30 days from order of court for the distribution of the estate, otherwise, this is deemed to be an acceptance. *(See Art. 1067).*

[NOTE:

(a) One who repudiates is deemed never to have owned or possessed the inheritance *(Art. 533)* without prejudice to the rights of creditors. *(Art. 1052).*

(b) One is not allowed to repudiate legacies with burdens when he accepts gratuitous legacies. *(Arts. 954, 955).].*

Art. 1052. If the heir repudiates the inheritance to the prejudice of his own creditors, the latter may petition the court to authorize them to accept it in the name of the heir.

The acceptance shall benefit the creditors only to an extent sufficient to cover the amount of their credits. The

excess, should there be any, shall in no case pertain to the renouncer, but shall be adjudicated to the persons to whom, in accordance with the rules established in this Code, it may belong. (1001)

COMMENT:

(1) When Creditors May Accept

(a) While rights may be waived, still waiver cannot be allowed, if among other things, it is *prejudicial* to a *third person with a right recognized by law*.

(b) The creditors do *not* accept in their own name; they accept in the name of the heir (or devisee or legatee).

(c) The creditor cannot accept everything that has been repudiated, they can accept only to the extent they have been prejudiced.

(d) Even if the creditors accept everything that has been repudiated, the renouncing heir is *not considered* as having accepted — he is still a *renouncer,* and cannot therefore be represented.

(2) Rule If Creditors Will Not Be Prejudiced

The creditors will not be allowed to accept in the name of the heir if they have not been prejudiced, therefore:

(a) If the heir still has enough properties of his own to cover his debts, the creditors cannot avail themselves of Art. 1052. (In other words, the heir's own properties will *first* be liable). *(See 7 Manresa 432).*

(b) If the creditors became creditors ONLY AFTER the repudiation, they cannot be said to have been prejudiced by the repudiation, for they did not exist as such at the time of repudiation. (Therefore, the creditors in Art. 1052 are those already such at the time of repudiation). *(See 7 Manresa 431).*

*[NOTE: W*hile the law says *"creditors,"* if there be only *one creditor,* he can avail himself of Art. 1052. *(7 Manresa 430).*

Similarly, if there be several creditors, it is *not* essential that all of them avail themselves of Art. 1052. If only one wants to make use of the right, this is perfectly alright.*]*.

(3) Problems

(a) *T* instituted a friend *F* to an estate of P1 million. *T* has no compulsory heirs. *F* is indebted to *C* for P800,000. Although *F* is completely insolvent, he renounces the inheritance. *C* then petitions the court to accept the inheritance in *F's* name. Will he be allowed to do so?

ANS.: Yes, but only to the extent of P800,000. The remaining P200,000 will not go to *F* but will go to the persons entitled by law to the same. Thus, in the problem given, it will go to the intestate heirs. (If there be no relative within the 5th degree, the State will inherit same as the last intestate heir).

(b) *A* died, leaving an estate worth P1 million. In the will, *A* gave *B,* his friend, P200,000 and the rest to *C*, who is *A's* legitimate son. *A* did not give anything to *D,* his own legitimate brother. *C* repudiated his inheritance although he had no money and although he owed *X* P500,000. *X* was allowed to get this P500,000. The remaining P300,000 is claimed by *C, D* and *B*. Decide.

ANS.*:* The P300,000 will not go to the renouncer, *C,* but will go to *B,* the friend, by virtue of accretion. This is so, because by virtue of *C's* repudiation, there is no more legitime to speak of, and everything is FREE. Accretion excludes *D's* right to inherit by intestacy.

(c) *A* in his will gave P200,000 to *B*, and P200,000 to *C*. *B* and *C* are *A 's* legitimate sons. The estate is P400,000. *B* has a legitimate child *D*. *B* owes *X* P50,000 but *B* repudiated the inheritance although he was insolvent. *X* petitioned the court to authorize him *(X)* to accept the inheritance.

(1) Will *X* be allowed to do so?

(2) If there be any excess, who should get the same?

ANS.:

(1) Yes, *X* will be allowed to accept in *B's* name but only to the amount of P50,000 which is his credit.

(2) The remaining extra P150,000 will go to *C* (P100,000 in his own right by way of legitime and P50,000 by accretion). *Reason: D* cannot inherit *B's* legitime of P100,000 by representation for a renouncer cannot be represented. Neither can *D* inherit any part of the free portion left (P50,000) because a voluntary heir cannot be represented, and because same must go to *C* by accretion, *C* having been instituted also to the free portion.

Art. 1053. If the heir should die without having accepted or repudiated the inheritance his right shall be transmitted to his heirs. (1006)

COMMENT:

When Right to Accept or Repudiate is Transmitted to Heirs of the Heir

(a) *Example: A* dies leaving P100,000 to *B,* a friend, who has a legitimate child *C*. If *B* predeceases *A, B* acquires no right since he is a voluntary heir and therefore does not transmit the P100,000 to *C*. But, if *B* survives *A,* and later *B* dies without having accepted or repudiated the inheritance, the right to accept or repudiate is transmitted to *C*. Observe that the death of the heir should be after that of the decedent in order that Art. 1053 may be applied.

(b) In the above example, if *B* dies later than *A*, but *C* renounces his right to inherit from *B,* can *C* make use of Art. 1053?

ANS.: No, even if *B* was not able to accept or repudiate *A's* inheritance. This is evident because the transmission of said right to choose presupposes that the heirs of the original heir are willing to inherit from said original heir.

[NOTE: While it is true that although a renouncer who cannot be represented may still represent, still this principle has no application to the present problem — *first,* because the principle holds true in the case of PREDECEASE, not in the case of a SURVIVAL; *second,* because a *voluntary* heir can never be represented; and *third,* because there is *no real representation* involved in Art. 1053 (as the term representation technically signifies), because even if *C* accepted *B's* inheritance, and would exercise *B's* option, he would not really be inheriting from *A* but from *B* (who had survived *A*) thus, involving *not* a case of inheritance by right of representation but an inheritance in *his own right* — from *B.].*

Art. 1054. Should there be several heirs called to the inheritance, some of them may accept and the others may repudiate it. (1007a)

COMMENT:

(1) Rule if there are Several Heirs

Example: T died instituting 5 friends. Is it alright for the two of them to accept and for the other three to repudiate the inheritance?

ANS.: Yes, with respect to their individual shares.

(2) Problem

T died instituting *F,* a friend, as his only heir. The day after *T* died, *F* also died, leaving five children. *F* had not been able to signify either his acceptance or repudiation of *T's* inheritance. Is it permissible for two of the children to accept in his name, and for the other three to repudiate?

ANS.: Yes, with respect to their respective shares.

Art. 1055. If a person, who is called to the same inheritance as an heir by will and *ab intestato,* repudiates the inheritance in his capacity as a testamentary heir, he is understood to have repudiated it in both capacities.

Should he repudiate it as an intestate heir, without knowledge of his being a testamentary heir, he may still accept it in the latter capacity. (1009)

COMMENT:

(1) Repudiation as Testamentary Heir

(a) *Reason for par. 1:* A testamentary heir who repudiates does *not* seem to appreciate the generosity of the testator; therefore, he is not worthy to receive his intestate share. *(7 Manresa 469).*

(b) *Example of par. 1: T* instituted his only son to 3/4 of the estate. No other provision was made. The son repudiated his share as testamentary heir. The remaining 1/4 which should be dealt with as intestate is claimed by the son himself, and by the testator's brother — as intestate heirs. *Decide.*

ANS.: The brother gets said 1/4. *Reason*: While the son is the nearest intestate heir, his repudiation of the testamentary 3/4 renders him undeserving of the intestate share. For the same reason, the 3/4 should also be given to the brother.

[NOTE: The law says "he is *understood* to have repudiated it in both capacities." Does this mean that he is *automatically* disqualified from receiving the intestate share, or does this mean that he is *merely presumed* to have repudiated also the intestate share, without prejudice to his expressly reserving his right to the same?

ANS.: It is submitted that the answer is that he is automatically disqualified to get his intestate share; that is, he is NOT ALLOWED to repudiate the testamentary share and at the same time accept the intestate share. *(See 7 Manresa 468-469).* (This is then one form of IMPLIED repudiation {intestate} based however on an EXPRESS repudiation {testate}.)].

(2) Repudiation as Intestate Heir

(a) *Example of 2nd par.: A* died, leaving an estate worth P1 million. In his will, *A* gave *B*, his legitimate son, P700,000.

No disposition was made of the balance. If *B* repudiates the P300,000 which should accrue to him as the nearest intestate heir, without knowing that he had been also made testamentary heir in the amount of P700,000, he may still accept this portion in the character of testamentary heir.

(b) *Reason for the 2nd par.:* It is always possible that the heir may respect the express will of the testator and would not desire to see the wishes of the testator unfulfilled. *(7 Manresa 469).*

(3) Query

If he repudiates it as an intestate heir, KNOWING that he is also a testamentary heir, may the heir still accept in his capacity as testamentary heir?

ANS.: Despite the literal wording of the law, it is believed that the answer is YES, in view of the reason given in No. 2(b).

(4) Guide to the Memory

(a) Remember that a "will" is the express will of the testator while "succession by intestacy" is only the presumed will of the decedent.

(b) Now then, the disregarding of the express will should carry with it the disregarding of the presumed will, while the disregarding of the presumed will does not necessarily mean the disregarding of the express will.

Art. 1056. The acceptance or repudiation of an inheritance, once made, is irrevocable, and cannot be impugned, except when it was made through any of the causes that vitiate consent, or when an unknown will appears. (997)

COMMENT:

(1) Irrevocability of Acceptance or Repudiation

General Rule — Once an acceptance or repudiation is made, it is irrevocable. *Reason:* To prevent confusion and instability of rights.

(2) Exceptions

(a) When the acceptance or repudiation was made thru any of the causes that vitiate consent:

1) mistake (of substance or on the principal conditions)

2) violence

3) intimidation

4) undue influence

5) fraud. *(Art. 1330).*

(b) When an unknown will appears. *(Art. 1056).* Manresa makes a distinction here:

1) If the new will makes only insignificant changes in the old one, the appearance of the unknown will should not allow the impugning of the previous acceptance or repudiation made concerning the old one. This is so because the cause for impugning can not really be said to be present.

2) If the new will makes substantial changes, the old acceptance or repudiation may be impugned. *(7 Manresa 398).*

[NOTE: A threat to enforce one's claim through competent authority, if the claim is just or legal, does not vitiate consent. *(Art. 1335, last par.).]*.

[NOTE: If an heir instituted under a suspensive condition accepts, but the condition is *not* fulfilled, the acceptance is naturally VOID.*]*.

Art. 1057. Within thirty days after the court has issued an order for the distribution of the estate in accordance with the Rules of Court, the heirs, devisees and legatees shall signify to the court having jurisdiction whether they accept or repudiate the inheritance.

If they do not do so within that time, they are deemed to have accepted the inheritance. (n)

COMMENT:

(1) When Acceptance or Repudiation Must Be Signified to the Court

The old law did not expressly set the time within which the inheritance should be accepted or repudiated by the heirs. In lieu thereof, Arts. 1004 and 1005 of the old Civil Code mentioned the time within which an action should be brought against the heirs to compel them to accept or repudiate the inheritance. The provisions of Art. 1057 of the new Civil Code render the actions mentioned by the old Civil Code unnecessary and lead to an earlier distribution of the estate. *(Comment of the Code Commission).*

[NOTE:

(a) If there are no settlement or administration proceedings, it is obvious that this Article cannot apply.

(b) Even if there are settlement or administration proceedings, still this Article is not exclusive, that is there can be allowed the other forms of accepting or repudiating the inheritance. For example, the sale by an heir of his hereditary rights to a stranger is a form of implied acceptance. *(Art. 1050, par. 1).*

(c) Notice that Art. 1057 provides a way for tacit or implied acceptance. Hence, if there are administration or settlement proceedings, the heirs, etc., cannot repudiate the inheritance after the lapse of thirty days.*]*.

(2) Need for Judicial Approval

Guy v. CA
502 SCRA 151 (2006)

ISSUE: May parents and guardians repudiate the inheritance of their wards (and/or children)?

HELD: No, unless there is a judicial approval.

Section 4

EXECUTORS AND ADMINISTRATORS

Art. 1058. All matters relating to the appointment, powers and duties of executors and administrators and concerning the administration of estates of deceased persons shall be governed by the Rules of Court. (n)

COMMENT:

(1) Executors and Administrators

(a) See Rules 78-90, Rules of Court.

(b) The distinctions between an executor and an administrator with a will annexed *(cum testamento enexo),* have already been discussed.

(c) An executor of a will cannot officially act as such before his appointment is confirmed by the court. If he acts as one before said time, he is called *an executor de son tort* ("in his own wrong").

(d) One day before testator died, he designated his executor to take over and administer the property. All actions done in connection with the property by this executor *de son tort* must be properly accounted for him. *(See Lopez v. Lopez, 69 Phil. 395).* He may also be termed *executor de facto. (See Ibid.).*

(e) No executor or administrator must be appointed till there is proof of the decedent's death. *(Sy Hong v. Sy Lioc Suy, 10 Phil. 209).*

(2) Administrator Pendente Lite

(a) An administrator *pendente lite* or special administrator is one who is appointed in the meantime to take charge of the estate, where there is a *delay* in the appointment of the regular executor or administrator — a delay occasioned by certain causes such as an appeal from the allowance or disallowance of a will. *(See Rule 80, Sec. 1, Rules of Court).*

Ocampo v. Santos
O.G. Oct. 18, 1941, p. 3268

FACTS: Two girls claimed to be the widow of the decedent and as such desired to be appointed administrator. In the meantime, while this issue is being decided, what should be done?

HELD: A special administrator must be appointed.

(b) A special administrator is allowed to sell part of the property, upon approval by the court, but is NOT required or allowed to pay the debts of the deceased. *(De Gala v. Gonzales, 54 Phil. 104; Rule 80, Sec. 2, Rules of Court).*

(c) If however no objection had been raised in the trial court, an action to recover the debt can be had against the special administrator, provided the estate has not been prejudiced. The objection cannot indeed be raised for the first time on appeal. However, it is not the special administrator who is required to satisfy the judgment out of the estate but the regular administrator or executor. *(See Pacific Commercial Co. v. Sotto, 34 Phil. 237).*

(3) Other Kinds of Special Administrators

(a) One appointed even after there is already a regular executor or administrator, when the latter seeks to recover his own credit or claim against the estate. *(Rule 86, Sec. 8, Rules of Court).*

[NOTE: In such a case, the special administrator may be given *necessary funds* for purposes of defense. For this object, the court may order the regular administrator to give the funds out of the estate. *(See Sison v. Azcarraga, 30 Phil. 129).].*

(b) One known as an administrator *durante minore aetate* — one appointed when the person who has the right to become executor or administrator is *still a minor.* The appointment continues until the end of such minority. *(See Sec. 647, Act 190, Code of Civil Procedure).*

[NOTE: Such a person has all the rights of a regular executor or administrator.*].*

(4) Regular Administrator

In the appointment of a REGULAR administrator, the surviving spouse is given first preference. *(Rule 78, Sec. 6, Rules of Court; Johannes v. Harvey, 43 Phil. 175).*

[NOTE: Said surviving spouse must be:

(a) capable (*not* minors, *not* non-residents)

(b) not hostile to those interested in the estate. *(Arevalo v. Bustamante, 68 Phil. 656).*

(c) solvent (because a bond is needed)

(d) the legal spouse

[NOTE: Even if she marries again after having been appointed, her authority to act as administratrix continues. *(See Rule 78, Sec. 3, Rules of Court).].*

(5) Order of Preference for Appointment of Regular Administrator

If no person is named in the will or the executors are incompetent, refuse the trust, or fail to give bond, or a person dies intestate, administration shall be granted:

(a) To the SURVIVING HUSBAND or WIFE, as the case may be, or NEXT OF KIN or BOTH, in the discretion of the court, or to such *person* as such surviving husband or wife or next of kin, requests to have appointed, if competent and willing to serve;

(b) If such surviving husband or wife, as the case may be, or next of kin, or the person selected by them, be incompetent or unwilling, or if the husband or widow, or next of kin, neglects for *thirty (30)* days after the death (of the decedent) of the person to apply for administration or to request that administration be granted to some other person, it may be granted to one or more of the principal CREDITORS, if competent and willing to serve;

(c) If there is no such creditor competent and willing to serve, it may be granted to SUCH OTHER PERSON as the court may select. *(Rule 78, Sec. 6, Rules of Court).*

[NOTE: The order of preference set forth in the law may be disregarded by the probate court, provided no abuse of discretion has been made. *(Eslei v. Tad-y, 46 Phil. 854).].*

[NOTE: Joint or plural administrators may be appointed, particularly when the estate is large and there are different interests to be represented. *(Sison v. De Teodor, L-8039, Jan. 28, 1957).].*

[NOTE: Authority as administrator ends with:

(a) the closing of the settlement, testate or intestate proceedings. *(Cruz and Co. v. Montemayor, 63 Phil. 404).*

(b) death, resignation, or removal.*].*

(6) Principal Duty of Administrator

The administrator has the duty of *administering, settling,* and *closing* the administration without delay. *(Wilson v. Rear, 70 Phil. 251).* Of course, he should determine what properties must belong to the estate, and must bring the needed actions for their recovery if they be in the possession of others. Within three months after his appointment, he must submit an inventory and appraisal of the decedent's *real* and *personal property*. Within a year from his appointment, he must render proper accounting. *(See Rule 85, Sec. 8, Rules of Court).*

[NOTE: In a will, although a certain person is appointed expressly as an administrator or executor, still if the intent is to make him a *trustee,* the appointment should be construed as that of a *trustee*. *(Perez v. Caluag, GR 16182, April 13, 1955).].*

Estate of Amadeo Matute v. Judge Reyes
GR 29407, July 29, 1983

When the estate of a dead person is already the subject of testate or intestate proceedings, the administrator cannot enter into any transaction regarding the estate without the prior approval of the probate court.

(7) Generally, It Is the Executor or Administrator Who Is Primarily Liable for Attorney's Fees Due the Lawyer Who Rendered Legal Services for the Executor or Administrator

This is in relation to the settlement of the estate, and where the executor or administrator may seek reimbursement from the estate for the sums paid in attorney's fees if it can be shown that the services of the lawyer redounded to the benefit of the estate. *(Salonga Hernandez & Allado v. Pascual, 488 SCRA 449 [2006]).*

Salonga Hernandez & Allado v. Pascual
488 SCRA 449 (2006)

ISSUE: Whether or not it is proper for a court to mandate the Probate Court to treat the Motion for Writ of Immediate Execution as a petition seeking a court order to direct the payment of attorney's fees as expenses of administration, but subject to the condition that petitioner give due notice, to the devisees and legatees so designated in the will of the claim prior to the requisite hearing thereon.

HELD: Yes. This is inorder not to unduly protract the settlement of the subject estate.

(8) Query

Who is liable for attorney's fees due the lawyer rendering legal services in relation to estate settlement?

ANS.: As a general rule, it is the executor or administrator who is primarily liable for attorney's fees due the lawyer who rendered legal services for the executor *or* administrator in relation to the settlement of the estate and the executor or may seek reimbursement from the estate for the sum paid in attorney's fees if it can be shown that the services of the lawyer redounded to the benefit of the estate. *(Salonga Hernandez & Allado v. Pimentel, 488 SCRA 449 [2006]).* A claim for attorney's fees partakes of the nature of an administration expense, and the claim for reimbursement must be superior to the rights of the beneficiaries. *(Ibid.).*

In order not to unduly-protract the settlement of the subject estate, the Supreme Court held in the case at bar that it "deems it proper instead to mandate the Probate Court to treat the Motion for Writ of Immediate Execution as a petition seeking a court order to direct the payment of attorney's fees as expenses of administration, but subject to the condition that petitioner give due notice to the devisees and legatees so designated in the will of the claim prior to the requisite hearing thereon. The requisite notice to the heirs, devisees, and legatees about the claim for attorney's fees against the estate is anchored on the constitutional principle that no person shall be deprived of property without due process of law. Failure of the lawyer to give notice to the heirs, devisees, and legatees of his claim for attorney's fees renders the claim inefficaciousness. *(Ibid.)*.

Art. 1059. If the assets of the estate of a decedent which can be applied to the payment of debts are not sufficient for that purpose, the provisions of Articles 2239 to 2251 on Preference of Credits shall be observed, provided that the expenses referred to in Article 2244, No. 8, shall be those involved in the administration of the decedent's estate. (n)

COMMENT:

Insolvency of the Estate

(a) The rules on preference and concurrence of credits are to be applied in case of insolvency of the estate.

(b) Art. 2244 gives the ORDER OF PREFERENCE.

Pastor, Jr. v. Court of Appeals
GR 56340, June 24, 1983

The general rule is that a probate court cannot issue a writ of execution, because its orders usually refer to the adjudication of claims against the estate which the executor or administrator may satisfy without the need of resorting to a writ of execution. The probate court as such does not render any judgment enforceable by execution.

However, by way of exception, the probate court may issue writs of execution in the following instances:

(1) to satisfy debts of the estate out of the contributive shares of heirs, devisees and legatees in the possession of the decedent's estate;

(2) to enforce payment of the expenses of partition; and

(3) to satisfy the costs when a person is cited for examination proceedings.

[NOTE: A legacy or a devise is not a debt of the estate hence the same cannot be enforced by a writ of execution. *(Ibid.).].*

Art. 1060. A corporation or association authorized to conduct the business of a trust company in the Philippines may be appointed as an executor, administrator, guardian of an estate, or trustee, in like manner as an individual; but it shall not be appointed guardian of the person of a ward. (n)

COMMENT:

Juridical Entities Acting in a Fiduciary Capacity

Note that the juridical persons referred to can be appointed guardian of the PROPERTY, but *not* the *person* of a ward.

Section 5

COLLATION

Meanings of Collation

As used in the law of succession, collation has at least two meanings:

(a) First, it means "*computing* or *adding* certain values to the estate, and charging the same to the LEGITIME." *(See Arts. 1061, 1062, 1063, 1064).*

(b) Secondly, it means "*computing* or *adding* certain values to the estate, and charging the same to the FREE PORTION." *(See Arts. 1062, 1063).* Conversely, the phrase *"not collationable"* can mean:

1) First, it should be computed or added, but it should be charged to the *free portion* (and not to the legitime).

2) Secondly, it should NOT even be computed or added to the estate, for it is *not part* of the same. *(See Art. 1067).*

[NOTE: There can be collation both in *testamentary* and *legal* succession.*].*

Art. 1061. Every compulsory heir, who succeeds with other compulsory heirs, must bring into the mass of the estate any property or right which he may have received from the decedent, during the lifetime of the latter, by way of donation, or any other gratuitous title, in order that it may be computed in the determination of the legitime of each heir, and in the account of the partition. (1035a)

COMMENT:

(1) Collation by Compulsory Heirs

(a) This Article speaks of collation of the first kind — adding the values to the estate, and charging (or imputing) the same to the legitimes — the purpose being to produce EQUALITY as among the compulsory heirs of the same class.

(b) Equality is produced because every donation *inter vivos,* for example, given to a legitimate child is considered *generally* as an advance of his legitime or inheritance.

Example:

D has P1 million. He gave a donation *inter vivos* of P100,000 to *X,* his elder child. Later, he died intestate, leaving the remaining P900,000. How should this amount

be divided between *X, the elder child, and Y, the younger child?*

ANS.: The P100,000 is collationable, and therefore must be added to the remaining P900,000. The net hereditary estate is therefore P100,000 which should now be divided EQUALLY between *X* and *Y*, who should get P500,000 each. But since *X* has already received P100,000 as advance of his legitime or inheritance, he will get only P40,000 more. Thus, the P900,000 will be distributed as follows:

X	—	P400,000
Y	—	P500,000
		P900,000

Thus, also, a *net equality* is obtained. Moreover, not only is there equality in quantity but also in *quality*. Thus, if the P100,000 originally donated to *X* was in the form of a CAR, a car worth P100,000 must, if possible, also be given to *Y*. *X* and *Y* may receive the remaining P400,000 each in the form of cash should there be cash in the estate. *(See also Art. 1073,* which provides that "the donee's share of the estate shall be *reduced* by an amount equal to that already received by him, and his co-heirs shall receive an *equivalent, as much as possible,* in *property of the same nature, class and quality").*

Buhay De Roma v. CA, et al.
L-46903, July 23, 1987

The fact that a donation is irrevocable does not necessarily exempt the donated properties from collation as required under Art. 1061 of the Civil Code. Given the precise language of the deed of donation, the decedent-donor would have included an express prohibition to collate, if that had been the donor's intention.

Lucerna Vda. de Tupas v. Regional Trial Court
GR 65800, Oct. 3, 1986

An inofficious donation is collationable, *i.e.*, its value is imputable into the hereditary estate of the donor at

the time of his death for the purpose of determining the legitime of the forced or compulsory heirs and the freely disposable portion of the estate. This is true as well, as of donations to strangers as of gifts to compulsory heirs, although the language of Art. 1061 of the Civil Code would seem to limit collation to the latter class of donations.

Pagkatipunan v. IAC
GR 70722, July 3, 1991

Art. 1061 of the Civil Code provides: Every compulsory heir, who succeeds with other compulsory heirs, must bring into the mass of the estate any property or right which he may have received from the decedent, during the lifetime of the latter, by way of donation, or any other gratuitous title, in order that it may be computed in the determination of the legitime of each heir, and in the account of the partition.

Sanchez v. CA
87 SCAD 463
(1997)

The legal presumption of validity of the questioned deeds of absolute sale, being duly notarized public documents, has not been overcome. Upon the other hand, fraud is not presumed. It must be proved by clear and convincing evidence, and not by mere conjectures or speculations. We stress that these deeds of sale did not involve gratuitous transfers of future inheritance; these were contracts of sale perfected by the decedents during their lifetime. Hence, the properties conveyed thereby are not collationable because, essential, collation mandated under Article 1061 of the Civil Code contemplates properties conveyed *inter vivos* by the decedent to an heir by way of donation or other gratuitous title.

Zaragoza v. CA and Morgan
GR 106401, Sep. 29, 2000

FACTS: The father, during his lifetime, partitioned his properties to his children — Gloria, Zacariaz, and

Florentino — all surnamed Zaragoza, by way of deeds of absolute sale except that in respect to daughter Alberta because of her marriage, she became an American citizen and was prohibited to acquire lands in the Philippines, except by hereditary succession. After the father died without a will, Alberta sued Florentino for the delivery of her inheritance consisting of Lots 871 and 943. In his answer to the complaint, the latter claimed that Lot 871 is still registered in their father's name while Lot 943 was sold to him for a valuable consideration.

The Court of Appeals, which affirmed the decision of the Court of First Instance (now Regional Trial Court), gave weight to the testimonial and documentary evidence presented by Alberta to support its findings that Lots 871 and 943 were her inheritance. It noted the admission of Florentino in his letter in 1981 to Alberta that their father had given them their inheritance. It likewise found that the alleged sale of Lot 943 was fictitious and void. *Issue:* Was the partition done during the lifetime of the father valid?

HELD: Yes. It is valid for as long as it is done without impairing the legitime of compulsory heirs. Such legitime is determined after collation by compulsory heirs of what they received during the lifetime of the deceased by way of donation or any other gratuitous title. *(Art. 1061).*

In the case at bar, however, collation could not be done because the other compulsory heirs were not impleaded in the case. So the Supreme Court dismissed the case without prejudice to the institution of a new proceeding where all the indispensable parties are present for the rightful determination of their respective legitime and if the partitioning *inter vivos* prejudiced the legitimes. For partition *inter vivos* simply means the division of the estate during the lifetime of the owner. It is valid as long as it does not prejudice the legitimes of compulsory heir.

(c) Since the purpose of collation is to preserve the legitime, and to maintain equality among the compulsory heirs (as a rule), it follows that there is *no necessity for collation*

if there are no compulsory heirs. (Udarbe v. Jurado, 59 Phil. 11).

(d) It does not follow, however, that only compulsory heirs must collate. As long as there are compulsory heirs, donations to *them* as well as to *strangers* must be collated:

1) those donated to compulsory heirs must be imputed to their legitime;

2) those donated to strangers must be imputed to the *free portion*. (For if their values are not to be added, how can we know if the legitimes have been impaired or not?).

(2) Reference to Compulsory Heirs

(a) Note that Art. 1061 and the succeeding articles refer only to compulsory heirs. This is because the aim of this chapter is to consider donations, etc., as advances of the legitime.

(b) Art. 1061 speaks of "every compulsory heir." Is the surviving spouse included here?

ANS.: While it is true that the surviving spouse is a compulsory heir, still she is not included here because in general, donations to her during the marriage are null and void. *(Art. 133).* Therefore, ownership over said donated property still pertains to the donor (or his estate). On the other hand, moderate donations like birthday or anniversary gifts are not to be computed at all in determining the value of the estate.

(c) Donations given to *future* spouses (by the other) are considered donations to strangers, for at said time, one is not yet the compulsory heir of the other.

(3) 'Collation in Value' Distinguished from 'Collation in Kind'

The law says "must bring into the mass of the estate." Does this necessarily mean that the thing itself which was donated must be returned or collated?

ANS.: No, not necessarily. For collation is of two kinds: (a) collation in VALUE, and (b) collation in KIND. (The latter usually occurs when the donee has for example no money with which to reimburse in case the donation turns out to be totally inofficious.).

[NOTE: Collation in KIND is not, properly speaking, a "Collation" (numerical computation). It is really a RETURNING in KIND in case the donation has to be totally *reduced* or *revoked* because it is COMPLETELY INOFFICIOUS and the donee either has no money or does not desire to reimburse in money.*].*

[NOTE: The same thing donated are not to be brought to collation and partition, but only their value at the time of the donation, even though their just value may not then have been assessed.

Their subsequent increase or deterioration and even their total loss or destruction, be it accidental or culpable, shall be for the benefit or account and risk of the donee. *(Art. 1071, Civil Code).].*

Natividad P. Nazareno, et al. v. CA, et al.
GR 138842, Oct. 18, 2000

In the presence of an implied trust involving the lots in question, collation is said to exist. This is so in the case of an innocent purchaser for value which relied on the petitioner's title.

The rule is settled that "every person dealing with registered land may safely rely on the correctness of the certificate of title issued therefor and the law will in no way oblige him to go behind the certificate to determine the condition of the property." *(Cruz v. CA, 281 SCRA 491 [1997]).*

(4) Two Kinds of Donations

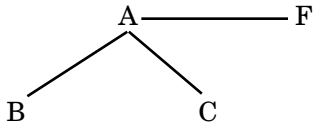
The law says that what must be collated are those received "by way of DONATION, or any other GRATUITOUS TITLE." We can, therefore, distinguish two kinds of donations:

(a) the direct or ordinary donation

(b) the indirect donation (*Examples:* debt which has been remitted; renunciation of another inheritance by the deceased in favor of the compulsory heirs; sums paid by a parent in satisfaction of the debts of his children; election expenses, fines.) *(See Art. 1069).*

[NOTE: Proceeds in a life insurance policy are not collatable since for the purpose of collation, they are not considered donations. The same is true in the case of a *mutual benefits* contract, which makes as *beneficiary,* a *compulsory heir* — on the theory that any proceeds from such a contract (as in the case of insurance), belong exclusively to the beneficiary. *(Southern Luzon Employees Assn. v. Gulpeo, et al., L-6114, Oct. 30, 1954).].*

(5) Problem



B and *C* are *A's* legitimate children. During *A's* lifetime, he gave *B* the sum of P100,000. In his will, *A* distributed his remaining estate of P900,000 as follows: *B* was given P150,000; *C* was given P250,000; and *F,* a friend, was given P500,000. When *A* died, *B* complained, stating that he had not been given his right legitime. Is *B* right?

ANS.: B should not complain. Since the P100,000 is collationable, the net hereditary estate is P1 million (P900,000 plus P100,000). *B's* legitime is therefore P250,000. Inasmuch as he had previously been given P100,000 he should be satisfied with the P150,000 he would inherit by virtue of the will, since all in all, he would be getting P250,000.

(6) Where Disputes Concerning Collation Are Settled

The provisions of the Civil Code with reference to collation clearly contemplate that disputes between heirs with respect to the obligation to collate may be determined in the course

of the administration proceedings. *(Guinguing v. Abuton and Abuton, 48 Phil. 144).*

Art. 1062. Collation shall not take place among compulsory heirs if the donor should have so expressly provided, or if the donee should repudiate the inheritance, unless the donation should be reduced as inofficious. (1036)

COMMENT:

When Compulsory Heirs Will Not Collate

Donations *inter vivos* to compulsory heirs are not to be collated (still computed, but not charged to the legitime) in two cases. In said two cases, the donation shall be charged to the *free portion:*

(a) First, if the donor expressly provides. (*Purpose:* So that preference, not *equality,* is obtained; that is, the donor does not want the donation charged to the legitime — because he wants to give the donee the property in ADDITION to the latter's legitime.).

Example:

D has two sons, *A* and *B*. He gave *A* a donation of P100,000 and expressly stated in the deed of donation that the same was NOT collationable. If *D* dies intestate leaving P900,000 how should the same be divided?

ANS.: Equally, that is, *A* and *B* will each get P450,000. Thus, *A* receives a total of P550,000 (because of the donation), or a *preference* of P100,000.

[NOTE: If the donor had not said "no collation," equality was clearly being desired, so *A* would have received only P400,000 (which added to the P100,000 would give him a share of P500,000 — *equal* to that of *B*).*]*.

[NOTE: A "preference" is allowed unless the legitime of the others would be impaired.*]*.

Example:

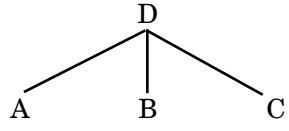
D has two sons, *A* and *B*. He gave *A* a donation of P800,000 and expressly stated in the deed of donation that the amount "should not be collated." If at *D's* death without a will, his estate is worth P200,000, how much would be the share of each?

ANS.: B will get the whole P200,000 plus P50,000 more to be taken from the donation to *A*. While it is true that according to the deed of donation, the same should not be collated, still we must add its value to find out if the legitime has been impaired or not. Since the net hereditary estate is therefore P1 million, *B's legitime* is P250,000.

(b) Secondly, the donation should be charged not to the legitime but to the free portion if the donee should REPUDIATE the inheritance. *(Art. 1062).*

[NOTE: The reason here is clear; he waives his legitime, his right as a compulsory heir; therefore, he ceases to be one. For all legal purposes, he is a stranger to the inheritance. But, of course, if such donation impairs the legitime of the accepting compulsory heirs — said donation must be reduced.*]*.

Example:



(repud.)

D has three legitimate children *A, B,* and *C*. *D* donated to *A* P600,000. When *D* died intestate, the remaining estate was P300,000.

(a) If all the children including *A* will accept, should the donation to *A* be reduced? Why?

(b) If *B* and *C* accept, but *A* repudiates, should the donation to *A* be reduced? Why? If so, by how much?

ANS.:

(a) Since all accepted, including *A,* the donation to him will not be reduced. *Reason:* The total estate would be P900,000, and there being THREE children, the legitime of each is P150,000. Since this is what *B* and *C* can each get from the remaining P300,000, their legitimes have *not* been impaired.

(b) If *B* and *C* accept but *A* repudiates, there will be only TWO compulsory heirs. The total estate would still be P900,000 and *B* and *C* are entitled to a combined legitime of P450,000. Inasmuch as the free portion is only P450,000, it follows that the donation to *A* will be reduced by P150,000.

[NOTE here that although the law says "collation shall *not* take place ... if the donee should repudiate the inheritance," the donation must still be computed to find out what the legitime is, and if found inofficious, it must be reduced.*]*.

Art. 1063. Property left by will is not deemed subject to collation, if the testator has not otherwise provided, but the legitime shall in any case remain unimpaired. (1037)

COMMENT:

(1) Testamentary Dispositions Generally Will Not Be Collated

(a) This Article's use of the term *"collation"* is rather misleading because there is nothing to be brought back to the estate inasmuch as it has not yet been given away.

(b) *"Not subject to collation"* here means merely that the legacy or devise given should be imputed to the free portion, and not the legitime. The testator can of course provide otherwise.

(2) Example

T has two legitimate children, *A* and *B*. *T* made a will, giving *A* a legacy of P100,000. There was no other provision to the will. The estate was P1 million. Inasmuch as P100,000 has been disposed of as a legacy, how will the remaining P900,000 be divided?

ANS.: The P900,000 will be divided equally between A and *B*, and each will therefore get P450,000. The P100,000 given as legacy to *A* is NOT considered an advance of his legitime, but as an advance of the free portion. It is clear that by giving *A* the legacy, the testator intended to give him a *preference*.

[NOTE: Had it been a donation, no preference would have been intended and the remainder would have been divided as follows: P400,000 for *A*, and P500,000 for *B*, since in the case of donations, the law presumes EQUALITY to be the desire of the testator.*]*.

[NOTE: It is true that —

(a) Regarding *dispositions inter vivos* (donations), the general rule is EQUALITY and the exception is PREFERENCE. *(Art. 1062)*.

(b) Regarding dispositions *mortis causa* (legacies, etc.), the GENERAL rule is PREFERENCE and the exception is EQUALITY. *(Art. 1063).]*.

(3) Problems

(a) *T* has two legitimate children, *A* and *B*. *T* made a will giving *A* a legacy of P800,000. The total estate was however P1 million. If no other provision is found in the will, how will the P200,000 be divided?

ANS.: The P200,000 will go to *B*. However, the legacy will be reduced by P50,000 and this amount will also go to *B*, otherwise his legitime (P250,000) would be impaired.

(b) *T* has two legitimate children, *A* and *B*. *T* originally had P1 million but he gave to *A* a donation of P100,000 and to *B* a legacy (in a will) of P100,000. If the will contains no other

provision, how will the remaining P800,000 be divided? Why?

ANS.:

	P800,000	(remainder)
PLUS	P100,000	(Collationable donation)
	P900,000	

P900,000 divided by 2 = P450,000

(theoretical share of each)

1) *A* is scheduled to receive P450,000 but since he has been given an advance of P100,000, he will now get only P350,000.

2) *B* will get P450,000, the legacy not being considered an advance of his legitime.

Resume:

A	=	P350,000
B	=	P450,000
		P800,000

[NOTE: Out of the whole P1 million, *A* got P450,000 (P100,000 as donation, P350,000 as intestate heir.)*.]*

[NOTE ALSO that *B* received P100,000 more than *A* because of the "preference" that resulted from his having been given a legacy*.]*.

(*NOTE FURTHERMORE* that the above solution is in accordance with the rules on partial intestacy because the legacy was imputed to the free portion, and was equally borne by the intestate shares of *A* and *B*, to wit:

Estate	=	P 1 million
Intestate share of each	=	P 500,000
But legacy	=	P 100,000
Therefore intestate share of each	=	P 450,000.).

[NOTE: The legacy was borne by both intestate shares because both were greater than their legitimes.*]*.

(4) When Article Will Not Apply

In a case of a distribution and partition of the *entire estate* by the testatrix *without* her having made any previous donations during her lifetime which would require collation to determine the legitime of each heir, there is no reason to apply Arts. 1061, 1062, and 1063. If only *part* of the estate had been given by will, this would be different, for here, Art. 1063 may apply. *(Marina Dizon-Rivera v. Estela Dizon, L-24561, June 30, 1970).*

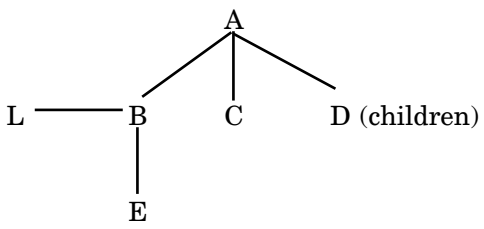
Art. 1064. When grandchildren, who survive with their uncles, aunts, or cousins, inherit from their grandparents in representation of their father or mother, they shall bring to collation all that their parents, if alive, would have been obliged to bring, even though such grandchildren have not inherited the property.

They shall also bring to collation all that they may have received from the decedent during his lifetime, unless the testator has provided otherwise, in which case his wishes must be respected, if the legitime of the co-heirs is not prejudiced. (1038)

COMMENT:

(1) Collation by Grandchildren

(a) *Example of 1st par.:*



During *A's* lifetime, *A* gave *B* a house. That house was later on donated by *B* to *L,* a friend. If *B* predeceases *A,* then *E* will represent *B,* and together with *C* and *D* will inherit from *A*. *E* will be obliged to collate the value of the house, even if *E* himself has not inherited said property. This is so because, had *B* been alive, he would have been obliged to bring to collation the value of said house. Since *E* merely takes his *(B's)* place, it naturally follows that collation by him *(E)* is in order.

(b) *Example of 2nd par.:*

In the example given in (a), if *A* had given *E* a house during *A's* lifetime, the value of said house should also be collated (considered an advance of his inheritance) unless of course the testator has provided otherwise. However, even if there is such a contrary provision, the legitime of the co-heirs must not be prejudiced. Hence, even if the testator has stated that the house should not be considered as an advance of the legitime of *E* (meaning that aside from the legitime, *E* would get also the house), still this will not be the case if by such means, the legitime of the co-heirs is impaired.

(2) Additional Remarks About Paragraph One

(a) Par. 1 gives an exception to the rule that only donees should collate.

(b) Par. 1 applies only when the grandchild inherits by right of representation, not when he inherits in his own right, for here the reason for the law would cease.

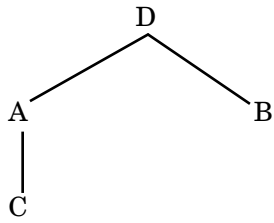
(c) Par. 1 although applying apparently only in the case of predecease, applies ALSO and for the same reason in both *incapacity* and *disinheritance.*

Art. 1065. Parents are not obliged to bring to collation in the inheritance of their ascendants any property which may have been donated by the latter to their children. (1039)

COMMENT:

(1) Donations to Grandchildren

Example:



D has two legitimate children, *A* and *B*. *A* has a child *C*. *D* donated to *C* P100,000. *D* dies intestate leaving an estate of P900,000. Divide.

ANS.: *A* and *B* will each inherit P450,000. *A* is not required to collate what his child *C* had received by way of donation.

(2) Reason For The Law

A should not collate for he himself had not received the donation.

(3) Question

In the example given in No. (1), does *C* have to collate?

ANS.: If by collation we mean that the value must be computed to find out if the legitime has been impaired or not, the answer is YES. But if we mean that it will be computed to *C's* legitime, the answer is NO, because in the case presented, *C* is not a compulsory heir of *D,* and is therefore not entitled to a legitime for he is excluded by his father *A*.

Art. 1066. Neither shall donations to the spouse of the child be brought to collation; but if they have been given by the parent to the spouses jointly, the child shall be obliged to bring to collation one-half of the thing donated. (1040)

COMMENT:

Donations to Spouse of Child

(a) The donee is not a compulsory heir of the parents-in-law. Since the donations were not given to the child himself, he should not be obliged to collate what he did not receive. *(7 Manresa 618).*

(b) "Non-collation" in this Article does not mean that the value should not be computed. It only means that although the value of the donation should be computed (since all donations to strangers are also computed or "collated"), its value should not be considered as an advance of the legitime of the child himself.

(c) The exception is self-explanatory. The half share given to the child should be considered an advance of his legitime.

[NOTE: All donations, whether given to strangers (the spouse of the child being in the category) or to compulsory heirs, should always be reduced if found inofficious. The basic restriction is imposed by the law itself. "No person may give or receive, by way of donation, more than he may give or receive by will. The donation shall be inofficious in all that it may exceed this limitation." *(Art. 762).* "Donations made to strangers shall be charged to that part of the estate of which the testator could have disposed by his last will." *(Art. 909, par. 2).].*

Art. 1067. Expenses for support, education, medical attendance, even in extraordinary illness, apprenticeship, ordinary equipment, or customary gifts are not subject to collation. (1041)

COMMENT:

(1) Expenses for Support

"Not subject to collation" — their values are not added to the hereditary estate; they are not considered as advances of the inheritance, whether as part of the legitime or part of the free portion.

(2) Reasons For The Law

(a) These expenses are not considered donations; their cause is not generosity, but moral, social and legal obligations.

(b) The almost physical impossibility of computing the value of these things, like the customary gifts. *(7 Manresa 626).*

Example:

Because *A* required medical attendance for 2 years on account of psychoneurosis, his parents spent P50,000 for him. Is this subject to collation? No.

(3) Meaning of Education

"Education" here means only "up to high school." College education, it would seem, is included within the scope of the next article. *(Art. 1068).*

[NOTE: However, in Art. 290, both kinds of education are included in the category of "support." If said criterion were to be followed for the subject of collation, there would be no necessity for Art. 1069. Therefore, to give effect to Art. 1069, the distinction made hereinabove must be made.*]*.

(4) Support After Death

Support after death, namely, allowances during the liquidation of the estate, are not embraced under Art. 1067. Said allowances are advances of the inheritance. *(See Lesaca v. Lesaca, L-3605, Apr. 21, 1952).*

Art. 1068. Expenses incurred by the parents in giving their children a professional, vocational or other career shall not be brought to collation unless the parents so provide, or unless they impair the legitime; but when their collation is required, the sum which the child would have spent if he had lived in the house and company of his parents shall be deducted therefrom. (1042a)

COMMENT:

(1) Expenses For a Career

(a) As already stated in the comments under the preceding Article, this present one deals with education after high school, and may even include graduate courses in the Philippines and abroad, but *not after* the course is finished (as when a father buys an hacienda for his son who has graduated with a degree in agriculture). *(See 7 Manresa 621).* The hacienda is a real donation, chargeable to the legitime.

(b) The expenses in Art. 1068 will not be considered as an advance of the legitime but as an advance of the free portion.

(c) However, if the parents so provide, said expenses will be considered as an advance of the legitime.

(d) In no case should the legitime be impaired.

(2) Expenses At Home

Expenses which would have been incurred had the child stayed home with the parents should be deducted. *Reason:* His parents would have spent anyway said amount for his support. *(7 Manresa 630).* Thus, in one case, it was held that from the expenses incurred for a course in surveying, should be deducted the half which anyway would have been used to support the student concerned at home. *(Adan v. Casili and Adan, 76 Phil. 279).*

Art. 1069. Any sums paid by a parent in satisfaction of the debts of his children, election expenses, fines, and similar expenses shall be brought to collation. (1043a)

COMMENT:

(1) Other Sums Which Should Be Collated

(a) To enable his son to win an election, a father spent P100,000. This is collationable (chargeable to the legitime) because the expenses are considered donation. This

practice of certain parents often work to the disadvantage of the other children whose legitimes may be thus impaired.

(b) *Meaning of "debt"* — The debt must be valid and enforceable, otherwise the son is not benefited in any way. *(7 Manresa 635).*

(2) Problems

(a) *A* has a legitimate son *B*. To obtain a loan from a bank, *B* had to have *A* act as his *(B's)* guarantor. When *B* could not pay, *A* had to pay for him. Is the amount used collationable? Manresa answers this in the negative because in such a case, the son would be not a donee of the father's generosity, but a debtor obliged to pay his father. Note that in this case, the father was himself bound to pay because he had consented to be a guarantor. Upon the other hand, had the father paid of his own accord (and not because he was a guarantor), the sum paid in satisfaction of this debt would clearly be collationable. *(7 Manresa 635).*

(b) Because a father acted as guarantor for the son, he paid P100,000. The son is therefore a debtor, not a donee of the father. *(See [a].).* Later, when the father died, the son repudiated the inheritance. Is he still bound to pay the P10,000 to the estate?

ANS.: Yes. *(7 Manresa 636).*

(c) Because a father pitied his son who had borrowed money he could not pay, the father paid P100,000. This amount is ordinarily collationable. *(Art. 1069).* When the father died, the son repudiated the inheritance. In this case, does the son have to pay the estate?

ANS.: No, because he is not a debtor. But of course, the amount used should be reduced, that is, the estate may recover from the son insofar as the legitimes of the other compulsory heirs have been impaired. *(See Art. 1062; 7 Manresa 636).*

Art. 1070. Wedding gifts by parents and ascendants consisting of jewelry, clothing, and outfit, shall not be reduced as inofficious except insofar as they may exceed one-tenth of the sum which is disposable by will. (1044)

COMMENT:

(1) Wedding Gifts

The wedding gifts here, although really donations, are not chargeable to the legitime in view of the sentimental importance of a wedding. Nevertheless, they may be reduced if they exceed (for each child) one-tenth of the free disposal. This is to prevent abuse and extravagance.

Example:

A had 2 legitimate children *B* and *C*. When the 2 children married, *A* gave a P10,000 pin to *B,* and a P20,000 "trousseau" to *C,* as wedding gifts. *A* left an estate worth P190,000. Should the gifts be reduced?

ANS.:	The estate is	P190,000;
	B's gift is	P10,000;
	C's gift is	P20,000;
	Total is	P220,000
Hence free portion =		P110,000

Therefore:

a) *B's* gift should not be reduced because it does not exceed 1/10 of the free portion.

b) *C's* gift should be reduced since it exceeds 1/10 of the free portion. The free portion is P110,000 and 1/10 thereof is P11,000. Therefore, *C's* gift should be reduced by P9,000. This P9,000 should be chargeable against *C's* legitime because the law consider it as an advance thereof. *(7 Manresa 639).*

NOTE: In the preceding example, how should the remaining P190,000 be divided if the father died intestate?

ANS.:

	P190,000
plus	9,000
	P199,000

Therefore, the theoretical intestate share of each is P99,500. *B* will get this amount. But *C* will get only P99,500 minus P9,000 or P90,500.

Thus:	*B* gets	P99,500
	C gets	P90,500
		P190,000

(2) Gifts in Cash or Money

Notice that the wedding gifts must, by express provisions, consist of "jewelry" or "clothing" or "outfit."

Query: How about CASH or MONEY or REAL PROPERTY?

ANS.: It is submitted that by analogy, cash or money or real property, may be included within the scope of the Article, for what afterall is the difference? The contrary view, however, is given by Justices J.B.L. Reyes and Ricardo C. Puno. *(See Reyes and Puno, Outline of Phil. Civil Law, Vol. III, p. 207).*

Art. 1071. The same things donated are not to be brought to collation and partition, but only their value at the time of the donation, even though their just value may not then have been assessed.

Their subsequent increase or deterioration and even their total loss or destruction, be it accidental or culpable, shall be for the benefit or account and risk of the donee. (1045a)

COMMENT:

(1) Collation of the Value

(a) Note that only the value should be collated. *(Guerrero v. De la Cuesta, 59 Phil. 464).*

(b) This is the value at the time of the perfection of the donation. *Reason:* It is this that really had been given gratuitously.

(c) *Reason for par. 2* — The owner, being the donee, bears the loss. Hence, even if the thing given has been lost by a fortuitous event, the donee must still collate its value.

(2) What Value Controls

In one case, somebody contended that where a certain value is stated in the deed of donation, that value cannot be questioned when the properties are brought into collation. This is not correct. The recital in the deed can not be controlling. The actual value at the time of the donation is a question of fact which must be established by proof, the same as any other fact. *(Tordilla v. Tordilla, 60 Phil. 162).* The value stated in the deed should of course not be controlling, inasmuch as an *increased* valuation of the properties may have been prompted by the vanity of the donor; just as a *decreased* valuation may have been due to humility, or a desire to pay lower taxes. *(7 Manresa 643-644).*

Art. 1072. In the collation of a donation made by both parents, one-half shall be brought to the inheritance of the father, and the other half, to that of the mother. That given by one alone shall be brought to collation in his or her inheritance. (1046a)

COMMENT:

Donation by Both Parents

A was legally married to *B*. They had a legitimate child *C*. Both parents agreed to give *C* a house during their lifetime. Later A died. When *C* participates in the inheritance of *A*, how much should be collated by him? Only half the value of the house. *(Art. 1072).*

[NOTE: Whereas Art. 1066 refers to donations given to spouses, Art. 1072 refers to donations given by spouses (the parents spoken of).*]*.

Art. 1073. The donee's share of the estate shall be reduced by an amount equal to that already received by him; and his co-heirs shall receive an equivalent, as much as possible, in property of the same nature, class and quality. (1047)

COMMENT:

Reduction of Donee's Share in the Estate

A has 2 children *B* and *C*. *B* had been given a donation of an old car worth P100,000 during *A's* lifetime. When *A* died, he left an estate worth P900,000. Since *B* is supposed to receive a total of P500,000 he will be given only P400,000. (He has already received P100,000 by way of donation). *C* in turn should be given, if possible, a car in the estate worth P100,000 and cash worth P400,000. If the car cannot be given, as when the estate had only one car, Art. 1074 should be applied.

[NOTE: Notice that the law ordains not only equality in value but also in kind, nature, class, and quality, if this can be done. *(7 Manresa 651).].*

Art. 1074. Should the provisions of the preceding article be impracticable, if the property donated was immovable, the co-heirs shall be entitled to receive its equivalent in cash or securities, at the rate of quotation; and should there be neither cash nor marketable securities in the estate, so much of the other property as may be necessary shall be sold at public auction.

If the property donated was movable, the co-heirs shall only have a right to select an equivalent of other personal property of the inheritance at its just price. (1048)

COMMENT:

(1) Additional Ways of Equalization

In the process of equalization, more rights are given to the co-heirs who did not receive donations, if the donations were of REAL PROPERTY.

(2) Rights (if REAL property)

(a) get property of same kind

(b) if none, get cash or securities

(c) if none, sell property to get cash

(3) Rights (if PERSONAL property)

(a) get property of same kind

(b) if none, get equivalent (in value) personal property (no right to demand CASH or to demand a SALE to get cash)

Art. 1075. The fruits and interest of the property subject to collation shall not pertain to the estate except from the day on which the succession is opened.

For the purpose of ascertaining their amount, the fruits and interest of the property of the estate of the same kind and quality as that subject to collation shall be made the standard of assessment. (1049)

COMMENT:

(1) Fruits and Interest of Collatable Properties

D has two legitimate sons *A* and *B*. *A* had formerly been given a donation of land as an advance of the inheritance. Prior to *D's* death, full ownership over the land and its fruits belong to *A*, but from the moment *D* dies, all the fruits thereof up to the moment distribution is made, belong to the estate (should be added in the computation of the net hereditary estate). Thus, all will participate in said fruits.

(2) Reason for the Law

This is just because it cannot be denied that the land is really part of the inheritance (an ADVANCE thereof). Remember, too, the provisions of *Art. 781*.

"The inheritance of a person includes not only the property and the transmissible rights and obligations existing at the

time of his death, but also those which have accrued thereto since the opening of the succession." *(Art. 781, Civil Code).*

[NOTE: The donee is not deprived of the possession of the land. *(Guinguing v. Abuton and Abuton, 48 Phil. 144).].*

Art. 1076. The co-heirs are bound to reimburse to the donee the necessary expenses which he has incurred for the preservation of the property donated to him, though they may not have augmented its value.

The donee who collates in kind an immovable, which has been given to him, must be reimbursed by his co-heirs for the improvements which have increased the value of the property, and which exist at the time the partition is effected.

As to works made on the estate for the mere pleasure of the donee, no reimbursement is due him for them; he has, however, the right to remove them, if he can do so without injuring the estate. (n)

COMMENT:

(1) Rules for Returning in Kind

(a) Although this Article speaks of collation "in kind," this is strictly speaking not collation, but a RETURNING in KIND.

(b) This happens when:

1) the donation is *totally* reduced because it is completely inofficious.

2) AND the donee either has no money or does not desire to reimburse in money.

(2) Comment of Justice J.B.L. Reyes

"The provisions of Art. 1076 could be applied only to the case of a donation that becomes revoked as *inofficious in its totality* under the rules of Art. 912; it is only then that the very same thing donated must be returned. But that is *not collation.*

Art. 1076 in its present form should be placed with the other articles treating of the reduction of donations, in the chapter of legitimes." *(Lawyer's Journal, Dec. 31, 1950, p. 618).*

[NOTE: There are instances when the property itself cannot be returned, as when it is now in the possession and ownership of a third person in good faith.*].*

(3) Comment of the Code Commission

Art. 1076 of the new Civil Code makes mention of necessary, useful, and voluntary improvements that may have been made on the property subject to collation, a subject not found in the old Civil Code. The Commission believes that although these rules may be inferred from the provisions of the present law governing possession, it is not out of place to have them expressly formulated under the section on Collation, as is done in Louisiana *(Arts. 1266, 1267, 1268, and 1269),* Brazil *(Art. 1792, par. 2),* Lower Canada *(Art. 729),* France *(Arts. 861 and 862),* and Switzerland. *(Art. 63). (Comment of the Code Commission).*

(Improvements which do not exist at the time of partition are not supposed to be reimbursed.)

(4) Problem if Value of Donation Increases

D donated to *F*, a parcel of land worth P1 million. At the time of *D's* death, he had one legitimate son, one surviving spouse, and one acknowledged natural child. At that time too, the land was already worth P4 million. How much value of land, if any, must be returned to the estate?

ANS.: Because of the presence here of a legitimate child (legitime — 1/2), a surviving spouse (legitime — 1/4), and an acknowledged natural child (legitime — 1/4), there is no more disposable portion, and the donation is *totally inofficious*. BUT this should not mean that the entire land must now be returned. This is because what had been donated was only P1 million. Therefore, only 1/4 of the present value of the land (1/4 of the land itself) must be returned. The remaining 3/4 inures to the benefit of the donee who had become its owner since the time

of the perfection of the donation. Of course, all the fruits of said 1/4 also belong to the estate, that is, the fruits accruing since the death of the decedent. *(See also Art. 1075).*

Art. 1077. Should any question arise among the co-heirs upon the obligation to bring to collation or as to the things which are subject to collation, the distribution of the estate shall not be interrupted for this reason, provided adequate security is given. (1050)

COMMENT:

(1) Questions Arising from Collation

(a) Questions on collation do not interrupt distribution — as long as adequate security is given.

(b) Said questions may be threshed out during the administration proceedings. *(Guinguing v. Abuton, 48 Phil. 144).*

(c) Just because more than thirty years have elapsed since the perfection of the donation, it does not necessarily follow that collation is barred by prescription, for prescription on said matter did not run as long as the donor was still alive. *(Ignacio, et al. v. Ignacio, et al., [C.A.], 5465-R, prom. July 31, 1951).*

(d) Only properties received by *gratuitous* title may be the subject of collation. *(Hernaez v. Hernaez, 1 Phil. 718).* Thus, collation may, in proper cases, be done, whatever be the character or nature of the donation — simple, remunerative or onerous — but in the last (remunerative or onerous), only insofar as they exceed the value of the service or of the charge. *(7 Manresa 589; Ignacio v. Ignacio, supra).*

(e) Final judgments by the proper court regarding questions on collation are binding both on the person who raised the issue, and on the heirs concerned. *(See Rule 90, Sec. 2, Rules of Court).*

(2) When Collation Is Prematurely Raised

Vda. de Rodriguez v. Court of Appeals
L-39532, July 20, 1979

When the estate proceedings have not yet reached the stage of partitioning and then distributing the property, any question of collation that is brought up can be regarded as having been prematurely raised.

Section 6

PARTITION AND DISTRIBUTION OF THE ESTATE

Subsection 1. — PARTITION

Art. 1078. Where there are two or more heirs, the whole estate of the decedent is, before its partition, owned in common by such heirs, subject to the payment of debts of the deceased. (n)

COMMENT:

(1) Co-Heirship Before Partition

Example:

T has two children *A* and *B*. If *T* dies, *A* and *B* will be co-heirs of the whole estate, subject of course to the payment of debts.

Principle: Co-heirs are co-owners.

Arcenas v. Cinco
L-29288, Nov. 29, 1976

FACTS: A parcel of land was equally owned by two individuals but one of them had in good faith introduced improvements thereon by planting 300 coconut trees. How should the land be partitioned?

HELD: After giving the improver equitable compensation for the improvements, the value of the estate (after deducting the compensation adverted to) should be divided equally among the co-owners (or co-tenants).

Sebial v. Sebial
64 SCRA 385

Generally, a co-heir cannot acquire the shares of the others by prescription. And this is so, as long as he recognizes expressly or implicitly the existence of the co-heirship.

Mendoza v. CA
GR 44664, July 31, 1991

Under Article 1078 of the Civil Code, "where there are two or more heirs, the whole estate of the decedent is, before its partition, owned in common by such heirs, subject to the payment of debts of the deceased." Co-ownership is extinguished when the portions are concretely determined and technically described.

Crucillo v. Intermediate Appellate Court
317 SCRA 351
(1999)

The heirs of Balbino A. Crucillo agreed to orally partition subject estate among themselves, as evinced by their possession of the inherited premises, their construction of improvements thereon, and their having declared in their names for taxation purposes their respective shares.

Petitioners have, therefore, no right to redeem the same property from the spouses Noceda as when the sale was made, they were no longer co-owners thereof, the same having become the sole property of respondent Rafael Crucillo.

(2) Problem

T has two children *A* and *B*. *T* dies leaving *A* and *B* P100,000 cash and a piece of land.

(a) If the property is not yet partitioned, *A* and *B* are co-owners as co-heirs. Therefore, if one should sell his share to a stranger, the right of legal redemption

is that provided for by law for co-heirs. *(Art. 1088).*

(b) Now then suppose the inheritance is partitioned this way: *A* and *B* get P50,000 cash each; but they will continue to enjoy *the land undivided.* And suppose *A* later on sells to a stranger his *right or share in the land*, what rules on legal redemption should apply?

ANS.: The rules on a sale by a co-owner this time *(Art. 1620),* and not by a co-heir. *(Art. 1088). Reason:* There has already been a partition of the inheritance. *(Castro, et al. v. Castro, 51 O.G. 5612, L-7464, Oct. 24, 1955).*

[NOTE: The period for legal redemption for *co-owners* is *30* days from notice in writing by the vendor *(Art. 1623);* for *co-heirs,* the period is also one month — 30 days. *(Art. 1088).* Thus, under the new Civil Code, there is NO difference in the period; BUT under the old Civil Code, only 9 days were given to the co-owner *(Art. 1524, old Civil Code),* while 30 days were given to the co-heir. *(Art. 1067, old Civil Code).].*

(3) Summary Adjudication Thru an Affidavit

If there is only ONE heir, there is no need for a judicial declaration of his heirship, and he may summarily adjudicate to himself the entire estate by means of an affidavit filed in the office of the Register of Property, in accordance with Sec. 1, Rule 74, Rules of Court. *(Cabayao v. Caagay, L-6636, Aug. 2, 1954).* In case of two or more heirs, the practice in the distribution of the estate is to assign the whole of the properties left for distribution to the heirs in certain definite proportions, an aliquot part pertaining to each of the heirs. *(Blas, et al. v. Muñoz-Palma, et al., L-19270, Mar. 31, 1962).*

Sanchez v. CA
87 SCAD 463
(1997)

For a partition (or extrajudicial settlement) to be valid, Section 1, Rule 74 of the Rules of Court, requires the concurrence of the following conditions: (1) the decedent left no will;

(2) the decedent left no debts, or if there were debts left all had been paid; (3) the heirs and liquidators are all of age, or if they are minors, the latter are represented by their judicial guardian or legal representatives; and (4) the partition was made by means of a public instrument or affidavit duly filed with the Register of Deeds.

Heirs of Joaquin Teves v. CA
316 SCRA 632
(1999)

The fact that a person predeceased the decedent does not mean that he or, more accurately, his heirs, lose the right to share in the partition of the property for this is a proper case for representation, wherein the representative is raised to the place and degree of the person represented and acquires the rights which the latter would have if he were living.

(4) Sale by Heirs

When there are two or more heirs, it is valid for an heir to sell his share in an estate pending liquidation. After all, this is not a case of "future inheritance" for the decedent is already dead. *(Mondonido v. De Roda, L-5561, Jan. 26, 1954).*

Ibarle v. Po
L-5046, Feb. 27, 1953

FACTS: A husband died leaving as heirs a widow and some minor children. Among other things, the husband left a parcel of land admitted to be conjugal property. After his death, the widow sold the entire parcel to *X*. At a later date, the widow procured an appointment as guardian for her children and sold with court approval half of the same land to *Y*. This was the portion supposed to have been inherited by the children. *X* then brought an action to cancel the sale to *Y* of half of the property on the ground that the entire land had already been previously sold to him.

HELD: The cancellation of the second sale will not prosper inasmuch as same was made validly. The rights to the succession of a person are transmitted from the moment of his death.

Thus, when the widow sold the entire portion to *X*, half of it already belonged by inheritance to the children, which half she could not then dispose of unless she was first appointed guardian for them (appointment as guardian was essential under the old law). Inasmuch as the children automatically became owners upon their father's death, no *formal or judicial declaration* of heirship or ownership was essential. Thus, the sale to *X* referring to the portion owned by the children is null and void. On the other hand, the sale to *Y* of said half was made under court authority. Therefore, the second sale should *not* be cancelled.

Saturnino v. Paulino, et al.
L-7385, May 19, 1956

FACTS: A and *B* inherited real estate. *A* sold the whole to *C* without *B's* consent. Subsequently administration proceedings were instituted, and an administrator appointed. *B* now wants to:

(a) invalidate the sale to *C* insofar as his *(B's)* share is concerned;

(b) and redeem *A's* share from *C*.

The Court of Appeals held that *B's* action cannot prosper because the property is still in *custodia legis,* in view of the administration proceedings, and that therefore *B* should wait until the property is awarded to him. Is the Court of Appeals correct?

HELD: The Court of Appeals is wrong because the rights to an inheritance are transmitted upon the death of the decedent, and consequently, *B may exercise* his legal rights without waiting for the result of the administration proceedings. Moreover, since the property is now in *C's* possession (the administrator not having attempted to divest *C* of this possession), the property is certainly not in *custodia legis*. Instead therefore of dismissing *B's* action, the Court of Appeals should pass upon the contentions of the parties on the merit to really determine if *B* is entitled to inherit or not; if the sale to *C* is valid or not; and if *B* is entitled to redeem.

(5) Non-Interference by Heirs While Property Is Still Under Administration

The administrator of the estate is NOT a mere *alter ego* of the heirs, but is an OFFICER of the COURT, entrusted with the management and settlement of the estate, until, with the court's approval he has distributed and delivered to the heirs their respective shares of the inheritance, which distribution and delivery should be made only *after, not* before, the payment of all debts, expenses, and taxes, and after the declaration of the heirs had been made. Before the completion of the liquidation of the estate, the heirs have generally NO RIGHT to interfere in its ADMINISTRATION. *(Lat v. Court of Appeals, et al., L-17591, May 30, 1962).*

(6) A Deed of Extrajudicial Settlement Is a Public Document

Heirs of Joaquin Teves v. CA
316 SCRA 632
(1999)

A deed of extrajudicial settlement is a public document, and a public document executed with all the legal formalities is entitled to a presumption of truth as to the recitals contained therein; in order to overthrow a certificate of a notary public to the effect that the grantor executed a certain document and acknowledged the fact of its execution before him, mere preponderance of evidence will not suffice.

Art. 1079. Partition, in general, is the separation, division and assignment of a thing held in common among those to whom it may belong. The thing itself may be divided, or its value. (n)

COMMENT:

(1) Kinds of Partition

(a) Classified according to the duration of its existence:

1) provisional or temporary. *(Art. 1084).*

2) permanent. *(Art. 1084).*

(b) Classified according to the extent of the properties involved:

1) partial

2) total

(c) Classified according to who made the partition:

1) *judicial* — this is made by the court either in the course of administration proceedings; or in an ordinary action for partition.

2) *extrajudicial* —

a) made by the testator. *(Art. 1080).*

b) made by the decedent in an act *inter vivos*. *(Art. 1080).*

c) made by the heirs themselves. *(Rule 74, Sec. 1, Rules of Court).*

d) made by a third person entrusted by the testator or decedent. *(Art. 1081, par. 1).*

Ralla v. Untalan
GR 62353-54, Apr. 27, 1989

The rule is that, there can be no valid partition among the heirs until after the will has been probated. This, of course, presupposes that the properties to be partitioned are the same properties embraced in the will. Thus, the rule is inapplicable where there are two separate cases, one for partition and another, a special proceedings (originally for probate of a will), each involving the estate of different persons comprising dissimilar properties.

Where a partition had not only been approved and thus became a judgment of the court, but distribution of the estate in pursuance of such partition had fully been carried out and the heirs had received the property as-

signed to them, they are precluded from subsequently attacking its validity or any part of it.

Where a piece of land has been included in a partition, and there is no allegation that the inclusion was effected through improper means or without the petitioners' knowledge, the partition barred any further litigation on said title and operated to bring the property under the control and jurisdiction of the court for proper disposition according to the tenor of the partition. The partition cannot be attached collaterally.

Heirs of Joaquin Teves v. Court of Appeals
316 SCRA 632
(1999)

Every act which is intended to put an end to indivision among co-heirs and legatees or devisees is deemed to be a partition, although it should purport to be a sale, an exchange, a compromise, or any other transaction.

An action questioning the extrajudicial settlements instituted after more than 25 years from the assailed conveyance constitutes laches, which is the negligence or omission to assert a right within a reasonable time, warranting a presumption that the party entitled to assert it either has abandoned it or declined to assert it.

An oral partition is valid, and the non-registration of an extrajudicial settlement does not affect its intrinsic validity — the intrinsic validity of partition not executed with the prescribed formalities does not come into play when there are no creditors or the rights of creditors are not affected.

(2) Judicial Partition

(a) This may be done in the order of distribution made by the court, and can be based on a draft or project of partition. (But no delivery could be made till after the project of partition is approved). *(Quizon v. Castillo, 79 Phil. 9).*

(b) The court should not follow the distribution made in the will, if said distribution is not in accordance with law. *(Marcelino v. Antonio, 70 Phil. 388).*

(c) The court is allowed to compel the executor or administrator to submit a draft or project of partition so that the court may be sufficiently informed of the properties it has to distribute. For this purpose, the executor or administrator may be threatened with contempt in case of disobedience. *(Reyes v. Reyes de Ilano, 63 Phil. 629).*

[NOTE: Unless the court orders the submission of the project, the executor or administrator is NOT required to submit one. As a matter of fact, the order of distribution may be made even without such project.*].*

(d) Even before debts of the estate have been paid or before final accounting by the administrator or executor, *partial or advanced distribution* of the estate may be made by the court. (This is so, particularly when the heirs need money.) *(See Recto Dia v. Castillo, 69 Phil. 577).*

[NOTE: To safeguard creditors, a bond or a deposit may be required. *(Berceno v. Ocampo & Sotelo, 74 Phil. 277).* Moreover, the court may provide that the distribution is without prejudice to the superior rights of creditors. *(Guidote v. Bank of the Phil. Islands, 67 Phil. 391).].*

[NOTE: If inadvertently no bond was required by the court, the creditor can still insist on securities for unpaid credits *even after* approval of the project of partition, as long as the properties have not yet been actually distributed. *(Javelosa v. Barrios, 66 Phil. 107).].*

(e) If the properties have already been distributed, the creditors can still demand recovery from the heirs. *(Cu Unjieng v. Tioqui, 4 Phil. 566).*

(f) Pending administration proceedings in the probate court, it is improper to file a separate independent action for partition. *(Baelo v. Baelo, O.G., Jan. 7, 1941, p. 56).*

(g) A judicial partition is not valid and does not bind heirs who were not parties thereto. *(Evangelista v. Bonilla, 46*

O.G. 4258, Sep. 1950). Therefore, those deprived of their rightful shares may still bring an action *reivindicatoria* within the proper prescriptive period. *(Ibid.).*

(3) Extrajudicial Partition Made by the TESTATOR

(a) See also discussion under Art. 1080.

Bahanay, Jr. v. Martinez
64 SCRA 452

FACTS: A wife in her will ordered the payment of her children's legitime in CASH, although she did not give the administration or management of the estate to one or more heirs. Is the order valid?

HELD: No, because the administration or management of the estate had not been given to one heir. Art. 1080 has, therefore, been violated.

(b) A testator can make the partition either in a *will* or in any document *inter vivos*.

(c) In no case must the partition prejudice the legitime. *(Art. 1080).*

(4) Extrajudicial Partition Made by a Decedent (By an Act *Inter Vivos*)

(a) Since Art. 1080 speaks of "persons," it follows that even if a person dies *intestate,* it would still be possible for him to have made a partition *inter vivos*. He may, for example, have divided the properties having in mind the shares of intestacy.

(b) See also comments under Art. 1080.

(5) Extrajudicial Partition Made by the Heirs

(a) This can be done as long as:

1) there are NO debts

2) everyone concerned is OF AGE or represented by GUARDIANS. *(See Sec. 1, Rule 74, Rules of Court).*

(b) This can be done ORALLY, and the same would be valid if freely entered into. *(Belen v. Belen, 49 O.G. 997, Mar. 1953; Hernandez v. Andal, 78 Phil. 196; Eugenio, et al. v. Luz, et al., CA, GR No. 531-B).* This is because a partition is not exactly a conveyance for the reason that it does not involve transfer of property from one to the other but rather a confirmation by them of their ownership of the property. Moreover, even if considered a conveyance, still the Statute of Frauds does *not* apply to completed or partially executed acts. *(See Barcelona v. Barcelona, et al., L-9014, Oct. 31, 1958).* To establish oral or parol partition however, the partition itself must be clearly proved. Hearsay testimony would consequently *not* be allowed. *(Miraflor v. Miraflor, C.A., L-12746-R, May 5, 1955).*

(c) Of course, to *register* the agreement (to prejudice third parties), a public instrument is needed. *(Sec. 1, Rule 74, Rules of Court).* Indeed, an oral partition between heirs is NOT binding on third persons. *(Ladisla v. Pestano, L-7623, Apr. 29, 1959).* Moreover, if the extrajudicial partition is by reason of the provisions of a will, the will must first be probated, even if there are NO DEBTS, and court approval is needed for said extrajudicial partition. *(Ventura v. Ventura, et al., L-11609, Sep. 24, 1959).* Similarly, an assignment of rights over the estate, made by an heir, is in the nature of an extrajudicial partition where court approval is imperative. This is so even if the deceased had died *intestate. (Intestate Estate of Irene Santos, Jose D. Villegas v. Adela Santos Gutierrez and Rizalina Santos Rivera, L-11848, May 31, 1962).* An extrajudicial partition executed without the knowledge and consent of the other co-heirs cannot prejudice the latter who have thus the right to obtain their inheritance regardless of the lapse of time. *(Villaluz, et al. v. Neme, et al., L-14476, Jan. 31, 1963).*

(d) It is presumed there are NO debts if within two years from the death of the deceased, no creditor has petitioned for letters of administration. *(See Rule 74, Sec. 1, Rules of Court).*

(6) Extrajudicial Partition Made by a Person Designated by the Decedent

See discussion under Art. 1081.

Art. 1080. Should a person make a partition of his estate by an act *inter vivos,* or by will, such partition shall be respected, insofar as it does not prejudice the legitime of the compulsory heirs.

A parent who, in the interest of his or her family, desires to keep any agricultural, industrial, or manufacturing enterprise intact, may avail himself of the right granted him in this article, by ordering that the legitime of the other children to whom the property is not assigned, be paid in cash. (1056)

COMMENT:

(1) Partition by Testator

(a) Under the old Civil Code, the word *"testator"* was used. Under the new Civil Code, the word *"person"* is used. This latter term is broader in scope. *(Tagala v. Ybeas, C.A., 49 O.G. 200).*

(b) Whereas under the old Code, it was essential for one to have made a *valid* will before his partition by an act *inter vivos* could be valid *(Legasto v. Versoza, 54 Phil. 766),* under the new Civil Code, said requirement is no longer necessary. *(Romero v. Villamor, 102 Phil. 641 [1957],* cited in *Marina Dizon-Rivera v. Estela Dizon, et al., L-24561, June 30, 1970).*

(2) Formalities

If the partition is made by an act *inter vivos* (other than by will), it would seem that no formalities are prescribed by the Article.

The partition will, of course, be effective only after death. It does not necessarily require the formalities of a will for after all, it is not the partition that is the mode of acquiring own-

ership. Neither will the formalities of a *donation* be required since donation will *not* be the mode of acquiring the ownership here after death; since no will has been made, it follows that the mode will be succession (intestate succession). Besides, the partition here is merely the *physical determination* of the part to be given to each heir.

(3) Partial Distribution

A *partial* distribution of the decedent's estate pending the final determination of the estate or intestate proceedings should as much as possible be discouraged by the courts, and unless in extreme cases, such form of advances of inheritance should not be countenanced. Creditors and the rightful heirs must be assured of their shares. *(Gatmaitan v. Medina, L-14400, Aug. 5, 1960).*

(4) Preservation of Enterprise

The second paragraph of the Article indicates one way of preserving intact an enterprise.

Art. 1081. A person may, by an act *inter vivos* or *mortis causa,* intrust the mere power to make the partition after his death to any person who is not one of the co-heirs.

The provisions of this and of the preceding article shall be observed even should there be among the co-heirs a minor or a person subject to guardianship; but the manda-tary, in such case, shall make an inventory of the property of the estate, after notifying the co-heirs, the creditors, and the legatees or devisees. (1057a)

COMMENT:

(1) Meaning of 'Mere Power to Make the Partition'

This is just the power to make a physical division of the hereditary property. The third person is *not* allowed to make the disposition or distribution of property — as for example — the power of giving one heir 2/3 and another heir 1/3 is not

allowed under the law. The disposition must have been made by the decedent or testator himself.

[NOTE: The testator is not allowed to entrust the power to physically partition the property to an executor who is also an heir, for in such case, it is to be doubted as to whether or not he can partition the property with impartiality. *(Del Rosario v. Del Rosario, 2 Phil. 321).].*

[NOTE: Arts. 1080 and 1081 can be observed, even if one of the heirs be a minor subject to guardianship.

But in this case, two things are required:

(a) *notification* to co-heirs, creditors, legatees, devisees

(b) *inventory* of the estate.*].*

(2) 'Mandatary' Defined

The *mandatary* is the person entrusted to make the partition. The mandatary should *not* be a co-heir. The partition by the mandatary may be either *approved* or *rejected* by the heirs. If rejected, the probate court can be called upon to decide the conflict.

Art. 1082. Every act which is intended to put an end to indivision among co-heirs and legatees or devisees is deemed to be a partition, although it should purport to be a sale, an exchange, a compromise, or any other transaction. (n)

COMMENT:

(1) When Partition is Effected

(a) As long as the co-ownership ceases to exist, there is a partition. If after partition, certain properties are still supposed to be owned in common, there can be a *later* partition of this.

(b) *A, B,* and *C,* were co-heirs. It was agreed to sell the property, and give the proceeds to *A*. The agreement is oral. Can this be a valid partition?

ANS.: Yes, because the indivision has ceased.

(c) If in the example given, *A* demands the sale, but dies before the sale is actually effected, is his right to the proceeds transmitted to his own heir?

ANS.: Yes. *(Belen v. Belen, 49 O.G. 997, Mar. 1953).*

(2) Sale of Property Puts an End to Co-Ownership

Gabila v. Perez
GR 29541, Jan. 27, 1989

The sale by the heirs of the property which they inherited from their father puts an end to their co-ownership over it. *(Art. 1082, Civil Code).* Hence, there is no further need for them to partition it, the purpose of partition being to separate, divide, and assign a thing held in common among those to whom it may belong. *(Art. 1079, Civil Code).*

(3) Deed of Partition

Favor v. CA
GR 80821, Feb. 21, 1991

FACTS: Deceased Regino Favor, left three sons and seven parcels of land in his name. Before the property could be divided among the three brothers, one of them died with neither wife nor children. Only the surviving brothers, Gregorio and Prudencio are involved in this litigation. In 1972, Gregorio sued his elder brother Prudencio for partition of the properties they had inherited from their father. Prudencio moved to dismiss the complaint for lack of cause of action. He contended that the properties mentioned in the complaint had already been partitioned under a Compromise Agreement concluded between him and Gregorio, and acknowledged before the justice of the peace. The trial court denied the motion. Prudencio reiterated the same defense in his answer. Gregorio amended his complaint in which he prayed in addition to the partition, for the invalidation of the compromise agreement on the ground of

fraud and mistake. The trial court declared the Compromise Agreement null and void, ordered the partition of the properties, awarded Gregorio damages and attorney's fees. The Court of Appeals reversed the trial court's decision, holding the compromise agreement valid and binding and ordered the dismissal of the complaint.

HELD: The Supreme Court remanded to the Regional Trial Court for partition, in accordance with Rule 69 of the Rules of Court, the parcels of land mentioned in the complaint. It affirmed the rest of the challenged decision. The Court ruled that although denominated as a compromise agreement, the document is deemed a deed of partition under Article 1082 of the Civil Code. As for its validity, the compromise agreement must be upheld, the challenge to it not having been substantiated.

A public instrument enjoys the presumption of validity that has not been overcome by Gregorio with full, clear and convincing evidence. The document has been duly notarized, and by the then justice of the peace, and *ex officio* notary public, of the town where it was executed. Although it was written in English, one can suppose that its contents were sufficiently explained to the parties thereto, who had claimed to be illiterate. The claim is believable in Prudencio, who declared he was a farmer and merely affixed his thumbmark to the document, but it is not as credible with respect to Gregorio, who actually signed the agreement. Gregorio was a businessman and even ran for the position of barangay captain, for which the ability to read and write is prescribed as an indispensable qualification. Gregorio also signed his complaint and his verification as well, but in the petition he filed with the Supreme Court, after the trial court found that he was literate — he merely affixed his thumbmark to the verification. If the purpose was to convince us that he already could not write, he has not succeeded. To prove defect or lack of consent, the evidence must be strong and not merely preponderant. Gregorio's claim that he was tricked by his brother into signing the Compromise Agreement, which he believed was only a mortgage receipt is not convincing. If any one was more likely to be deceived, it was not Gregorio but the farmer Prudencio who was less experienced than his brother in business matters and court litigations.

But while upholding the compromise agreement, the court found that the complaint for partition should not have been entirely dismissed by the appellate court. The reason is that there are still certain properties of Regino that have not been distributed between the brothers as the Compromise Agreement reveals. There still remain two parcels of land that have not yet been partitioned, which by agreement of the brothers "shall remain our property" and another one which was not included in the compromise agreement. Partition of these lots is mandatory under Article 494 of the Civil Code which provides: No co-owner shall be obliged to remain in the co-ownership. Each co-owner may demand at any time the partition of the thing owned in common, insofar as his share is concerned. Nevertheless, an agreement to keep the thing undivided for a certain period of time, not exceeding 10 years, shall be valid. This term may be extended by a new agreement. Article 1083 bolsters the above rule by declaring that a co-heir has a right to demand division of the estate unless the testator should have expressly forbidden its partition. No such prohibition was made by Favor who died intestate. As the compromise agreement was entered into in 1948, the provision therein for co-ownership is deemed to have expired in 1958, no extension thereof having been established. Hence, these two lots must now be the subject of a separate partition conformably to the prayer in the complaint.

Art. 1083. Every co-heir has a right to demand the division of the estate unless the testator should have expressly forbidden its partition, in which case the period of indivision shall not exceed twenty years as provided in Article 494. This power of the testator to prohibit division applies to the legitime.

Even though forbidden by the testator, the co-ownership terminates when any of the causes for which partnership is dissolved takes place, or when the court finds for compelling reasons that division should be ordered, upon petition of one of the co-heirs. (1051a)

COMMENT:

(1) When Partition Can Be Demanded

(a) As long as the partition is *not* expressly prohibited, partition can be demanded anytime. This right does not prescribe and can apply to a co-legatee. *(See Del Rosario v. De Rosario, 2 Phil. 321).* But the heir desiring partition must make parties to the suit all persons interested in the estate. *(7 Manresa 677).*

(b) But partition can be demanded only if the co-ownership still exists. Therefore, if one of the co-heirs has by adverse possession for the needed time acquired exclusive ownership over the property, partition would no longer lie. *(Ramos v. Ramos, 49 O.G. 1008, Mar., 1953).*

(2) Prohibition to Partition

(a) The prohibition to partition for a period *not exceeding* twenty years can be imposed on the legitime. This is the only burden that can be imposed on the legitime, except of course the *reserva troncal* which is imposed on the legitime of ascendants in certain cases.

(b) If the prohibition to partition is for more than 20 years, the excess is *void*.

(c) Even if a prohibition is imposed, the heirs by mutual agreement can still make the partition, and a party thereto cannot afterwards ask for its rescission because he would be in estoppel. *(See Leaño v. Leaño, 25 Phil. 180).* There would be no estoppel however if there was vitiated consent. *(De Borja Vda. De Torres v. Encarnacion, L-4681, July 31, 1951; Jacinto v. Jacinto, [C.A.], 52 O.G. 5282).*

[NOTE: By the same token, it is believed that all can mutually agree to sell the property, with the intention of dividing the proceeds of said sale.

Of course, if even one objects to the partition or sale, the lone minority will have to be upheld by the court, so that the desire of the decedent can be given effect, unless the second paragraph of Art. 1083 can apply regarding:

(a) existence of causes for the dissolution of a partnership. *(See Arts. 1830-1831).*

(b) existence of compelling reasons for the division.*].*

Art. 1084. Voluntary heirs upon whom some condition has been imposed cannot demand a partition until the condition has been fulfilled; but the other co-heirs may demand it by giving sufficient security for the rights which the former may have in case the condition should be complied with, and until it is known that the condition has not been fulfilled or can never be complied with, the partition shall be understood to be provisional. (1054a)

COMMENT:

(1) When Voluntary Heirs Can Demand the Partition

(a) This Article distinguishes between

1) pure heirs

2) and conditional (suspensive) heirs

(b) The former can demand partition anytime, subject to Art. 1083. If together with them, there are conditional heirs, sufficient security must be given by the pure heirs to safeguard the rights of the conditional heirs.

(c) The conditional heirs cannot demand partition till the condition is fulfilled.

(2) Provisional Partition

This Article also speaks of a provisional partition.

Art. 1085. In the partition of the estate, equality shall be observed as far as possible, dividing the property into lots, or assigning to each of the co-heirs things of the same nature, quality and kind. (1061)

COMMENT:

Equality in the Partition

If a project of partition is submitted to the probate court, it must allow the heirs concerned to present proof of the reasonableness or unreasonableness of the project, otherwise the heirs may be said to have been deprived of their property without the due process of law. Indeed, without the necessary hearing, to compel the heirs to participate in the drawing of lots of the properties grouped in accordance with the value of the lands, arbitrarily and unilaterally fixed by a commissioner appointed by the court, without allowing them to dispute the fair market value of the shares, would be manifestly unfair. *(Cabaluna, Jr. v. Cordova, L-15746, Feb. 29, 1964).*

Art. 1086. Should a thing be indivisible, or would be much impaired by its being divided, it may be adjudicated to one of the heirs, provided he shall pay the others the excess in cash.

Nevertheless, if any of the heirs should demand that the thing be sold at public auction and that strangers be allowed to bid, this must be done. (1062)

COMMENT:

Indivisible Object

(a) Note that if *even ONE* heir should demand a public auction, this must be done.

(b) *Assignment or sale of real estate by commissioners.* — When it is made to appear to the commissioners that the real estate, or a portion thereof, cannot be divided without great prejudice to the interests of the parties, the court may order it assigned to one of the parties willing to take the same, provided he pays to the other parties such sum or sums of money as the commissioners deem equitable, unless one of the parties interested asks that the property be sold, instead of being so assigned, in which case the court shall order the commissioners to sell the real estate

at public sale and the commissioners shall sell the same accordingly. *(See Sec. 5, Rule 69, Rules of Court).*

Art. 1087. In the partition the co-heirs shall reimburse one another for the income and fruits which each one of them may have received from any property of the estate, for any useful and necessary expenses made upon such property, and for any damage thereto through malice or neglect. (1063)

COMMENT:

Reimbursement by Co-Heirs

(a) Reimbursement must be made of:

(1) income and fruits
(2) useful and necessary expenses
(3) damages thru malice or neglect

(b) The reimbursement can be sought in an action for judicial partition. *(Urlanda v. Pitaroque, 22 Phil. 383).* But even if the partition is extrajudicial, it is submitted that an action for reimbursement would lie by itself.

Art. 1088. Should any of the heirs sell his hereditary rights to a stranger before the partition, any or all of the co-heirs may be subrogated to the rights of the purchaser by reimbursing him for the price of the sale, provided they do so within the period of one month from the time they were notified in writing of the sale by the vendor. (1067a)

COMMENT:

(1) Legal Redemption by Co-Heirs

For this Article to apply, the following requisites must all be present:

(a) there must be two or more heirs;

(b) one must *sell* his *hereditary* rights;

(c) the buyer must be a *stranger;*

(d) the sale must be *before* partition;

(e) at least one co-heir must demand the redemption;

(f) the demand must be made within a period of one month from the time of *notification* in writing;

(g) the redemptioner must *reimburse* the *price* of the sale.

(2) First Requisite — Two or More Heirs

(a) If there be only one heir, the Article cannot apply for who would redeem?

(b) *Heirs* — include legatees and devisees.

(3) Second Requisite — Sale of Hereditary Rights

(a) There must be a "sale," not another transaction, like donation. But an onerous donation, or an *adjudicacion en pago* is equivalent to a sale. The same thing is true of *barter*.

(b) The "sale" must be an *actual* one (not merely contemplated). *(Chaves v. Bagot, [C.A.] 343 O.G. 4185).*

(c) The "sale" may be a *voluntary* one or an *involuntary* (forced) sale (as in the case of sales on execution).

(d) What must have been sold are "hereditary rights," and not *specific object or objects, nor rights in specific object. (7 Manresa 777; see also Mendoza v. Mendoza, 40 O.G. No. 7, p. 186, 69 Phil. 155).*

(e) Rights to "future" inheritance are not hereditary rights and therefore do *not* come within the scope of the present Article. As a matter of fact, a sale of rights to "future" inheritance is VOID.

The inheritance is "future" if the person from whom the property is expected to come is still alive. However, once there has been a death, the "right of inheritance is not merely in the nature of a hope," but an actual right. And this is so, even PRIOR to partition. This is because the right accrues from the moment of death. *(See Saturnino v. Paulino, L-7385, May 19, 1955).*

(f) But a sale of hereditary rights before partition is valid, subject only to the legal redemption given in Art. 1088. *(Beltran v. Soriano, 32 Phil. 66).*

(4) Third Requisite — Buyer Must Be a Stranger

(a) The purpose of allowing redemption is to keep strangers out of the common ownership, since this would be undesirable *(De Jesus v. Manglapus, 81 Phil. 115),* and to reduce the number of co-owners, because the law seeks to discourage co-ownership. Therefore, if the buyer is himself one of the co-heirs, the others cannot redeem for the reason that the law would not exist.

(b) "Strangers" refers to ALL who are:

1) not heirs

2) heirs who do *not* succeed (like an incapacitated child)

(c) Legatees, devisees, creditors — are "strangers."

(5) Fourth Requisite — Sale Before Partition

(a) If the sale is made after partition, Art. 1088 is not applicable. *(Saturnino v. Paulino, L-7385, May 9, 1965).* If after said partition some properties are still held in common, and a sale is made of an aliquot share therein, Art. 1620 is the article to apply.

(b) Art. 1088 does not apply if the sale is after the project of partition is made, even if the sale be before the approval by the court of the partition, provided that the would-be *redemptioner* was also a *party* to the project of partition. This is because the approval retroacts to the date when the project was made. *(De Jesus v. Daza, 77 Phil. 162).*

Castro, et al. v. Castro
L-7464, Oct. 24, 1955

FACTS: A, B, C, and *D* inherited from a deceased person a piece of land *pro indiviso,* and partitioned in

equal shares of 1/4 each. Then *A* died, and the same (whole) property was partitioned in this manner: *B* 1/2, *C* and *D* 1/4 each. In other words, only *B* inherited from *A*; while *C* and *D* received their original shares. If *B* should sell his aliquot part to *X,* can *D* claim the right of redemption as a co-heir?

HELD: For two reasons, *D* cannot redeem as a co-heir under Art. 1088 but only as a co-owner under Art. 1620.

Firstly, in this case, there was already a partition, and even if the property is still undivided, the fact is that they are already co-owners, and not co-heirs.

Secondly, *D* is not a co-heir of *B* with respect to the inheritance from *A,* since he *(D)* received nothing from *A*. Note that what he got (1/4) was exactly what he had already inherited from the first decedent.

Plan v. IAC
GR 65656, Feb. 28, 1985

Art. 1088 of the Civil Code, which refers to the sale of hereditary rights and not to specific properties, does not justify legal redemption of properties sold to pay the debts of the decedent's estate as to which there is no legal redemption.

In the administration and liquidation of a deceased person's estate, sales ordered by the probate court to pay the deceased's debts are final and not subject to legal redemption. Unlike in ordinary execution sales, no legal provision allows redemption in sales of property to pay deceased's debts.

(6) Fifth Requisite — At Least One Co-Heir Must Demand the Redemption

(a) If a person is not a co-heir, he cannot demand the redemption. Thus, the wife of a co-heir cannot make use of Art. 1088.

(b) Any of the co-heirs can redeem, no matter from what line, as long as he is *still* a co-heir. (Thus, if he himself has sold his right, he cannot redeem, except if he has reacquired what he sold by the exercise of the right of conventional redemption.) *(7 Manresa 776).*

(c) If more than one co-heir desires to redeem, this is alright, regardless as to who made the demand first, as long as the demand is within the legal period. Thus, all who are entitled to redeem may redeem — in proportion to their respective shares in the inheritance *(7 Manresa 777)* — provided, of course, that redemption in favor of one has not yet taken place.

(d) A stranger who purchases a co-heir's rights is not a co-heir, hence, he is *not* entitled to redeem if another co-heir sells his rights to another stranger. *(7 Manresa 779).*

(e) The right to redeem is therefore personal, and cannot be transmitted to others, except that the co-heir's own heir can exercise his rights in case of death. *(7 Manresa 780).*

(7) Sixth Requisite — Demand Within One Month from Notification in Writing

(a) Unless demand for redemption is made within one month, the right to redeem will lapse. *(Asuncion v. Jacob, [C.A.] 48 O.G. 2787).*

(b) The demand must be within one month from the time the vendor informs the would-be redemptioner in writing that there has been an ACTUAL sale. *(Chavez v. Bagot, [C.A.] 43 O.G. 4185).*

(c) *Query:* Suppose there never was a demand, but the other co-heirs knew of the fact of sale, would the period of one month begin to run?

ANS.: Yes, from the moment of knowledge. For the only purpose of *notification* is to inform or give knowledge. The law does *not* require a *useless formality*.

[NOTE: Without creditors to take into consideration, it is competent for the heirs of an estate to enter into an

agreement for distributions thereof in a manner and upon a plan different from those provided by the rules from which, in the first place, nothing can be inferred that a *writing* or *other* formality is essential for the partition to be VALID. *(Castro v. Miat, 397 SCRA 271 {2003}).].*

(d) *Query*: Suppose the notification was oral, would the period of one month begin to run? Yes. *(See preceding answer).*

Garcia v. Calaliman
GR 26855, Apr. 17, 1989

FACTS: On Feb. 11, 1946, Gelacio died intestate, leaving a parcel of unregistered land. His nephews, nieces, grandnephews inherited the property. On Dec. 3, 1954, one group of heirs signed a document entitled, "Extrajudicial Partition and Deed of Sale" of the property in question. The property was sold to Calaliman. The document was inscribed in the Register of Deeds. On Dec. 17, 1954, another group of heirs also sold to Calaliman their shares and participation in the same parcel of land. The deed of sale was registered in the Register of Deeds of Iloilo. On May 7, 1955, a third group of heirs, Garcia, *et al.*, sued Calaliman with the Court of First Instance for legal redemption of the 3/4 portion of the parcel of land inherited by the heirs from Gelacio, which portion was sold by their co-heirs to Calaliman. Undisputedly, Garcia, *et al.* did not receive notification in writing about the sale of the hereditary interest of some of their co-heirs in the parcel of land they inherited from Gelacio, although in a letter dated June 23, 1953, Garcia wrote one of his co-heirs, an uncle, proposing to buy the hereditary interests of his co-heirs in their unpartitioned inheritance. Although Garcia asked that his letter be answered, there is no proof that he was favored by one. Garcia, *et al.,* came to know that their co-heirs were selling the property on December 3, 1954 when one of the heirs asked Garcia to sign a document because the land they inherited was going to be sold to Calaliman. The document mentioned by Garcia could be no other than the one entitled "Extra-Judicial Partition and Deed of Sale," dated Dec. 3, 1954. Garcia,

et al. filed the case for legal redemption with the trial court on May 7, 1955. Calaliman claims that the 30-day period prescribed in Article 1088 of the new Civil Code for Garcia, *et al*. to exercise the right to legal redemption had already elapsed and that the requirement of Article 188 that notice must be in writing is deemed satisfied because written notice would be superfluous, the purpose of the law having been fully served when Garcia went to the office of the Register of Deeds and saw for himself the contents of the deeds of sale.

The trial court rendered judgment ordering Calaliman to resell the property to the plaintiffs. The Court of Appeals reversed the trial court and ordered the plaintiffs' case dismissed.

ISSUE: Did the plaintiffs take all the necessary steps to effectuate their right of legal redemption within the period fixed by Art. 1088 of the Civil Code.

HELD: The Supreme Court reversed the decision of the Court of Appeals reinstating that of the trial court and held that Garcia, *et al*. have not lost their right to redeem, for in the absence of a written notification of the sale by the vendors, the 30-day period has not even begun to run. Registration of the deed of sale with the Register of Deeds is not sufficient notice, specially where the property involved is unregistered land. The registration of the deed of sale as sufficient notice of the sale under the provisions of Section 51 of Act No. 496 applies only to registered lands and has no application whatsoever to a case where the property involved is unregistered land. Both the letter and spirit of the Civil Code argue against any attempt to widen the scope of the notice specified in Article 1088 by including therein any other kind of notice, such as verbal or by registration. If the intention of the law had been to include verbal notice or any other means of information as sufficient to give the effect of this notice, then there would have been no necessity or reasons to specify in Article 1088 of the Civil Code that the said notice be made in writing for, under the old law, a verbal notice or information was sufficient.

In the interpretation of Article 1623 of the Civil Code, the Supreme Court stressed that the written notice is indispensable, actual knowledge of the sale acquired in some other manner by the redemptioner, notwithstanding. He is still entitled to written notice, as exacted by the Code, to remove all uncertainty as to the sale, its terms and its validity, and to quiet any doubt that the alienation is not definitive. The law not having provided for any alternative, the method of notification remains exclusive, though the Code does not prescribe any particular form of written notice nor any distinctive method for written notification of redemption.

(8) Seventh Requisite — The Redemptioner Must Reimburse the Price of the Sale

A, B, and *C* are co-heirs. Before partition, *A* sold his hereditary rights to *X* for P100,000. *X* then sold to *Y* for P200,000. If *B* wants to redeem, how much must he pay *Y*?

ANS.: Only P100,000. This is true even if the rights have been resold. The purpose of the article cannot be evaded by a reconveyance of the interest to a third person at a higher price. Subsequent buyers get the property burdened with the right of co-heirs to effect a redemption at the price for which the heir who sold it parted with it. *(See Hernaez v. Hernaez, 32 Phil. 214).*

[NOTE: Art. 1088 speaks of a legal redemption which is *distinct* from the legal redemption given to a *co-owner* by Arts. 1620 and 1623. *(Wenceslao v. Calimon, 46 Phil. 906).].*

Art. 1089. The titles of acquisition of ownership of each property shall be delivered to the co-heir to whom said property has been adjudicated. (1065a)

COMMENT:

Delivery of Titles

See Comment under next Article.

Art. 1090. When the title comprises two or more pieces of land which have been assigned to two or more co-heirs, or when it covers one piece of land which has been divided between two or more co-heirs, the title shall be delivered to the one having the largest interest, and authentic copies of the title shall be furnished to the other co-heirs at the expense of the estate. If the interest of each co-heir should be the same, the oldest shall have the title. (1066a)

COMMENT:

(1) Meaning of 'Title'

"Title" here refers to the document evidencing the right of ownership, and not to the right itself. This is evident from the phrase *"authentic copies."*

(2) Order of Preference

Order of preference if some properties remain undivided:

(a) largest interest

(b) if same interest — the *oldest* heir

Subsection 2. — EFFECTS OF PARTITION

Art. 1091. A partition legally made confers upon each heir the exclusive ownership of the property adjudicated to him. (1068)

COMMENT:

Effect of Partition Legally Made

Once partition and distribution are made, the estate is finally settled. *(Chingen v. Arguelles, 7 Phil. 296).* The partition results in EXCLUSIVE ownership over the part or property adjudicated. And relatives who are neither compulsory heirs nor voluntary heirs nor devisees or legatees cannot question a judicial partition made as a consequence of a validly probated

will, particularly if the probate had long before become final. *(Rufino Coloma, et al. v. Atanacio Coloma, et al., L-19399, July 31, 1965).*

Ruperto J. Viloria v. CA, et al.
GR 119974, June 30, 1999

FACTS: In the action for partition, private respondents claimed that they were co-owners of the property subject thereof hence entitled to their share, while petitioner denied their claim by asserting that their rights were supplanted by his by virtue of the deed of absolute sale. As a result, the issue of co-ownership and the legality of the 1965 sale have to be resolved in the partition case.

HELD: The contention is without merit. Unless and until the issue of ownership is definitely resolved, it would be premature to effect a partition of the properties. Thus, the appellant court did not exceed the limits of its jurisdiction when it ruled on the validity of the 1965 sale.

[NOTE:

(a) Even after partition, the rights of third parties remain unaffected. *(Sec. 12, Rule 69, Rules of Court).*

(b) A purchaser of hereditary rights, before partition, acquires the properties that would be allotted to the vendor-heir in the partition. *(Jakosolem v. Rafols, 73 Phil. 628).].*

Art. 1092. After the partition has been made, the co-heirs shall be reciprocally bound to warrant the title to, and the quality of, each property adjudicated. (1069a)

COMMENT:

(1) Warranty of Title and Quality

(a) title (eviction)

(b) quality (and hidden defects)

(2) Warranty Against Eviction

(a) For warranty to the first to be enforceable, it is not necessary that the heir be deprived of full ownership. It is enough that there be a burden or encumbrance that must be respected.

(b) Eviction here does not have to be by final judgment before recourse to the warranty can be sought, as long as no heir objects. *(7 Manresa 803).*

(3) Nature of the Warranty

The warranty is:

(a) reciprocal and proportionate. *(Art. 1093).*

(b) and may be waived. *(See Art. 1096).*

Art. 1093. The reciprocal obligation of warranty referred to in the preceding article shall be proportionate to the respective hereditary shares of the co-heirs; but if any one of them should be insolvent, the other co-heirs shall be liable for his part in the same proportion, deducting the part corresponding to the one who should be indemnified.

Those who pay for the insolvent heir shall have a right of action against him for reimbursement, should his financial condition improve. (1071)

COMMENT:

Reciprocal and Proportionate Warranty

This Article deals with:

(a) proportionate liability

(b) responsibility in the *meantime* for another's *insolvency*

(c) right of reimbursement

Art. 1094. An action to enforce the warranty among co-heirs must be brought within ten years from the date the right of action accrues. (n)

COMMENT:

Prescription of the Warranty

Ten years from the date the right of action accrues.

Art. 1095. If a credit should be assigned as collectible, the co-heirs shall not be liable for the subsequent insolvency of the debtor of the estate, but only for his insolvency at the time the partition is made.

The warranty of the solvency of the debtor can only be enforced during the five years following the partition.

Co-heirs do not warrant bad debts, if so known to, and accepted by, the distributee. But if such debts are not assigned to a co-heir, and should be collected, in whole or in part, the amount collected shall be distributed proportionately among the heirs. (1072a)

COMMENT:

Warranty of Debts

(a) There may be:

(1) good debts (collectible debts)

(2) bad debts

(b) Warranty for *good debts*

(1) warrants that the debtor is *solvent* at the *time of partition* (not later)

(2) good for 5 years — following the date of the partition

(c) There is no warranty for bad debts, so an heir accepts them at his own risk.

Art. 1096. The obligation of warranty among co-heirs shall cease in the following cases:

(1) When the testator himself has made the partition, unless it appears, or it may be reasonably presumed, that

his intention was otherwise, but the legitime shall always remain unimpaired;

(2) When it has been so expressly stipulated in the agreement of partition, unless there has been bad faith;

(3) When the eviction is due to a cause subsequent to the partition, or has been caused by the fault of the distributee of the property. (1070a)

COMMENT:

When Warranty Ceases

Example of par. 3 — Failure of heir to interrupt adverse possession by another is clearly his own fault and he may lose the property by prescription.

Subsection 3. — RESCISSION AND NULLITY OF PARTITION

Art. 1097. A partition may be rescinded or annulled for the same causes as contracts. (1073a)

COMMENT:

(1) Rescission or Annulment of the Partition

(a) Rescission presupposes an ordinarily valid contract, but there is an *extrinsic defect,* like prejudice to creditors.

(b) Annulment presupposes a contract with an intrinsic defect, like the vices of consent (fear, force, etc.). *(See also Salonga v. Evangelista, 20 Phil. 273).*

(c) The presence of fraud, excusable mistake, or inadvertence makes a partition annullable. *(Torres v. Encarnacion, L-4681, July 31, 1951).*

(d) But mere disregard of the provisions of the will, will *not* annul a partition, if everybody concerned had freely given his consent, for all would be in estoppel. *(Leaño v. Leaño, 25 Phil. 180).*

(2) Status of a Partition Made Although One of the Heirs was Absent

Casiano Agolto and Maria Asuncion Agolto v. Court of Appeals, et al.
L-23025, June 30, 1970

FACTS: An *absent* heiress (absent because of illness) was included in a deed of partition made among the heirs, thru a brother who apparently represented her, but who had no such written power of attorney to act as such. If said absent heiress does *not ratify* the partition, will the same be binding on her?

HELD: The deed of partition is not binding on said heiress (Maria Asuncion Agolto) in view of the lack of authority and the lack of ratification.

(3) When Action for Partition Prescribes

Although as a general rule, an action for partition among co-heirs does NOT prescribe, this is true only as long as one or some of them do not hold the property in question under an adverse title. *(Cordova v. Cordova, L-9936, Jan. 14, 1948).* The statute of limitations operates, as in other cases, from the moment such adverse title is asserted by the possessor of the property. *(Ramos v. Ramos, 45 Phil. 362).* Thus, if an extrajudicial settlement is executed by SOME heirs, stating that they are the SOLE heirs, and who as a consequence obtained transfer certificates of titles in their names (to the exclusion of the others), the excluded ones cannot successfully ask for the annulment of the partition if the period for such annulment has already prescribed (4 years from the discovery of the fraud, *i.e.*, from the time the instrument of partition is registered — since registration is constructive notice to the entire world). *(Gerona, et al. v. De Guzman, et al., L-19060, May 29, 1964).*

Heirs of Maningding v. CA
85 SCAD 357
(1997)

Prescription, as a rule, does not run in favor of a co-heir or co-owner as long as he expressly or impliedly recognizes the co-ownership.

Mere refusal to accede to a partition, without specifying the grounds for such refusal, cannot be considered as notice to the other co-owners of the occupant's claim of title in himself in repudiation of the co-ownership.

(4) Query

Can you give an instance when *partition* is said to be "premature"?

ANS.: This happens when ownership of the lot is still in dispute. In a situation where there remains an issue as to the expenses chargeably to the estate, partition is inappropriate. In estate settlement proceedings, there is a proper procedure for the accounting of all expenses for which the estate must answer.

Art. 1098. A partition, judicial or extra-judicial, may also be rescinded on account of lesion, when any one of the co-heirs received things whose value is less, by at least one-fourth, than the share to which he is entitled, considering the value of the things at the time they were adjudicated. (1074a)

COMMENT:

Rescission on Account of Lesion

(a) The lesion or damage must be at least 1/4, otherwise rescission will not lie. *(Garcia v. Tolentino, 25 Phil. 102).*

(b) If less than 1/4, the proper action is one for damages.

Art. 1099. The partition made by the testator cannot be impugned on the ground of lesion, except when the legitime of the compulsory heirs is thereby prejudiced, or when it appears or may reasonably be presumed, that the intention of the testator was otherwise. (1075)

COMMENT:

When Partition by Testator Can Be Rescinded Because of Lesion

This Article applies, whether the lesion is 1/4, more than 1/4, or less than 1/4 — thus, the partition made by the testator may still be rescinded:

(a) If the legitime is impaired.

(b) If the intent of the testator is for his partition to be rescinded should there be lesion.

Art. 1100. The action for rescission on account of lesion shall prescribe after four years from the time the partition was made. (1076)

COMMENT:

Prescription of Rescission

(a) If brought after more than 4 years, the action for rescission will fail. *(Alforque v. Veloso, 65 Phil. 227).*

(b) It has been held that in case of a judicial partition, the four-year period begins to run *not* from the time of the project of partition but from the time there is *court approval,* for had it been disapproved by the court, it would have been void. *(Samson v. Araneta, 60 Phil. 27).*

Art. 1101. The heir who is sued shall have the option of indemnifying the plaintiff for the loss, or consenting to a new partition.

Indemnity may be made by payment in cash or by the delivery of a thing of the same kind and quality as that awarded to the plaintiff.

If a new partition is made, it shall affect neither those who have not been prejudiced nor those who have not received more than their just share. (1077a)

COMMENT:

Option of the Suing Heir

The defendant heir, despite a proper ground for rescission, is still given an option:

(a) indemnification

(b) or a new partition

[NOTE: The plaintiff must necessarily be one who suffered the lesion referred to in the law, so, if he has in fact received more than his share, he cannot successfully ask for rescission. *(Cadiz v. Cabuniag, 56 Phil. 271).].*

Art. 1102. An heir who has alienated the whole or a considerable part of the real property adjudicated to him cannot maintain an action for rescission on the ground of lesion, but he shall have a right to be indemnified in cash. (1078a)

COMMENT:

When No Rescission Can Prosper

Reason for Article: Rescission requires mutual restitution. *(See Chingen v. Arguelles, 1 Phil. 296; also Art. 1359).*

Art. 1103. The omission of one or more objects or securities of the inheritance shall not cause the rescission of the partition on the ground of lesion, but the partition shall be completed by the distribution of the objects or securities which have been omitted. (1079a)

COMMENT:

Preterition of Objects in the Partition

(a) This involves a preterition, not in the institution, but in the partition, of one or more *objects*.

(b) Preterition of an object in a will gives rise to *mixed succession*. Preterition of an object in the partition does *not* give rise to rescission.

Art. 1104. A partition made with preterition of any of the compulsory heirs shall not be rescinded, unless it be proved that there was bad faith or fraud on the part of the other persons interested; but the latter shall be proportionately obliged to pay to the person omitted the share which belongs to him. (1080)

COMMENT:

(1) Preterition of Compulsory Heirs in the Partition

(a) This involves a preterition of *compulsory heirs,* not in the institution, but in the *partition.*

(b) Such preterition in the partition will NOT cause rescission except if there was:

(1) fraud

(2) bad faith

If the exception is present, the partition can be considered *not valid. (Gemora v. Yaptico, 52 Phil. 616).*

[NOTE: An acknowledged natural child preterited in the partition can bring an action for recovery of his share from the other heirs to whom the property has been adjudicated. *(Tomias v. Tomias, L-3004, May 30, 1951).].*

(2) Where the Remand of a Case to Determine Share of Preterited Heir Is Proper

Rebecca Viado Non, et al. v. CA, et al.
GR 137287, Feb. 15, 2000

The exclusion of petitioner Delia Viado, alleged to be a retardate, from the deed of extrajudicial settlement verily has had the effect of preterition. This kind of preterition, however, in the absence of proof of fraud and bad faith, does not justify a collateral attack on Transfer Certificate of Title 373646.

The relief, as so correctly pointed out by the Court of Appeals, instead rests on Art. 1104 to the effect that where the preterition is not attended by bad faith and fraud, the partition

shall not be rescinded but the preterited heir shall be paid the value of the share pertaining to her. Again, the appellate court has thus acted properly in ordering the remand of the case for further proceedings to make the proper valuation of the Isarog property and ascertainment of the amount due to petitioner Delia Viado.

Art. 1105. A partition which includes a person believed to be an heir, but who is not, shall be void only with respect to such person. (1081a)

COMMENT:

Intrusion of a Stranger in the Partition

(a) Instead of a preterition here, there is intrusion.

(b) Nevertheless, the partition is not completely void.

(c) Only the part corresponding to the non-heir is VOID.

(d) Those who are able to get shares, although they are not entitled thereto, must give them to one who is an heir and lawfully entitled to receive the same. *(De Torres v. De Torres, 28 Phil. 9).*

CIVIL CODE of the PHILIPPINES ANNOTATED

By

EDGARDO L. PARAS,† Litt. B., LL.B., LL.M., LL.D.

Associate Justice
Supreme Court of the Philippines
(1986-1992)

SIXTEENTH EDITION
2008

VOLUME THREE
ARTS. 774-1105
(WILLS AND SUCCESSION)

Published & Distributed by
REX Book Store
856 Nicanor Reyes, Sr. St.
Tel. Nos. 736-05-67 • 735-13-64
1977 C.M. Recto Avenue
Tel. Nos. 735-55-27 • 735-55-34
Manila, Philippines
www.rexpublishing.com.ph

by

EDGARDO L. PARAS

ISBN 978-971-23-5068-9

No. _____

ISBN 978-971-23-5068-9

9 789712 350689

Printed by
REX PRINTING COMPANY, INC.
TYPOGRAPHY & CREATIVE LITHOGRAPHY
84 P. Florentino St., Quezon City
Tel. Nos. 712-41-01 • 712-41-08

To my dearly beloved wife Gloria†, my loving children Emmanuel, Edgardo, Jr., and Eugene; my caring daughter-in-law Ylva Marie and my talented grandchildren Yla Gloria Marie and Edgardo III — in all of whom I have found inspiration and affection — I dedicate this humble work.

PREFACE

Significant doctrines as well as reiterations of the same by our Supreme Court by way of its most recent pronouncements affecting the Law on Wills and Succession have been promulgated since this volume's last sold-out edition.

These judicial interpretations of the law seem to be in keeping with the fast-tracked pace of the Gloria Macapagal-Arroyo regime. However, in general, the subject in spite or despite of the advent of E-Commerce, has remained stable. After all, Civil Law has and always will be one of the stabilizing factors in our daily lives.

For the eventual realization of this updated and revised edition, the REX Book Store hereby values the solicitous help rendered by Dr. Edgardo "Edgie" C. Paras, Jr., himself an author of several books, a Ph.D. in economics *(summa cum laude)* and a Doctor of Civil Law *(summa cum laude)*, consultant of the United States Agency for International Development/AGILE — an attached agency of Harvard Institute for International Studies and Pricewaterhouse Coopers, editor-in-chief of SCAD (Supreme Court Advanced Decisions), a fellow of the famous Hague Academy of International Law at the Netherlands (Holland), President of the Philippine Legal Writers Association, and vice-president-trustee of the De La Salle University Press. Formerly, he was governor of the National Book Development Board (under the Office of the President [Malacañang]); professor/lecturer of UST Graduate School of Law, UP Law Center, DAP, DBP, SEC, BSP, and Assumption College San Lorenzo; research attorney of the Court of Appeals; and judicial staff head of the Supreme Court. Dr. Paras recently took post-doctoral studies at both the Harvard University and National University of Singapore, respectively.

Grateful acknowledgment is made to the other distinguished members of the Paras Family: Gloria Conti Paras† (retired Associate Justice of the Court of Appeals), Emmanuel (senior partner of Sycip Salazar Hernandez and Gatmaitan law firm), and Eugene (MTC Judge of Hagonoy, Bulacan and law professor) for added research and insightful comments.

Gratitude is given to the Philippine Supreme Court for awarding the 5-Volume annotated works on the Civil Code (now on its 15th ed.) by Justice Edgardo Paras — the prestige-laden **Centenary Book Award** for "being a scholarly reference in the field of law," given the 8th day of June 2001, on the occasion of the Supreme Court's Centenary. The Executive Committee that bestowed the prestigious honor was composed of Chief Justice Hilario G. Davide, Jr., Justice Artemio V. Panganiban, and retired Justices Camilo D. Quiason and Ameurfina A. Melencio-Herrera (also chancellor of the Philippine Judicial Academy), respectively.

Rex Book Store, Inc.
Publisher

CONTENTS

Volume Three