COMMENTS AND JURISPRUDENCE ON SUCCESSION

TITLE IV

SUCCESSION

Chapter I

GENERAL PROVISIONS

Art. 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 will or by operation of law.[1]

Concept of Succession. — In general, succession may be understood in either of two senses. In its broadest juridical sense, it signifies the substitution or subrogation of a person in the transmissible rights and obligations of another. Under this definition, it embraces not only succession *mortis causa,* but even succession *inter vivos*. In its strict juridical sense, it signifies the substitution or subrogation of a person in the transmissible rights and obligations of a deceased person. Under this definition, it is limited to succession *mortis causa.*[2] It is in this sense that it is understood in the New Civil Code. Consequently, Art. 774 defines it as 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

[1]New provision.

[2]5 Manresa, 6th Ed., p. 209, "Succession" is derived from the phrase "sub cedere" which means "to substitute" or "to subrogate."

are transmitted through his death to another or others either by his will or by operation of law. This definition, as can be seen, is in conformity with the general provision of Art. 712 which enumerates the different modes of acquiring ownership and other real rights.

Basis of Succession. — What is the basis or foundation of the right of succession? There are, of course, certain extreme individualists and socialists, who deny the very existence of succession, because they believe that death extinguishes all rights, since it would be illogical to fix the birth of a right from the moment when the will which is supposed to create the right has ceased to exist. Consequently, according to them, the inheritance falls into the possession of the nearest of kin or of the State.[3] On the other hand, those who accept the idea of succession cannot agree with regard to the basis or foundation of succession. According to Manresa, the different theories advanced by them may be classified as follows:

Theories which base the right of succession on the right of private property: — If man has the right to own private property, he has the power to dispose of such property freely, imposing such licit terms and conditions as he might deem convenient. Consequently, he may distribute them by means of a testament, since a testament is nothing more than an instrument of alienation conditioned upon his death. This is the basis of testamentary succession; the same principle serves to explain intestate succession. The will of the decedent is the causal element of succession. When it is not expressly manifested, the law, taking his place, supplies it; those who are called to inherit are those who would have been called by the decedent had he been able to execute a testament.

(1) Theories which base the right of succession on the right of the family: — If the family is recognized as the heart and soul of society, the idea of succession must, therefore, revolve around it. Hence, the basis of succession rests upon family co-ownership. Consequently, intestate succession is considered, under this theory, as the normal kind of succession, while testamentary succession is the abnormal or exceptional kind.

(3) Eclectic theories: — These theories try to harmonize the two principles — individual and social. According to the exponents

[3]5 Manresa, 6th Ed., p. 317.

of these theories, the *raison d'etre* of the right of succession is the harmonious combination of two institutions — private ownership and the family.[4] This is so because succession is, after all, but a mode of perpetuating the right to own private property. Consequently, whether we look at it from the viewpoint of private ownership or the viewpoint of the family, the basis or foundation of succession is the recognized necessity of perpetuating man's patrimony beyond the limits of human existence. This necessity, in turn, is based on the necessity of giving greater stability to the family and to the social economy.[5]

It was, probably, this realization of the fundamental relationship between succession and the social order which was the basis and justification of the Code Commission in effecting some of the changes of our law of succession. Thus, according to the Commission:

> "The economic, social and political conflicts raging throughout the world today have created a new concept of legal order. Economists as well as jurists and political leaders are in search of the solution of the problems of maximum satisfaction of human wants, and society is realizing more and more that human happiness may be attained by tempering the concept of extreme individualism with State guidance.
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> "The social legislations now prevalent in the United States of America, Mexico, New Zealand, Australia and England to mention but a few are typical expressions of this new concept of legal order. This is the same spirit of our own Constitution.
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> "The purification of the system of private ownership of its abuses, the closing of those channels upon which wealth has flowed in torrents from generation to generation of a particular family, the emancipation of innocent persons from the bondage of undue conservation which has denied them the right to share in the estate of their parents, the elimination of distant relatives who may succeed to property to the accumulation of which they have not contributed anything, the staying of the dead hand to prevent it from meddling in the affairs of the living — these are among the means which may be advisable for the stability of the social order.

[4]Ibid., pp. 318-320.
[5]4 Castan, 6th Ed., p. 148

> "A powerful factor for the attainment of this stability of the social order is the socialization of ownership, not in the sense of socialism' but in the sense of effectively adapting property to the needs of society, which constitutes one of the underlying principles of the Title of Succession of the proposed Civil Code."[6]

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.[7]

Subjective Elements of Succession. — The subjective elements of succession consist of the decedent and those who are called to succeed such decedent either by will or by operation of law, such as the heirs, devisees or legatees. According to the above article, the person whose property is transmitted through succession, whether or not he left a will, is called the decedent. If he left a will, he is also called the testator. On the other hand, those who are called to the inheritance are known as heirs, devisees or legatees. An heir is a person called to the whole or to an aliquot portion of the inheritance either by will or by operation of law; a devisee is a person to whom a gift of real property is given by virtue of a will; while a legatee is a person to whom a gift of personal property is given by virtue of a will.[8]

Art. 776. The inheritance includes all the property, rights and obligations of a person which are not extinguished by his death.[9]

Objective Element of Succession. — The objective element of succession is what is known as the inheritance. According to the above article, the inheritance includes all the property, rights and obligations of a person which are not extinguished by his death. There are, however, other definitions which are based on this codal

[6]Report of the Code Commission, pp. 109-110.
[7]New provision.
[8]Art. 782, Civil Code.
[9]Art. 659, Spanish Civil Code.

definition. Thus, according to Manresa, it may be defined as the universality of all the property, rights and obligations constituting the patrimony of the decedent which are not extinguished by his death.[10] According to Castan, on the other hand, it may be defined as the entirety of the patrimonial properties and relations which constitute the objective elements of succession.[11]

Idem; Inheritance distinguished from succession. — It is clear that inheritance and succession, as both terms are understood in the present Civil Code, constitute two different concepts, although related to each other. The first refers to the universality of all the property, rights and obligations constituting the patrimony of the decedent which are not extinguished by his death; the second, on the other hand, is the legal mode by which such property, rights and obligations are transmitted.[12] In other words, the first is the objective element of the second.

Idem; Restricted concept of inheritance. — It must be noted, however, that under our legal system, the concept of inheritance is much more restricted than that found in the Spanish Civil Code. Unfortunately, this is not even indicated by the provision of Art. 776 of the New Civil Code — a provision which is an exact copy of Art. 659 of the Spanish Code. It is, however, undeniable that under our law, no succession shall be declared unless and until a liquidation of the assets and debts left by the decedent shall have been made and all his creditors fully paid. Until a final liquidation is made and all debts are paid, the right of the heirs to inherit remains inchoate. It partakes of the nature of a mere hope and nothing more. This is so because under our rules of procedure, liquidation is necessary in order to determine whether or not the decedent has left any liquid assets which may be transmitted to his heirs.[13] Thus, in *Limjoco vs. Intestate Estate of Pedro Fragante,*[14] the Supreme Court declared:

> "Under the regime of the Spanish Civil Code and before the enactment of the Code of Civil Procedure, the heirs of a deceased person were considered in contemplation of law as the continuation of his personality by virtue of the provision of Article 661

[10]5 Manresa, 6th Ed., p. 321.
[11]4 Castan, 6th Ed., p. 155.
[12]5 Manresa, 6th Ed., pp. 320-321.
[13]Centenera vs. Sotto, 78 Phil. 432.
[14]80 Phil. 776.

> of the first Code *(suppressed in the New Civil Code)* that the heirs succeed to all the rights and obligations of the decedent by the mere fact of his death. It was so held by this Court in *Barrio vs. Dolor, 42 Phil. 44, 46.* However, after the enactment of the Code of Civil Procedure, Article 661 of the Spanish Civil Code was abrogated, as held in *Suiliong & Co. vs. Chio-Taysan, 12 Phil. 13, 22.* In that case as well as in many others decided by this Court after the innovations introduced by Act No. 190 *(now reproduced in the New Rules of Court),* it has been the constant doctrine that it is the estate or the mass of property, rights and assets left by the decedent, instead of the heirs directly, that becomes vested and charged with his rights and obligations which survive after his demise.
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> "The heirs were formerly considered as the continuation of the decedent's personality simply by legal fiction. The reason was one in the nature of a legal exigency derived from the principle that the heirs succeeded to the rights and obligations of the decedent. Under the present legal system, such rights and obligations as survived after death have to be exercised and fulfilled only by the estate of the deceased. And if the same legal fiction were not indulged, there would be no juridical basis for the estate, represented by the executor or administrator, to exercise those rights and to fulfill those obligations of the deceased. The reason and purpose for indulging the fiction is identical and the same in both cases. This is why among the artificial persons recognized by law figures 'a collection of property to which the law attributes the capacity of having rights and duties, as for instance, the estate of a deceased person.'"

Therefore, it is no longer the heirs who are responsible for the payment of the debts or obligations of the decedent, but the estate itself; and if the estate should not be sufficient to pay for such debts or obligations, the heirs cannot be made to pay for the unpaid balance. In other words, such debts or obligations do not become the debts or obligations of the heirs after the death of the decedent; they remain as debts or obligations of the decedent, to the payment of which his property may be subjected wherever it be found.[15] Consequently, the inheritance may be more accurately defined as the universality of all the property and transmissible rights and obligations constituting

[15]Pavia vs. De la Rosa, 8 Phil. 70; Suillong vs. Chio-Taysan, 12 Phil. 13; Montelibano vs. Cruz, (CA), 35 Off. Gaz. 1083; Tranez vs. Vail, (CA), 37 Off. Gaz. 1253; Ledesma vs. McLuchlin, 66 Phil. 547.

the patrimony of the decedent which are not extinguished by his death and which are available for distribution among those who are called to succeed after settlement or liquidation.

Art. 777. The rights to the succession are transmitted from the moment of the death of the decedent.[16]

Causal Element of Succession. — From the very definition of succession as enunciated in Art. 774, it is evident that it is the expressed will of the decedent as manifested in his last will and testament or his presumed will as provided by law which is the efficient cause of the transmission of successional rights, while the fact of his death is the condition. It must be observed, however, that the fact of death with respect to succession is more than a condition; it is the very reason of succession itself — as a matter of fact, it is the very reason for the manifestation of the will of the decedent. Hence, we can very well say that the death of the decedent is not only the condition, but also the final cause of the transmission of successional rights.

Idem; Transmission of successional rights. — Art. 777 enunciates the principle that the rights to the succession are transmitted from the moment of the death of the decedent. This principle is complemented by the provisions of Arts. 1042 and 533 of the Code.

Some commentators of the Spanish Civil Code have criticized the phraseology of Art. 657 *(now Art. 777)* as inexact. These commentators contend that it would have been better if the article had stated that the succession of a person is opened *(se abre)* at the moment of his death.[17] Manresa, however, answers this criticism by saying that succession is a mode of acquisition by means of which the property of the decedent passes to the heir by virtue of the death of the former. There is, therefore, a true transmission from one person to the other, and in order to give precise expression to the idea, the Code says that successional rights are transmitted *(se transmiten),* instead of saying that succession is opened *(se abre),* such expression

[16]Art. 667, Spanish Civil Code, in modified form.
[17]3 Navarro Amandi, p. 82; Gomez, p. 94.

having a distinct meaning of its own, since it refers to the effects, while the other refers to the cause.[18]

Whether we say that the rights to the succession are transmitted or the succession of a person is opened, there is no question that the moment of death is the decisive moment when the heirs acquire a definite right to the inheritance whether such right is pure, conditional or with a term. It is of little importance if a long or short period may have elapsed from the death of the decedent when the heirs or legatee enters into the possession of the inheritance or legacy, because the acquisition shall always retroact to the moment of said death in accordance with the provision of Art. 1042 which should be considered as the complement of the present article. And it could not be otherwise because successional rights, whether generated by the will of the decedent or by law, can have no effectiveness except through the death of the said decedent. Until then, there may be a change in the will of the testator, or in the dispositions provided by law with regard to the persons called in the different orders of succession, or even when there are no such alterations, there may be changes in the circumstances of those who are favored so that they are deprived altogether of their rights, either because they have committed some cause of disinheritance or some act of incapacity. Therefore, since the effectiveness of successional rights depends upon the death of the decedent, and since such death is the very reason of succession, the moment of such event has been fixed as the moment for the transmission.[19]

Consequently, after the death of the decedent, anyone of the heirs may enter into a contract with respect to his share in the inheritance even before partition has been effected. This is so because his right with respect thereto is already in the nature of a vested right in accordance with the principle declared in Art. 777 of the Civil Code, to the effect that the rights to the succession are transmitted at the moment of the death of the decedent.[20] Hence, he may sell his undivided share in the inheritance[21] or even donate

[18]5 Manresa, 6th Ed., pp. 310-311.

[19]Ibid., pp. 309-310.

[20]Uson vs. Del Rosario, 92 Phil. 530. To the same effect; Baun vs. Heirs of Baun, 53 Phil. 654. Cuison vs. Villanueva, 90 Phil. 850; Enriquez vs. Abadia, 50 Off. Gaz. 4185.

[21]Ibarle vs. Po, 49 Off. 956. To the same effect: Barreto vs. Tuazon, 59 Phil. 845; Jakosalem vs. Rafols, 73 Phil. 628.

it.[22] Conversely, before the death of the decedent, no heir may enter into a contract with respect to his future share in the inheritance. This is so because, before the death of the decedent, the heirs have only a mere hope or expectancy, absolutely inchoate in character, to their share in the inheritance. Hence, any contract entered into with respect to future inheritance would have no object whatsoever, and as a consequence, would be inexistent from the beginning.[23] This is confirmed by Art. 1347 of the Code itself which declares that no person can enter into a contract with respect to future inheritance except in cases expressly authorized by law.[24]

Lorenzo vs. Posadas
64 Phil. 353

This is an appeal from a decision of the lower court dismissing an action commenced by plaintiff in his capacity as trustee of the estate of Thomas Hanley, deceased, against the defendant Collector of Internal Revenue, for the refund of an inheritance tax on the estate of the deceased paid by plaintiff under protest and for collection of interest thereon. It appears that on May 7, 1922, Thomas Hanley died, leaving a will and some personal and real properties. The will which was duly admitted to probate, provides among other things, that all properties of the testator shall pass to his nephew, Matthew Hanley. However, it also provides that all real estate shall be placed under the management of the executors for a period of ten years, after the expiration of which the properties shall be given to the said Matthew Hanley. The plaintiff contends that the inheritance tax should be based upon the value of the estate at the expiration of the period of ten years after which according to the testator's will, the property could be and was to be delivered to the instituted heir, and not upon the value thereof at the time of the death of the testator. Invoking the provision of Art. 657 *(now Art. 777)* of the Civil Code, the Supreme Court, speaking through Justice Laurel, held:

[22]Osorio vs. Osorio, 41 Phil. 531.

[23]For illustrative cases, see Tinsay vs. Yusay, 47 Phil. 639; Arroyo vs. Gerona, 58 Phil. 226; Tordilla vs. Tordilla, 60 Phil. 162; Reyes vs. Reyes, (CA), 45 Off. Gaz. 1836; Rivero vs. Serrano, 48 Off. Gaz. 642.

[24]The exceptions referred to are those found in Art. 130, with respect to donations *propter nuptias* by the future spouses to each other of future property, and in Art. 1080, with respect to partitions *inter vivos* made by a person of his estate among his heirs.

"Whatever may be the time when actual transmission of the inheritance takes place, succession takes place in any event at the moment of the decedent's death. Thomas Hanley having died on May 27, 1922, the inheritance tax accrued as of that date.

"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.

"Consequently, we hold that a transmission by inheritance is taxable at the time of the predecessor's death, notwithstanding the postponement of the actual possession or enjoyment of the estate by the beneficiary, and the tax is measured by the value of the property transmitted at the time regardless of its appreciation or depreciation."

Uson vs. Del Rosario
92 Phil. 530

The records show that Faustian Nebreda died in 1945 long before the effectivity of the New Civil Code, survived by his widow, Maria Uson, plaintiff in this case, and four illegitimate children, defendants. The litigation involves several parcels of land which belonged to the decedent at the time of his death. Plaintiff contends that she is entitled to all of the said property on the ground that at the time of the death of the decedent, she was the only heir entitled to succeed. The defendants, on the other hand, contend that, while it is true that they are not entitled to inherit from the decedent under the old Civil Code, yet under the new Civil Code, which went into effect in 1950, they are entitled to inherit concurrently with the surviving spouse. Therefore, applying the principle stated in Art. 2253 in relation to Art. 2264, this right to succeed, which is declared for the first time in the new Civil Code, shall be given retroactive effect even though the act or event which gives rise thereto may have occurred under the prior legislation. The Supreme Court held:

"The right of ownership of Maria Uson over the lands in question became vested in 1945 upon the death of her late husband and this is so because of the imperative provision of the law which commands that the rights to the succession are transmitted from the moment of death *(Art. 657, old Civil Code —*

now Art. 777, new Civil Code). The new right recognized by the new Civil Code in favor of the illegitimate children of the deceased cannot, therefore, be asserted to the impairment of the vested right of Maria Uson over the lands in dispute."

Idem; Rule in case of presumptive death. — It must be noted that the principle enunciated in Art. 777 is applicable not only to actual death, but even to presumptive death. This is clear from the provisions of Arts. 390 and 391 of the Code. Thus, according to these articles, in order that an absentee is presumed dead for the purpose of opening his succession, it is necessary that he must have been absent for at least ten years, it being unknown whether or not he still lives.[25] This rule, however, is subject to the following exceptions: *first,* if the absentee disappeared after the age of seventy-five years, in which case an absence of five years shall be sufficient in order that his succession may be opened;[26] and *second,* if the absentee disappeared under any one of the three circumstances enumerated in Art. 391, in which case an absence of four years shall be sufficient.[27]

When or at what precise moment will there be a transmission of successional rights in case of presumptive death? As applied to the case of normal or ordinary presumption of death, will it be at the beginning of the ten-year period or at the end or expiration of such period, and as applied to the case of abnormal or extraordinary presumption of death, will it be at the beginning of the four-year period or at the end or expiration of such period? A distinction must be made between the fact of death and the moment of death. These presumptions which are enunciated in the Civil Code only tell us when the absentee is presumed to be dead; they do not tell us when such absentee died.[28] Hence, as a general rule, the time when the absentee died must be proved in accordance with the ordinary rules of evidence. If this is not possible, then he is deemed to have

[25]Art. 390, Civil Code.

[26]Ibid.

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

[28]See Judge Advocate General vs. Gonzales, (CA), 48 Off. Gaz. 5329.

died at the time of the that expiration of the period designated by law. There is, however, an exception to this rule, and that is when the absentee disappeared under any one of the extraordinary circumstances enumerated in Art. 391 of the Code. Because the absentee disappeared under danger of death, in such case, he is deemed to have died at or about the time when he disappeared.[29]

Idem; Effect of judicial settlement. — From what had been stated, it is clear that since the moment of the death of the decedent is the determining factor when the heirs acquire a definite right to the inheritance, whether such right is pure or contingent, it is immaterial whether a short or long period of time lapses between the moment of the death of the decedent and the heir's entry into the possession of his inheritance. Once the heir accepts his inheritance and takes possession thereof, his right thereto is deemed to retroact to the moment of the decedent's death.[30] Consequently, the fact that the hereditary estate is placed under administration will not affect the application of the rule stated in Art. 777.[31] As a matter of fact, it has even been held that the fact that the law provides for the appointment of a legal administrator for the liquidation of the decedent's estate and the partition of his *haeriditas jacens* among his heirs, does not deprive such heirs of the right to intervene in the administration of the estate for the protection of their interests. Notwithstanding the appointment of a judicial administrator, it is well settled that the heirs have a right to intervene when they believe that the administrator's acts are prejudicial to their interests.[32] There is of course no question that under our legal system, the formal declaration or recognition of the right of the

[29]This exception has been impliedly recognized by the Court of Appeals in the case of Judge Advocate General vs. Gonzales, *supra,* when it held that a soldier who was declared as missing in action on May 7, 1942, must have died on or before such date.

[30]Arts. 1042, 533, Civil Code.

[31]See also Quison vs. Salud, 12 Phil. 109; Ilustre vs. Alaras Frondosa, 17 Phil. 321; Malahacan vs. Ignacio, 19 Phil. 434; Beltran vs. Dorian, 32 Phil. 66; Bondad vs. Bondad, 34 Phil. 232; Baldemor vs. Malanyaon, 34 Phil. 367; Velasco vs. Vizmanois, 45 Phil. 675; Fule vs. Fule, 46 Phil. 317; Dais vs. CFI of Capiz, 51 Phil. 396; Vda. de Bonnevie vs. Vda. de Pardo, 59 Phil. 486; Garcia vs. David, 67 Phil. 279; De Vera vs. Galauran, 67 Phil. 213; Lao vs. Dee, 90 Phil. 868 (unrep.); Vda. de Rodriguez vs. Tan, 92 Phil. 273; Morales vs. Yanez, 52 Off. Gaz. 1945; Marabiles vs. Quito, 100 Phil. 64.

[32]Dais vs. CFI of Capiz, 51 Phil. 396. To the same effect: Adrian vs. Obleada, 58 Phil. 302; Marabiles vs. Quito, 100 Phil. 64

heirs requires judicial confirmation in the proper testate or intestate proceedings. Nevertheless, such right has always been protected from encroachments made or attempted before the judicial declaration.[33] Hence, even before there has been a judicial declaration of heirship, it is well established that an heir has a right to assert a cause of action as an heir, although he has not been judicially declared to be so. This is logical because of the principle that the property of a deceased person, both real and personal, becomes the property of his heir by the mere fact of death of his predecessor in interest.[34]

It must be noted, however, that just because the heirs acquire ownership over their inheritance from the very moment of the death of the decedent, they can then compel the administrator to deliver to them the respective portions to which they are entitled either by will or by operation of law. While it is very true that they acquire ownership thereof from the moment of the death of their predecessor, yet upon the appointment of a judicial administrator, the latter, by virtue of his appointment, acquires a right to the possession of the estate, subject to the orders of the court, unless he consents to the heirs continuing in possession thereof.[35] As a matter of fact, Sec. 3, Rule 87 of the New Rules of Court bars the filing of an action by an heir to recover the possession of property belonging to the estate until there is an order of the court which has jurisdiction of the testate or intestate proceedings assigning said property to such heir. Under our law, an executor or administrator, who assumes the trust, takes possession of the property left by the decedent for the purpose of liquidating all debts. While the debts are undetermined and unpaid, no residue may be settled for distribution among the heirs. Consequently, before distribution is made or before any residue is known, the heirs have no cause of action against the executor or administrator for the possession of property left by the decedent.[36] Nevertheless, this will not affect the principle that the rights to the succession are transmitted at the moment of the death of the decedent. Once the administration proceedings is terminated and the heirs will finally accept their respective portions in the inheritance,

[33]Morales vs. Yanez, 52 Off. Gaz. 1945.

[34]Marabiles vs. Quito, 100 Phil. 64. To the same effect: Vda. de Bonnevie vs. Vda. de Pardo, 59 Phil. 186; Cuevas vs. Abesamis, 71 Phil. 147.

[35]Arayata vs. Joya, 51 Phil. 634.

[36]Lao vs. Dee, 90 Phil. 868 (unrep.).

the possession thereof is deemed transmitted to them without any interruption and from the moment of the death of the decedent.[37]

Art. 778. Succession may be:

(1) Testamentary;

(2) Legal or intestate; or

(3) Mixed.[38]

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.[39]

Art. 780. Mixed succession is that effected partly by will and partly by operation of law.[40]

Kinds of Succession. — According to Art. 778, succession may be testamentary, legal or intestate, or mixed. This classification is based on the manner of effecting the succession. Explaining this classification, the Supreme Court once stated:

> "There are three ways in which succession may be effected: by the will of man, by the law, or by both at the same time. In the first case, the succession is called testamentary, because it is based on a last will and testament, which is the orderly manifestation of the testator's will; in the second, it is called legal, because it takes effect by operation of law; and the third is called mixed, because it partakes of the character of both testamentary and legal succession."[41]

There is, however, another class of succession deducible from the provision of Art. 130 of the Civil Code which is contractual in character and which is applicable only to donations of future property by reason of marriage made by one of the future spouses to the other. Consequently, we can very well add contractual succession in its

[37]Art. 533, Civil Code.
[38]New provision.
[39]New provision.
[40]New provision.
[41]Macrohon vs. Saavedra, 51 Phil. 267.

restricted form, although relatively insignificant, as the fourth class of succession under the Civil Code.

Idem; Testamentary succession. — Testamentary succession is that which results from the designation of an heir, made in a will executed in the form prescribed by law.[42] Under the Spanish Civil Code, testamentary succession was merely defined as that conferred by the will of man.[43] The definition which is now found in Art. 779 of the New Civil Code is therefore new. It must be noted, however, that the designation of an heir is not essential for the validity of a will.[44] What is essential is that the succession must be effected through the testator's will executed in the form prescribed by law.

Idem; Intestate succession. — The Civil Code fails to give a definition of legal or intestate succession, although in Art. 960 it enumerates the different cases or instances (which are by no means exclusive) when legal or intestate succession shall take place. We can, however, define it as that which is effected by operation of law in default of a will. If the decedent has not made any will, or even where he has made one, if it has not been made in accordance with the formalities prescribed by law, his presumed will as provided by law shall govern the distribution of his hereditary estate after his death. Consequently, the most fundamental distinction between testamentary and intestate succession consists in the fact that, while in the first, it is the expressed will of the testator manifested in his last will and testament which is the supreme law in the succession, in the second, it is his presumed will as provided by the law itself which governs.

Idem; Mixed succession. — Originally, before the Spanish Civil Code was drafted in 1889, Spanish laws adhered to the rule of indivisibility of succession. Under this doctrine, based on the Roman law maxim – *memo pro parte testatus pro parte intestatus decedere potest* – succession cannot partake of the nature of both testamentary and intestate succession; in other words, it cannot be partly testate and partly intestate.[45] Under the Spanish Civil Code, this rule was repealed and this repeal is confirmed by the present Civil Code,

[42]Art. 779, Civil Code.
[43]Art. 658, Spanish Civil Code.
[44]Art. 841, Civil Code.
[45]Macrohon vs. Saavedra, 51 Phil. 267.

which states that succession may be mixed in the sense that it may be effected partly by will and partly by operation of law.[46]

Thus, under our law, if the testator makes a will which does not dispose all of his property, the result is what is known as mixed succession. The succession partakes of the nature of both testamentary and legal succession. Hence, in the distribution of the hereditary estate of the testator after his death, testamentary succession shall take place with respect to that part of his property which he has disposed of in his will, while legal succession shall take place with respect to that part which he has not disposed of.[47]

Idem; Contractual succession. — According to Art. 1347 of the Civil Code, no contract may be entered into regarding future inheritance except in cases expressly authorized by law. This precept or principle is based on the fact that the object of a contract should exist at the moment of its celebration or, at least, it can exist in the future.[48] Under Art. 130 of the Code, however, the future spouses may give or donate to each other in their marriage settlements their future property to take effect upon the death of the donor and to the extent laid down by the provisions of the Civil Code relating to testamentary succession. It is evident that this is one of the exceptions referred to in Art. 1347.[49] As a consequence of the limitation that the donation shall only be to the extent laid down by the provisions of the Civil Code relating to testamentary succession, it is imperative that the rule that the donor cannot give by way of donation more than he can dispose of by will shall have to be complied with.[50] Furthermore, since a donation by reason of marriage is a true contract and since it shall take effect only after the death of the donor, it is evident that it is in reality a contractual disposition *mortis causa*. In other words, we have here an example of what is known as contractual succession.[51] How does it differ from testamentary succession? The answer is simple. In testamentary succession, it is essential that the testamentary dispositions must be contained in a

[46]Art. 780, Civil Code.
[47]Arts. 841, 960, Civil Code.
[48]2 Castan, 6th Ed., p. 616.
[49]See Art. 1080, Civil Code, for other exception.
[50]Art. 752, Civil Code.
[51]6 Sanchez Roman 107.

will executed in accordance with the formalities prescribed by law, while in this kind of succession, the donation or disposition does not have to be contained in a will. It is, however, essential that it must be executed in accordance with the form prescribed for donations by reason of marriage; in other words, it must comply with the *Statute of Frauds*.[52]

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.[53]

Extent of Inheritance. — According to Art. 781 in conjunction with Art. 776, the inheritance of a person includes: *first,* all of his property which are existing at the time of his death; *second,* all of his transmissible rights and obligations which are existing at the time of his death; and *third,* all of the property and rights which may have accrued to the hereditary estate since the opening of the succession.

Idem; Property in existence at decedent's death. — In the first place, the inheritance includes all of the decedent's properties in existence at the time of his death. It must be noted, however, that this can only refer to those properties which are available for distribution among the persons called to the inheritance after settlement or liquidation.[54]

Does the body or mortal remains of the decedent form a part of the inheritance? The view maintained by American authorities is that it cannot be considered as a part of the inheritance inasmuch as it is not property.[55] It must be noted, however, that under Rep. Act No. 349, as amended by Rep. Act No. 1056, a person may validly grant to a licensed physician, surgeon, known scientist, or any medical or scientific institution, authority to detach at any time after the grantor's death, any organ of his body, and to utilize the

[52]Art. 127, Civil Code.

[53]New provision.

[54]See comments under Art. 776, Civil Code.

[55]Alexander on Wills, Vol. I, pp. 316-317. For rules regarding funeral arrangements — See Arts. 305, et seq., Civil Code, and Vda. de Carillo vs. Carillo, 67 Phil. 92.

same for medical, surgical or scientific purposes.[56] The grant or authorization must: (1) be in writing; (2) specify the person to whom or the institution to which the grant is given; (3) specify the organ to be detached; (4) specify the use or uses of the organ to be employed; and (5) be signed by the grantor and two disinterested witnesses.[57] If all of these requirements have been complied with, after the death of the grantor, the grant or authorization shall be binding upon the executor or administrator, successors of the deceased and members of his family.[58]

Idem; Transmissible rights and obligations. — In the second place, the inheritance of a person includes all of his transmissible rights and obligations to which the persons called to such inheritance succeed after the settlement of liquidation of his estate. Since enumeration of all of the different rights and obligations which are either transmissible or intransmissible is almost impossible within the limited scope of this work, the following rules might as well serve as guides for the determination of the transmissible or intransmissible character of a right or obligation.[59]

(1) In the first place, rights relative to persons and family or purely personal rights are, by their very nature, intransmissible in character. Consequently, they are not included in the inheritance.

(2) In the second place, rights relative to property or patrimonial rights are generally transmissible in character. Consequently, they may be included in the inheritance. Excepted from this rule are those which are expressly made intransmissible by operation of law such as personal and legal usufructs and personal easements.

(3) In the third place, rights arising from obligations or rights of obligations, whether contractual or otherwise, are generally transmissible in character. Consequently, they may be included in the inheritance. Excepted from this rule are those arising from contracts which by their very nature are intransmissible, those which are expressly made intransmissible by agreement of the parties, and those which are expressly made intransmissible by operation of law.

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[56]Sec. 1, Rep. Act No. 349, as amended.
[57]Sec. 2, Rep. Act No. 349, as amended.
[58]Sec. 3, Rep. Act No. 349, as amended.
[59]6 Sanchez 54-57.

Some of the rights and obligations which are intransmissible, either because they are purely personal in character or they are made so by operation of law, are the following: (1) rights and obligations between husband and wife; (2) property relations between husband and wife; (3) action for legal separation; (4) action to compel acknowledgment of a natural child; (5) action to obtain judicial declaration of illegitimate filiation of an illegitimate child who is not natural; (6) parental authority or *patria potestas;* (7) rights of a guardian; (8) right to receive and the obligation to give support; (9) right to hold a public office as well as the right to exercise a profession or vocation; (10) right of usufruct; (11) right of personal easement; (12) rights and obligations arising from a contract of partnership; (13) rights and obligations arising from a contract of agency; and (14) criminal responsibility. Thus, where a natural child dies survived by his mother, it has been held that the right of action for the acknowledgment of the child is, in principle and without exception, extinguished by his death, and cannot be transmitted as a portion of the inheritance of such child.[60] Similarly, where a merchant dies leaving a mercantile business to his widow and children, it has been held that such fact alone does not make such widow and children merchants.[61]

Conde vs. Abaya
13 Phil. 249

The records show that Casiano Abaya died intestate, survived by his brother, Roman Abaya, and by two unacknowledged natural children, who died during their minority after the death of Casiano Abaya, but before the institution of this action. In the intestate proceedings for the settlement of the estate of Casiano Abaya, Roman Abaya, who had been appointed administrator of the estate, filed a petition whereby he moved that he be declared, after due process of law, as the sole heir of the decedent. Paula Conde, mother and heir of the two natural children, opposed the petition, contending that the right of the two natural children whom she had by the decedent, and consequently, her rights as heir of such natural children, was superior to that of Roman Abaya. The Supreme Court, speaking through Chief Justice Arellano, held:

[60]Conde vs. Abaya, 13 Phil. 249.
[61]Hu Niu vs. Coll. of Customs, 26 Phil. 423.

"The power to transmit the right of such action by the natural child to his heirs cannot be sustained under the law. Although the Civil Code considerably improved the conditions of recognized natural children, granting them rights and actions that they did not possess under the former laws, they were not, however, placed upon the same plane as legitimate ones. The difference that operates these two classes of children is still great, as proven by so many articles dealing with the rights of the family and with succession in relation to the members thereof. It may be laid down as a legal maxim, that whatever the Code does not grant to the legitimate children must still less be understood as granted to recognized natural children or in connection with their rights. There is not a single exception in its provisions.

"The right of action pertaining to the child to claim his legitimacy is in all respects superior to that of the child who claims acknowledgment as a natural child. And it is evident that the right of action to claim his legitimacy is not one of those rights which the legitimate child may transmit by inheritance to his heirs; it forms no part of the component rights of his inheritance. If it were so, there would have been no necessity to establish its transmissibility to heirs as an exception in the terms and conditions of Article 118 *(now Art. 268)* of the Code. So that, in order that it may constitute a portion of the child's inheritance it is necessary that the conditions and the terms contained in Article 118 *(now Art. 268)* shall be present, since without them, the right that the child held during his lifetime, being personal and exclusive in principle and, therefore, as a general rule not susceptible of transmission, would and should have been extinguished by his death. Therefore, where no express provision like that of Article 118 *(now Art. 268)* exists, the right of action for the acknowledgment of a natural child is, in principle and without exception, extinguished by his death, and cannot be transmitted as a portion of the inheritance of the deceased child."

Idem; Id.— Monetary obligations. — Because of the doctrine that it is the estate or the mass of property, rights and assets left by the decedent, instead of the heirs directly, that becomes vested and charged with his rights and obligations which survive after his death,[62] it is but logical that when the law speaks of transmissible rights and obligations as being included in the inheritance, it can

[62]Suiliong & Co. vs. Chio-Taysan, 12 Phil. 13: Centenera vs. Sotto, 78 Phil. 432: Limjoco vs. Intestate Estate of Pedro Fragante, 80 Phil. 776.

only refer to those rights and obligations to which the persons called to inherit either by will or by operation of law succeed after the settlement or liquidation of the estate. It must be noted, however, that under the New Rules of Court, only monetary obligations or claims for money must be filed within the time limited by the rules against the estate of the decedent; otherwise, they are barred forever.[63] It is only these claims which must be liquidated in the testate or intestate proceedings. After liquidation, the court which has jurisdiction over the proceedings, on application of the executor or administrator, or 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.[64] Hence, under our system of procedure for the settlement of the estates of deceased persons, monetary obligations of the decedent can only be charged against his estate and not against his heirs.[65] This may be illustrated by the following problem:

> *Problem* — D was indebted to C for P500. When he died, he had no property, but he was survived by X, his son, who was making good in a certain business. As D had no property, C brought an action against X for the payment of the P500 plus legal interest thereon on the ground that not only the property but also the rights and obligations of a person are transmitted to his heirs upon his death either by will or by operation of law. Is C entitled to the remedy sought for?
>
> *Answer* — C is not entitled to the remedy. While it is true that the inheritance of a person includes not only his property but also his rights and obligations which are existing at the time of his death, yet his monetary obligations are excluded by operation of law. This is so because under our system of procedure for the settlement of the estate of deceased persons, such monetary obligations of the decedent can only be charged against his estate and not against his heirs.

It must be noted that the claims or obligations which can be charged against the estate of the decedent after his death are those

[63]Sec. 5, Rule 88, New Rules of Court.

[64]Sec. 1, Rule 91, New Rules of Court; Prieto vs. Valdez, (CA), G.R. No. 126347-R, March 5, 1955.

[65]Pavia vs. De la Rosa, 8 Phil. 70; Tranez vs. Vail,(CA), 37 Off. Gaz. 1253: Ledesma vs. McLuchlin, 66 Phil. 547; Litonjua vs. Montilla, 90 Phil. 757.

monetary obligations contracted by the decedent himself during his lifetime and not those contracted by his heirs. Consequently, a creditor of one of the heirs has no standing or legal personality to intervene in the testate or intestate proceedings for the settlement of the estate of the decedent by filing a motion praying that the participation of such heir in the inheritance should be sold in order to pay for the obligation. This is so because the creditor is not a creditor of the decedent but of the heir, and, therefore, is entitled to proceed against the participation of such heir only after the settlement or liquidation of the estate of the decedent.[66]

It is, therefore, clear from the provisions of the Rules of Court and from the decided cases that monetary obligations cannot be included in the inheritance. Other obligations, however, may be included. Most of these obligations which may form a part of the inheritance are those arising by operation of law from patrimonial rights which are adjudicated to the heirs after liquidation of the estate, such as those connected with ownership, possession or real easements, as well as those arising from contracts the object of which is the delivery of a thing other than money. Such obligations are chargeable against the heirs, but only to the extent of the value of the property which they may have received from the decedent.[67] Thus, where the decedent, during his lifetime, had assigned his interest in a certain parcel of land to a certain creditor, but such assignment is not registered, and, subsequently, such land is adjudicated to his heirs, it would not be correct to say that the assignee should have filed her claim in the intestate proceedings for the settlement of the estate of the decedent, since the transaction is not a monetary obligation. The transaction being binding between the parties, the same can still be invoked against them or against their privies. This means that the assignee can still press her claim against the heirs of the decedent. Such heirs cannot escape the legal consequence of the transaction because they have inherited the property subject to the liability affecting their common ancestor.[68]

[66]Litonjua vs. Montilla, 90 Phil. 757. To the same effect: Ledesma vs. McLuchlin, 66 Phil. 547.

[67]Guinto vs. Medina, (CA), 50 Off. Gaz. 199. See Arts. 1311, 1429, Civil Code.

[68]Vda. de Carillo vs. Salak, 91 Phil. 265. To the same effect: Guinto vs. Medina, (CA), 50 Off. Gaz. 199.

Idem; Accretions. — The inheritance of a person, according to Art. 781, also includes any property or right which may have accrued thereto since the opening of the succession. Some critics of the New Civil Code have criticized this provision on the ground that it is inaccurate and superfluous. According to them, since the rights to the succession are transmitted from the time of the death of the decedent,[69] and, as a consequence, the heirs become the owners in common of the hereditary estate from that time up to the time when a partition of the estate is made among such heirs,[70] therefore, any property or right which may have accrued thereto since the opening of the succession shall also belong in common to the heirs, not because it is included in the inheritance, but because of the principle of accession.[71] Defenders of the New Civil Code, on the other hand, maintain that since such property or right which may have accrued to the hereditary estate since the opening of the succession is subject to the payment of the debts of the decedent,[72] in the same way as any existing property or transmissible right originating from such decedent, and since what will actually be distributed to the persons who are called to the inheritance either by will or by operation of law will be the net remainder or residue of the estate, therefore, we must include in the inheritance all property and transmissible rights which may have accrued thereto since the opening of the succession.

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.[73]

Heirs, Devisees and Legatees in General. — According to the Code Commission, the concept of heir, devisee and legatee, as enunciated in the above article, is taken from the decision of the Supreme Court in the case of *Suiliong Co vs. Chio-Taysan,*[74] but

[69]Art. 777, Civil Code.
[70]Art. 1078, Civil Code.
[71]Art. 440, Civil Code.
[72]Art. 1078, Civil Code.
[73]New provision.
[74]12 Phil. 12.

slightly modified so that the word "heir" includes not only a relative who succeeds an intestate, but also any person who takes property by virtue of a will.

These definitions, however, have been severely criticized by some of our most eminent civilists. Thus, according to Mr. Justice J.B.L. Reyes:

> "The distinction between heir and legatee is not drawn with precision, and yet the distinction is all important, for Arts. 854 *(preterition)* and 918 *(disinheritance)* provide cases where the institution of heir is void, but the legacies and devices 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., the whole or a fraction of the whole; while a legatee or devisee is given individual items of property. As noted by Ferrera *(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*.
>
> "Art. 782 makes it impossible to differentiate the voluntary heirs instituted by will from the legatees. In limiting legatees and devisees to persons to whom gifts of property are given, it would logically follow that the quality of legatee or devisee results from a donation *mortis causa*. This is not a differential criterion, since donations *mortis causa* must have the formalities of wills. Furthermore, under this article, there would be no justification of a separate regulation of legacies, as is done in Sec. 7, Chi. 2, of the Project, since all testamentary legatees would be heirs under Art. 782.
>
> "Art. 660 of the Code of 1889 should be revived in lieu of the present Art. 782."[75]

Idem; Concept of heirs. — As noted above, the definition of an heir as a person called to the succession either by the provision of a will or by operation of law, has been criticized on the ground that it does not properly differentiate voluntary heirs from devisees or legatees. Under Art. 660 of the Spanish Civil Code, the distinction between the two concepts was precise and clearcut.[76] Yet, there is

[75]Reyes, Observations on the New Civil Code, Lawyer's Journal, Nov. 30, 1950.

[76]Art. 660 of the Spanish Civil Code provides that "an heir is one who succeeds by universal title," while "a legatee is one who succeeds by particular title."

no question that under the present Code, as deduced from certain provisions, the distinction still remains.[77] In other words, an heir still succeeds to the whole or to an aliquot portion of the inheritance either by virtue of a will or by operation of law, while a devisee or legatee still succeeds to individual items of property by virtue of a will. Thus, in a bill which passed the House of Representatives in 1952, but which was shelved in the Senate, the following definition of an heir was proposed. "An heir is a person called to the whole or an aliquot portion of the inheritance either by the provision of a will or by operation of law."[78] It is evident that this amendment would have corrected the defect of the definition of an heir embodied in Art. 782.

Idem; Id. — Kinds of heirs. — There are two classes of heirs in testamentary succession. They are voluntary and compulsory heirs. A voluntary heir is an heir called to succeed to the whole or an aliquot part of the disposable free portion of the hereditary estate by virtue of the will of the testator, while a compulsory heir is an heir called by law to succeed to a portion of the testator's estate known as the legitime.[79] This classification of heirs in testamentary succession into voluntary and compulsory is based on the fact that, under our law of succession, if the testator is survived by certain relatives for whom the law as a matter of policy has reserved a portion of his hereditary estate, such estate, is, as a general rule, divided into two parts. One part is known as the disposable free portion over which the testator has absolute testamentary control and which, consequently, may be disposed of by will in favor of any person not disqualified by law to succeed, while the other part is known as the legal portion or legitime over which the testator has no testamentary control because the law has already reserved it for certain heirs who are, therefore, called compulsory heirs, and which, consequently, cannot be disposed of by will in favor of any other person.

In legal or intestate succession, all heirs are called legal or intestate heirs. In order to distinguish such heirs from compulsory heirs who are also called to succeed by operation of law, a legal or intestate heir is ordinarily defined as an heir called to succeed by operation of law when legal or intestate succession takes place.

[77]See Arts. 854, 918, Civil Code.
[78]House Bill No. 1956.
[79]See Arts. 886, 887, Civil Code.

Intestate or legal heirs are classified into two groups, namely: those who inherit by their own right, and those who inherit by the right of representation. An intestate heir can only inherit either by his own right, as in the order of intestate succession provided for in Arts. 978 to 1014 of the Civil Code, or by right of representation provided for in Arts. 981 of the same law.[80]

Idem; Concept of devisees and legatees. — According to the second paragraph of Art. 782, devisees and legatees are persons to whom gifts of real and personal property are respectively given by virtue of a will. From this and other related provisions of the Civil Code, the following considerations must, therefore, be noted:

(1) Devises and legacies are possible only in testamentary succession. This is evident from the provision of the second paragraph of Art. 782.

(2) A devisee or legatee always succeeds to individual items of property by means of a particular or special title. This is so in spite of the fact that the original definition of a legatee (or devisee) as a person who succeeds by particular title has not been retained in the New Civil Code. To hold otherwise would destroy altogether the distinction between institution of heirs and devises or legacies — a distinction which is still preserved in the New Civil Code by virtue of the provisions of Art. 854 regarding the effects of preterition and of Art. 918 regarding the effects of imperfect disinheritance. This distinction was stated by the Supreme Court in a certain case as follows:

> "With reference to Article 813 *(now Art. 854),* it must be observed that the institution of heirs is therein dealt with as a thing separate and distinct from legacies. And they are separate and distinct not only because they are distinctly and separately treated in said article, but because they are in themselves different. Institution of heirs is a bequest by universal title of property that is undetermined. Legacy refers to specific property bequeathed by a particular or special title."[81]

[80]Intestate Estate of Petra V. Rosales, et al. vs. Rosales, G.R. No. L-40789, February 27, 1987.

[81]Neri vs. Akutin, 72 Phil. 322.

Thus, if the testator makes a will devising a certain parcel of land to A and bequeathing his automobile to B, A is a devisee, while B is a legatee.

(3) The devise or legacy which is given to a devisee or legatee by means of a will is, as a general rule, a charge against the free portion of the testator's property. This rule can be clearly deduced from the provisions of Arts. 914 and 925 of the Civil Code. It must be noted, however, that this rule is of practical importance only in case the testator is survived by compulsory heirs who, under our system of compulsory succession, are entitled to a legitime. In such case, the testator's hereditary estate is divided, as a general rule, into the legitime or legal portion and the disposable free portion. Since it is a rule that the testator has no testamentary control over the legitime, it follows that devises and legacies can only be charged against the disposable free portion. If the testator is not survived by compulsory heirs, his entire property is considered as free property, in which case, the devises and legacies can be charged against the entire property.

Hence, we can define devisees and legatees more accurately as persons to whom gifts of individual items of real and personal property, chargeable, as a general rule, against the disposable portion of the testator's hereditary estate, are respectively given by virtue of a will.

Idem; Id. — Distinguished from heirs. — From what has been stated, it is evident that devisees or legatees may be distinguished from heirs in the following ways:

(1) Devisees or legatees are always called to succeed to individual items of property, while heirs are always called to succeed to an indeterminate or aliquot portion of the decedent's hereditary estate. In other words, the first succeed by particular title *(titulo particular),* while the second succeed by universal title *(titulo universal).*

(2) Devisees or legatees are always called to succeed by means of a will, while heirs are called to succeed either by means of a will, *(voluntary)* or by operation of law *(compulsory and legal).*

It must be noted, however, that the only distinction between devisees and legatees, on one hand, and voluntary heirs on the other hand, is, while the first are always called to succeed to individual

items of property, as when the testator bequeaths an automobile or devises a parcel of land or a house to a certain person, the second are always called to succeed to an indeterminate or aliquot portion of the testator's hereditary estate, as when the testator institutes a friend to succeed to one-half or one-fourth of the free portion of his estate. In the terse language of the Spanish Civil Code, a devisee or legatee succeeds by particular title, while a voluntary heir succeeds by universal title. On the other hand, they are similar in the sense that both are called to succeed by means of a will and also in the sense that the shares of both are chargeable against the disposable free portion of the testator's estate. As it is, the two are sometimes considered synonymous.[82]

Idem; Id.; Id. — Importance of distinction. — Although, apparently, the distinction between voluntary heirs and devisees or legatees has been somewhat eroded by the definitions enunciated in Art. 782 of the Civil Code, nevertheless, the distinction is still very important in the following instances:

(1) In case of preterition or pretermission in the testator's will of one, some, or all of the compulsory heirs in the direct line: According to Art. 854 of the Civil Code, the effect is to annul entirely the institution of heirs, but legacies and devises shall be valid insofar as they are not inofficious.

(2) In case of imperfect or defective disinheritance: According to Art. 918 of the Code, the effect is to annul the institution of heirs to the extent that the legitime of the disinherited heir is prejudiced, but legacies and devises shall be valid insofar as they are not inofficious.

(3) In case properties are acquired by the testator after the execution of the will: According to Art. 793 of the Code, such properties are not, as a rule, included among the properties disposed of unless it should expressly appear in the will itself that such was the testator's intention. It is evident that this rule is applicable only to legacies and devises and not to institution of heirs.

[82]See comments under Art. 856, Civil Code.

Chapter II

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.[1]

Concept of Wills. — The above article gives the definition of a will. There are, however, other well-known definitions. Thus, according to Page, a will is a disposition, made by a competent testator in the form prescribed by law, of property over which he has legal power of disposition, which disposition is of such nature as to take effect after his death.[2] According to Jarman, it is an instrument by which a person makes a disposition of his property to take effect after his death, and which is, in its own nature, ambulatory and revocable during his life.[3] According to Bigelow, it is (1) a written instrument (2) duly executed and attested, by which (3) a competent person makes (4) a voluntary disposition (5) of property (6) in favor of another competent person (7) to take effect after the maker's death, (8) meantime being revocable. The divisions marked by numerals point out the elements of a will.[4]

Problem – What is meant by a will?

Answer – A will is an act whereby a person is permitted, with the formalities prescribed by law, to control to a certain

[1]Art. 667, Spanish Civil Code.
[2]Page on Wills, Vol. I, p. 4.
[3]Jarman on Wills, p. 18.
[4]Bigelow on Wills, p. 35.

degree the disposition of his estate, to take effect after his death. *(Art. 783, NCC.)*

Decades ago, Justice Moreland, in his dissenting opinion in *Santos vs. Manarang, 27 Phil. 209,* wrote:

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 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 x x x. All doubts must be resolved in favor of the testator having meant just what he said (*Alonso Q. Ancheta vs. Candelaria Guersey-Dalaygon, G.R. No. 139868, June 8, 2006).*

Characteristics of Wills. — From the codal definition found in Art. 783 and from related provisions of the Civil Code. It is evident that a will should have the following characteristics:

1. It is a strictly personal act;
2. It is an individual and unilateral act;
3. It is a free and voluntary act;
4. It is a formal and solemn act;
5. It is a disposition of property;
6. It is an act mortis causa; and
7. It is ambulatory and revocable during the testator's lifetime.[5]

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.[6]

Personal Character of Wills. — The first and most peculiar characteristic of a will is that it is a strictly personal act. Conse-

[5]6 Sanchez Roman 204; 4 Castan, (6th Ed.), p. 262.
[6]Art. 670, Spanish Civil Code, in modified form.

quently, the making of a will cannot be delegated or left in whole or in part to the discretion of a third person, or accomplished through the instrumentality of an agent or attorney.[7] It must be observed, however, that the mere act of drafting or writing of the will does not fall within the purview of the prohibition. Thus, it has been held that who does the mechanical work of writing the will is a matter of indifference. The fact, therefore, that the will was typewritten in the office of a lawyer is of no consequence.[8]

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.[9]

Delegation of Testamentary Acts. — Art. 785 is an extension of Art. 784. There are three acts inseparably or intimately connected with the making of a will, acts which are testamentary in character, and which, therefore, cannot be left in whole or in part to the discretion of a third person. They are: *first,* the duration of the designation of heirs, devisees or legatees; *second,* the efficacy of the designation; and *third,* the determination of the portions which they are to take when referred to by name.

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.[10]

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.[11]

Delegation of Non-Testamentary Acts. — It must be noted that while Art. 785 enumerates in absolute terms the different things which the testator cannot do, Art. 786 enumerates by way

[7]Art. 784, Civil Code.
[8]Castañeda vs. Alemany, 3 Phil. 426.
[9]Art. 670, Spanish Civil Code, in modified form.
[10]Art. 671, Spanish Civil Code, in modified form.
[11]New provision.

of exception the different things which he may do.[12] Although the making of a will, including all the testamentary acts connected therewith, cannot be left in whole or in part to the discretion of a third person, the testator, in order to make the different devises or legacies more effective, is allowed to entrust to a third person: *first,* the power to distribute specific property or sums of money which he may have left in general to specified classes or causes: and second, the power to designate the persons, institutions or establishments to which such property or sums of money are to be given or applied. Thus, he may bequeath P100,000 to a specified class, such as the different charitable institutiona of Manila, or to a specified cause, such as the cause of labor, entrusting, at the same time, to the executor of his estate the power to distribute the amount and also the power to designate the different institutions or organizations to whom the said amount shall be given. It is evident, therefore, that in the cases contemplated by the article under discussion, the testator has already completed the testamentary act of making a will; what he entrusts to the third person are merely the details thereof in order to make the devise or legacy more effective.

Art. 787, on the other hand, prohibits the testator from making a testamentary disposition which would allow another person to determine whether it is to be operative or not. Although the act determining whether a testamentary disposition is to be operative or not is not exactly testamentary in character, it is evident that the delegation of such act to a third person would be tantamount to allowing the testator to substitute the will of a third person for his own, which is precisely what the law intends to prevent when it states that the making of a will cannot be left in whole or in part to the discretion of a third person.

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.[13]

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

[12]5 Manresa, 6th Ed., p. 423.
[13]New provision.

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.[14]

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.[15]

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.[16]

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.[17]

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.[18]

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.[19]

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[14]New provision.
[15]New provision.
[16]New provision.
[17]New provision.
[18]New provision.
[19]New provision.

Construction of Wills. — The above articles enunciate the different rules for the construction or interpretation of wills.

Recognition of the fundamental axiom that ascertainment and effectuation of the intention of the testator is controlling in the construction of wills is found in American and Philippine decisions. American courts have stated this principle in various forms, among which may be cited, by way of example, such statements as the following: "The chief object and purpose in construing a will is to ascertain and give effect to the intention of the testator; the cardinal rule of testamentary construction is to ascertain the intention of the testator and give it effect; the construction of any will must be for the purpose of determining the dominant intent of the testator; if the testator's intent can be clearly perceived or ascertained, it must prevail; a will is to be so interpreted as to carry out the intention of the testator; a will must be construed so as to give full force and effect to the purpose of the testator; in construing a will, the courts must give effect to the intention expressed by the testator and carry out the object desired by him in disposing of his property; the whole effort, in the construction of a will, is to ascertain and give the fullest possible effect to the intention of the testator; the court will place itself in the position of the testator, ascertain his intent from the provisions of the will, and enforce it; the intention of the testator is the basic and fundamental rule in the construction of wills; the intent of the testator will control or govern the construction of a will; the purpose of construing a will is to ascertain and give effect to the intention of the testator; the testator's intent is the all-important consideration in the construction of wills." Thus, in American decisions, the testatorial intention, or its ascertainment and effectuation, has frequently been described as the "polar star," "polestar," "guiding star" or "Golden Rule" of testamentary construction. The rule that the testatorial intention governs in the construction of a will has been held to apply to every clause and part of the instrument. And a testator's intention, it has been said, is necessarily his intention when the will was executed.[20]

Idem; Dispositions susceptible of different interpretations. — Under Art. 788, if a testamentary disposition admits of different interpretations, in case of doubt, that interpretation by

[20]57 Am. Jur., Sec. 1133, p. 762.

which the disposition is to be operative shall be preferred. Under this rule, that construction is to be adopted which will sustain and uphold the will in all its parts, if it can be done consistently with the established rules of law. If the language used is reasonably susceptible of two different interpretations, one which will defeat, and the other sustain, the provisions, the doubt is to be resolved in favor of the construction which will give effect to the will, rather than the one which will defeat it.[21]

Idem; Mistakes and omissions. — The rules stated in Art. 789 which supplement the Parole Evidence Rule enunciated in Sec. 9, Rule 130 of the New Rules of Court, refer to a will where there are mistakes or omissions with regard to persons or property or where there are uncertainties with regard to the application of its provisions. There are therefore two distinct cases contemplated in this article. They are:

(1) When there is an imperfect description or when no person or property exactly answers the description. In this case, the mistake or omission must be corrected by ascertaining the testatorial intention using for this purpose either intrinsic or extrinsic evidence or both, but excluding the oral declarations of the testator as to his intention. This rule may be illustrated by the following example: The testator, who owns two parcels of land in a certain province, has devised one of them to his nephew, A. During the testate proceedings for the settlement of his estate after his death, a question arose as to the identity of the land devised because of the imperfect description of the property in the will. In such a case, how can the identity of the property devised be determined? It is clear that under Art. 789 of the Code, A may avail himself of either intrinsic or extrinsic evidence or of both in order to ascertain the testatorial intention. He cannot, however, testify or present witnesses who will testify to the effect that, during his lifetime, the testator verbally declared or revealed the identity of the property which he intended to devise, because it is evident that such testimony would be hearsay and therefore inadmissible as evidence.

(2) When there is an uncertainty arising upon the face of the will as to the application of any of its provisions. In this case, the testatorial intention is to be ascertained from the context of the will

[21]Ibid., Sec. 1126, pp. 720-721.

and the circumstances under which it was made, but again excluding the oral declarations of the testator as to his intention.

Idem; After-acquired property. — Under Art. 794, property acquired during the interval between the execution of the will and the death of the testator are not, as a rule, included among the properties disposed of, unless it should expressly appear in the will itself that such was the intention of the testator. Thus, if the testator made a will in 1965 disposing of his properties in the form of gifts or bequests of specific or determinate real or personal properties, and subsequently, during the period from 1965 to the time of his death in 1978 he is able to acquire other properties, according to Art. 793, the will shall only pass those properties which he had at the time of its execution in 1965, but not those which he had acquired subsequent thereto.

It is clear, however, in spite of the silence of the law, that the rule can be applied only to devises and legacies and not to institution of heirs. This can be inferred from the provisions of Arts. 776 and 781 regarding the extent of the inheritance. As a matter of fact, according to the latter article, 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 may have accrued thereto since the opening of the succession. Consequently, if, for instance, the testator had executed a will in 1960 instituting his three children, A, B and C, as his universal heirs in such a way that A shall be entitled to 1/2, B to 1/4, and C the remainder, and he died only in 1978, leaving considerable properties, most of which were acquired during the period between 1960 and 1978. It is evident that the division of the estate as dictated in the will shall be applied not only to those properties existing at the time of the execution of the will in 1960, but even to those that were acquired subsequent thereto.

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.[22]

Law Governing Form of Wills. — According to the above article, the validity of a will as to its form depends upon the observance of the law in force at the time it is made. Consequently,

[22]New Provision.

if a law different from the law in force at the time of the execution of the will goes into effect before or after the death of the testator, such a law shall not affect the validity of the will, provided that such will was duly executed in accordance with the formalities prescribed by the law in force at the time it was made.

The rule stated in this article is but an expression of the view, which is upheld by the weight of authority, that the formal validity of a will is to be judged not by the law in force at the time of the testator's death, or at the time the supposed will is presented in court for probate, or when the petition is decided by the court, but at the time the instrument was executed. One reason in support of the rule is that although the will operates only after the death of the testator, in reality, his wishes regarding the disposition of his estate among his heirs, devisees and legatees are given solemn expression at the time the will is executed and thus becomes a completed act.[23]

Idem; Effect of changes after testator's death. — Upon the death of the testator, successional rights arising from the will are vested in the persons called to the inheritance either as heirs or as devisees or legatees. In other words, the title of such heirs, devisees or legatees becomes a vested right, protected under the due process clause of the Constitution against any subsequent change in the law which would have the effect of invalidating the will. Consequently, to allow retroactivity of effect to any statutory change enacted after the death of the testator so as to invalidate a will which was perfectly valid at the time of its execution since it has complied with all of the formalities prescribed by the law then in force would certainly be equivalent to a deprivation of property rights without due process of law.[24] Thus, in *Bona vs. Briones,*[25] a case decided long before the enactment of the New Civil Code, it was held that although his will did not comply with the additional formalities prescribed by a law enacted after the death of the testator, yet it can still be admitted to probate since it had complied with all of the formalities prescribed by the law in force at the time of its execution.[26]

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[23]Enriquez vs. Abadia, 50 Off. Gaz. 4185. To the same effect: In re Will of Riosa, 39 Phil. 23.

[24]Enriquez vs. Abadia, 50 Off. Gaz. 4185.

[25]38 Phil. 276.

[26]The will in this case was executed in 1911 in accordance with Sec. 618 of the Code of Civil Procedure, which was the law then in force. The testator died in 1913. In 1916, Act No. 2645, amending Sec. 618 of the Code of Civil Procedure, was enacted.

By parity of reasoning, when the testator executes a will which is invalid for failure to comply with the formalities prescribed by law at the time of its execution, then upon his death he should be regarded and declared as having died intestate, and his heirs will then inherit in accordance with the rules of intestate succesion, and no subsequent law with more liberal requirements or which dispenses with such requirements as to execution should be allowed to validate a defective will and thereby divest the heirs of their vested rights in the estate by intestate succession.[27] Thus, in the case of *Enriquez vs. Abadia,*[28] a case decided under the New Civil Code, where the will which was presented for probate was a holographic will executed in 1923 when holographic wills were not yet recognized by law, it was held that although such wills are now recognized under Art. 810 of the New Civil Code, nevertheless, under Art. 795 of the same Code, it is evident that the will cannot be admitted to probate.[29]

In synthesis, we can therefore say that a will perfectly valid at the time of its execution cannot be invalidated by a law enacted after the death of the testator; neither can a will totally void at the time of its execution be validated by such subsequent legislation.[30]

Idem; Effect of changes before testator's death. — As a general rule, any statutory change enacted after the execution of the will but before the death of the testator cannot have any retroactive effect upon the formal validity of a will. The only exception which is recognized is when a retroactive effect is expressly declared by the statute itself or *is necessarily* implied from the language used therein.[31] This exception does not violate the constitutional prohibition regarding deprivation of property without due process of law because the statute is enacted before the death of the testator, and as a consequence, no rights are as yet vested in the persons called to the inheritance either as heirs, devisees or legatees.

[27]Enriquez vs. Abadia, 50 Off. Gaz. 4188.

[28]50 Off. Gaz. 4188.

[29]The testator in this case died in 1943, although the will was presented for probate after the effectivity of the New Civil Code.

[30]Thompson on Wills, Sec. 26, pp. 55-56.

[31]Art. 4, Civil Code; In re Will of Riosa, 39 Phil. 23.

Subsection 2. — Testamentary Capacity and Intent

Nature of Testamentary Capacity. — Testamentary capacity refers to the ability as well as the power to make a will. Although there is authority for the view that the right to make a will is an inherent or natural right, according to most authorities, it is purely a creature of statute, and, as such, is subject to legislative regulation and control. Aptly stated, the dead hand rules succession only by sufferance.[1]

It must be observed that although the Civil Code speaks only of testamentary capacity, nevertheless, there is a well-recognized distinction in American law between testamentary capacity and testamentary power. The first concerns the ability of the testator, while the second involves a privilege under the law.[2] Hence, although a person may have testamentary capacity to make a will, it does not necessarily follow that he also has testamentary power to do so. Thus, formerly at common law, convicts and married women had the capacity and yet were denied the power to make a will. Here, in the Philippines, the above distinction has been lost altogether. As a matter of fact, the term "testamentary power" is sometimes understood to refer to the power of the testator to designate the person or persons who are to succeed him in his property, and transmissible rights and obligations.

Art. 796. All persons who are not expressly prohibited by law may make a will.[3]

Persons with Testamentary Capacity. — According to the above article, all persons who are not prohibited by law may make a will. It must be noted, however, that the only persons who are expressly prohibited from making a will are those who do not possess the necessary age and mental requirements.[4] Other circumstances such as family relations, civil interdiction, prodigality, insolvency, alienage, and others of similar nature, which ordinarily modify or

[1]57 Am. Jur., Sec. 52, pp. 74-75.
[2]Hamilton vs. Morgan, 93 Fla. 311, 112 So 80 *citing* R.C.L.
[3]Art. 662, Spanish Civil Code.
[4]Arts. 797, 798, Civil Code.

limit capacity to act, do not affect or restrict testamentary capacity. Consequently, in order that a person can make a will, the following requisites are necessary:

(1) He must be at least eighteen years of age;[5] and

(2) He must be of a sound mind.[6]

Idem; When capacity must exist. — Testamentary capacity must exist at the time of the execution of the will. This is evident from the provisions of Arts. 798, 800, and 801 of the Code. Thus, in the probate proceedings for the allowance of the will either during the lifetime or after the death of the testator, one of the principal questions which must be presented for determination to the probate court is whether or not the testator had the necessary testamentary capacity at the time of the execution of the will.[7]

Art. 797. Persons of either sex under eighteen years of age cannot make a will.[8]

Age Requirement. — According to the above article, in order that a person can make a will, it is necessary that he must be at least eighteen years of age. Failure to conform with the requirement shall invalidate the will.[9]

When does a person reach the age of eighteen — does he reach it at the commencement of the day which is popularly known as his birthday or at the commencement of the day preceding his birthday? According to the weight of authority in American law, a person is said to have reached the required age at the commencement of the day preceding what is popularly known as his birthday.[10] Consequently, some commentators of the Civil Code of the Philippines maintain that since our law on testamentary capacity is of Anglo-American origin, the interpretation given in the jurisdiction of origin should be observed here.[11] It is, however, submitted that in view of the explicit

[5]Art. 797, Civil Code.

[6]Art. 798, Civil Code.

[7]Castañeda vs. Alemany, 3 Phil. 427; Pimentel vs. Palanca, 5 Phil. 436; Montanano vs. Suesa, 14 Phil. 676.

[8]New provision, Sec. 614, Act No. 190.

[9]Art. 839, No. 2, Civil Code.

[10]Gardner on Wills, p. 86; Page on Wills, Vol. 1, p. 245.

[11]3 Tolentino, Civil Code, (1956 Ed.), p. 42.

provision of Art. 13 of the Civil Code which states that when the law speaks of years, it shall be understood that it consists of three hundred sixty-five days, and that "in computing a period, the first day shall be excluded, and the last day included," a person is said to have reached the age of eighteen within the meaning of the law only at the commencement of the day which is popularly known as his birthday.

Art. 798. In order to make a will it is essential that the testator be of sound mind at the time of its execution.[12]

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.[13]

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 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.[14]

Mental Requirement. — According to Art. 798 of the Code, in order that the testator can make a will it is essential that he must be of a sound mind at the time of its execution. The definition of a sound mind is given in the next article, although it must be observed that the first paragraph enunciates the negative definition, while the second enunciates the positive definition. Both definitions are derived from American sources.

[12]New provision.
[13]New provision.
[14]New provision.

It is evident from both definitions that absolute soundness of mind and memory is not essential in order that a person can make a will. In the language of the Code, "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."[15]

Idem; Test of a sound mind. — Testamentary capacity is determined objectively from the standpoint of the purpose to be accomplished. Consequently, "soundness of mind" means ability of the testator mentally to understand in a general way the nature and extent of his property, his relation to those who naturally have a claim to benefit from the property left by him, and a general understanding of practical effect of the will as executed. The testator, however, must be able to understand the business in which he is engaged when he makes his will, and to appreciate the effect of the disposition made by him of his property. If he knows the nature of the estate to be disposed of, the proper objects of his bounty, and understands the character of the testamentary act, he has sufficient capacity to make a will.[16]

"The question is not so much, what was the degree of memory possessed by the testator, as, had he a disposing memory? Was he able to remember the property he was about to bequeath, the manner of distributing it, and the objects of his bounty? In other words, were his mind and memory sufficiently sound to know and understand the business in which he was engaged at the time when he executed his will?"[17]

It is, therefore, clear that whenever the testamentary capacity of the testator is put in issue during the probate proceedings, three questions are always asked in order to determine whether or not the testator was of sound mind at the time of the execution of will. They are: *first,* whether he knew, at least in a general way, the nature of the estate to be disposed of; *second,* whether he knew, at least in a

[15]Art. 798, Civil Code.
[16]57 Am. Jur., Sec. 64, pp. 81-82.
[17]Campbell vs. Campbell, 130 Ill. 466, quoted in Bagtas vs. Paguio, 22 Phil. 227.

general way, the proper objects of his bounty; and *third,* whether he understood or comprehended the character of the testamentary act.

Idem; Presumption of sound mind. — According to Art. 800 of the Code, "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 a sound mind at the time of making his dispositions is on the person who opposes the probate of the will." Consequently, it is only when those seeking to overthrow the will have clearly established the charge of mental incapacity that the courts will intervene to set aside a testamentary document.[18] Thus, according to Chief Justice Arellano:

> "The Code might have adopted either one of the two systems *(with respect to the mental capacity of the testator)* — that of establishing as a general rule the presumption of soundness of the mental faculties until the contrary be proven, or that of presuming mental weakness in the absence of proof that the act was performed while the mental faculties were in their normal condition. Under the first presumption, a will made should be declared valid in all cases, in the absence of evidence to the contrary. Under the second it would have to be considered as void upon the presumption that it was executed by a person demented unless the contrary is shown. The Code has adopted the first system as being the most rational, by accepting the principle that mental soundness is always to be presumed with respect to a person who has not been previously incapacitated until the contrary is demonstrated and proven by the proper persons; the correctness of this choice is beyond doubt; in the meantime the intervention of the notary and the witnesses constitutes a true guaranty of the capacity of the testator, by reason of their knowledge of the matter. *(Manresa, Commentaries, Vol. 5, 344).*"[19]

Idem; Id. – Inversion of presumption. — If the testator, one month or less, before making his will, was publicly known to be insane, the presumption of soundness of mind is inverted.[20] In other words, instead of a presumption of mental capacity, there is a presumption of mental incapacity. Consequently, the burden of proof

[18]Hernaez vs. Hernaez, 1 Phil. 689; In re Will of Butalid, 10 Phil. 27; Bagtas vs. Paguio, 22 Phil. 227; Torres and Lopez vs. Lopez, 48 Phil. 722.

[19]Hernaez vs. Hernaez, 1 Phil. 689.

[20]Art. 800, Civil Code.

is shifted to the proponents of the will. They must prove by proper evidence that the testator made the will during a lucid interval.

What is meant by a lucid interval? According to Thompson, it may be described as that period in which an insane person is so far free from his disease, that the ordinary legal consequences of insanity do not apply to acts done therein.[21] More precisely, it refers to that period in which an insane person has so far recovered from his insanity so that he is in a position to be able at the time of making his will to know the nature of the state to be disposed of, the proper objects of his bounty, and the character of the testamentary act. In American law, the rule is that, as distinguished from temporary mental weakness, insanity of a confirmed or permanent nature, shown to have afflicted the testator at one time, is presumed to have continued to the subsequent time of the execution of the will, in the absence of evidence to the contrary, and that once it is established that the testator had been afflicted with insanity of such type, the burden rests upon the proponent of the will to produce evidence that the incapacity did not exist when the will was executed, or to show that the will was made during a lucid interval.[22] Under our law, the rule is that 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. Hence, if it cannot be established that the testator was publicly known to be insane within the required period of one month or less before the making of his will, the presumption of mental capacity stands, and as a consequence, there will be no need on the part of the proponents of the will to prove that the testator made it during a lucid interval.

There is another case or instance when the presumption of mental capacity is inverted which we might as well consider as the second exception to the rule that every person is presumed to possess mental capacity. This occurs when the testator makes a will at a time when he is still under guardianship. Thus, in *Torres and Lopez de Bueno vs. Lopez,*[23] the Supreme Court held that where the testator was under guardianship at the time of the making of his will, there arises a *prima facie* presumption of mental incapacity;

[21]Thompson on Wills, Sec. 65, p. 114.
[22]57 Am. Jur., Sec. 94, pp. 101-102; Thompson on Wills, Sec. 65, pp. 114-116.
[23]48 Phil. 772.

consequently, the burden of proving soundness of mind in such case is cast upon the proponents of the will.

Idem; Sufficiency of evidence of mental capacity. — Whether the burden is cast upon the contestants of the will to prove mental incapacity of the testator or upon the proponents to prove mental capacity, the rule is that the evidence which should be presented must cover a wide range in order that all facts may be brought out which will assist the court in determining the question of mental capacity. The testimony of the subscribing witnesses as well as that of those present at the execution of the will, and of the attending physician concerning the testator's mental condition is entitled to great weight where they are truthful and intelligent.[24]

Sometimes, however, the question of evidence regarding the testator's mental condition becomes a ticklish problem when there is a conflict between the testimony of the subscribing witnesses or of those present at the execution of the will and the testimony of the attending physician. According to the weight of authority, where the testimony of the attending physician is based on mere professional speculation, such testimony cannot prevail over the positive statements of credible witnesses whose testimony does not in itself seem unreasonable.[25] However, if the testimony of such physician is not in the nature of mere professional speculation, as when it is established that he attended the testator during his last illness and saw him on the day when the will was supposed to have been executed, such testimony shall be given more credence.[26]

Idem; Effect of old age. — The law prescribes no limit in point of age beyond which a person cannot dispose of his property by will. On the contrary, it has been justly said that the will of an aged person should be regarded with great tenderness, where it appears not to have been procured by fraudulent means, but contains those very dispositions which the circumstances of his situation and natural affections dictated. To an aged person as well as to one in

[24]Torres and Lopez vs. Lopez, 48 Phil. 772, *citing* Alexander on Wills, Vol. 1, pp. 433, 484, and Wharton and Stile, Medical Jurisprudence, Vol. 1, p. 100, et seq.; Jungera vs. Borromeo, G.R. No. L-18498, March 30, 1967, 19 SCRA 656.

[25]Samson vs. Coralles Tan Quintin, 44 Phil. 573. *See also* Bagtas Paguio, 22 Phil. 227; Galvez vs. Galvez, 26 Phil. 243; Neyra vs. Neyra, 76 Phil. 296.

[26]Gonzales vs. Gonzales, 90 Phil. 444.

the prime of life, the usual tests as to testamentary capacity will be applied.[27]

Hence, mere senility or infirmity of old age does not necessarily imply that a person lacks testamentary capacity. It is, however, different in case of *senile dementia*. *Senile dementia* has been defined as that "peculiar decay of the mental faculties whereby the person afflicted is reduced to second childhood." *Senile dementia,* not senility, is the one which produces testamentary incapacity. "To constitute *senile dementia* in such a legal sense as to deprive one of testamentary capacity, there must be such a failure of mind as to deprive him of intelligent action.[28] But so long as a person "still possesses that spark of reason and of life, that strength of mind to form a fixed intention and to summon his enfeebled thoughts to enforce that intention," so long will he be considered to possess what the law terms "testamentary capacity."[29] Thus, in an American case where it was established by the contestants to the probate of the will that the testator was suffering from mental decay and loss of memory due to old age, sickness, debility of body, and extreme distress, it was held:

> "The depth and intensity of mental impressions always depend upon, and are measured by, the degree of attention given to the perception of facts, which requires observation, or to the conception of truths, which demands reflection; and hence, the inability of a person to recollect events occurring recently is evidence of mental decay, because it manifests a want of power of concentration of the mind. The aged live in the past, and the impressions retained in their minds are those that were made in their younger days, because at that period of their lives they were able to exercise will power by giving attention. While the inability of a person of advanced years to remember recent events distinctly undoubtedly indicates a decay of the human faculties, it does not conclusively establish *senile dementia,* which is something more than a mere loss of mental power, resulting from old age, and is not only a feeble condition of the mind, but a derangement thereof. x x x The rule is settled that if a testator at the time he executes his will understands the business in which he is engaged, and has a knowledge of his property, and how he

[27]57 Am. Jur., Sec. 70, pp. 86-87.
[28]Crisostomo vs. Maclang, (CA), 45 Off. Gaz. 2106.
[29]Torres and Lopez vs. Lopez, 48 Phil. 772.

wishes to dispose of it among those entitled to his bounty, he possesses sufficient testamentary capacity, notwithstanding his old age, sickness, debility of body, or extreme distress."[30]

Idem; Effect of infirmity or disease. — Neither is physical infirmity or disease inconsistent with testamentary capacity, although there is no question that evidence of such fact is admissible on the issue of testamentary capacity. Just as in the case of old age, the usual tests of testamentary capacity must still have to be applied.[31] Thus, it has been held that the fact that the testator, at the time of the execution of the will, was suffering from the last stages of tuberculosis and asthma,[32] or from paralysis and loss of speech,[33] or from cholera,[34] or from a combination of sleeping sickness, insomnia, tuberculosis, and diabetes,[35] will not affect his testamentary capacity, so long as it cannot be proved by competent evidence that, at the time when the will was executed, he was no longer in a position to know the nature of the estate to be disposed of, the proper objects of his bounty, and the character of the testamentary act. The same rule can be applied even if, at the time when the will was being executed, the testator was so sick that it was necessary for somebody else to guide his hand in order that he could sign it,[36] or even if a few months before the execution of the will, the testator, who was 85 years old, had a stroke of cerebral hemorrhage, with hemiplegia, caused by high blood pressure.[37] On the other hand, it has also been held that the fact that the testator, at the time of the execution of the will, was already in a comatose or semi-comatose condition, caused by cerebral hemorrhage,[38] or by apoplexy,[39] or by diarrhea and gastro-enteritis with complications

[30]Ames' Will, 1902, 40 Ore., 495, quoted in Torres and Lopez vs. Lopez, 48 Phil. 772. For illustrative cases on the effect of old age upon testamentary capacity — see Torres and Lopez vs. Lopez, 48 Phil. 772; Sancho vs. Abella, 58 Phil. 728; Samia vs. Medina, 60 Phil. 391; Montoya vs. Crisostomo, (CA), 44 Off. Gaz. 4382; Crisostomo vs. Maclang, (CA), 45 Off. Gaz. 2106.

[31]57 Am. Jur., Sec. 70, pp. 86-87.

[32]Bugnao vs. Ubag, 14 Phil. 163.

[33]Bagtas vs. Paguio, 22 Phil. 227.

[34]Galvez vs. Galvez, 26 Phil. 243.

[35]Neyra vs. Neyra, 76 Phil. 485.

[36]Amata vs. Tablizo, 48 Phil. 485.

[37]Magsuci vs. Gayona, (CA), 45 Off. Gaz. 157.

[38]Abquilan vs. Abquilan, 49 Phil. 450.

[39]Lim vs. Chinco, 55 Phil. 891.

of miocarditis,[40] or by cerebral thrombosis,[41] so that nothing around him could cause any impression or reaction, would certainly destroy his testamentary capacity.

Idem; Effect of insanity. — In its broadest sense, mental disease or insanity refers to any disorder of the mind resulting from disease or defect in the brain, whereby mental freedom may be perverted, weakened or destroyed.[42] Sometimes it is used as the equivalent of mental incapacity. It is, however, evident that there may be mental incapacity to make a will without actual insanity. At other times, it is confused with idiocy, imbecility or *senile dementia*. Idiocy, however, is used to describe only, those who are congenitally deficient in intellect, imbecility, those who are mentally deficient as a result of disease, and *senile dementia,* those who are incapable of any intelligent action due to old age.[43] Since these are absolute and permanent forms of mental disease or insanity, it is evident that persons suffering from them do not possess the necessary mental capacity to make a will. There are, however, other forms or degrees of mental disease or weakness which do not necessarily negative testamentary capacity. Under our law, 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.[44] Hence, mental aberrations which do not result in such impairment of the faculties as to render the testator unable to know or understand the nature of the estate to be disposed of, the proper objects of his bounty, and the character of the testamentary act will not destroy testamentary capacity. Between the highest degree of soundness of mind and memory which unquestionably carries with it full testamentary capacity, and the degree of mental aberration generally known as insanity or idiocy, there are numberless degrees of mental capacity or incapacity, and while on one hand, it has been held that mere weakness of the mind, or partial imbecility from disease of body, or from age, does not render a person incapable of making a will, provided that he has understanding and memory sufficient to enable him to know what he is about, and how or to whom he is disposing of

[40]Albornoz vs. Albornoz, 71 Phil. 414.
[41]Gonzales vs. Gonzales, 90 Phil. 444.
[42]Thompson on Wills, Sec. 63, p. 111.
[43]See Page on Wills, Vol. 1, Secs. 136-137, pp. 283-284.
[44]Art. 799, Civil Code.

his property, on the other hand, it has been held that testamentary incapacity does not necessarily require that a person shall be actually insane or of an unsound mind. Weakness of intellect may render the testator incapable of making a valid will, provided such weakness really disqualifies him from knowing or appreciating the nature, extent or consequences of the act he is engaged in.[45]

Idem; Effect of mental delusion. — An insane delusion which will render one incapable of making a will may be defined as a belief in things which do not exist, and which no rational mind would believe to exist. The essence of an insane delusion is that it has no basis in reason, cannot be dispelled by reason and can be accounted for only as the product of mental disorder.[46]

To justify the setting aside of a will on the ground that the testator was possessed of an insane delusion, it must be shown that the will was the product or offspring of the delusion, or at least, that it was influenced by the delusion. The validity of a will is not affected by the fact that the testator was under a delusion unless the delusion influenced him, at the time he executed the will, in his determination of the manner in which he should dispose of his property.[47]

Idem; Effect of belief in supernatural. — A belief in spiritualism is not in itself sufficient evidence of testamentary incapacity. Those who believe in spiritualism, when testamentary capacity is in question, must be considered in the same light as those who share in any other religious belief. Many of the clearest and brightest intellects have firmly believed in the doctrine of spiritualism and the reality of spiritual manifestations. That the basis for such belief may seem unsubstantial to the great majority of persons does not characterize it as an insane delusion which incapacitates the believer to make a will. A testator's belief that he was saved from harm on several occasions by a guiding spirit does not establish insane delusions on his part. Indeed, it seems to be the settled law that testamentary capacity cannot be determined alone by what one believes, nor by the character of the tales he tells concerning spirits, spooks, and supernatural things. Even a belief in witchcraft is not necessarily conclusive evidence of insanity.

[45]Bugnao vs. Ubag, 14 Phil. 163.
[46]57 Am. Jur., Sec. 80, pp. 90-91.
[47]Ibid., Sec. 81, pp. 91-92.

It is, however, possible that belief in spiritualism may establish lack of testamentary capacity. One may become a monomaniac upon the subject of spiritualism by dwelling upon it too persistently and profoundly, so that his will may be invalidated upon the ground of an insane delusion. A will executed by one under such an extraordinary belief in spiritualism that he follows blindly and implicitly supposed directions of spirits in constructing the will is not admissible to probate.[48]

Idem; Effect of drunkenness. — The fact that the testator is under the immediate influence of intoxicating liquor or drugs at the time he performs the testamentary act does not invalidate his will on the ground of lack of testamentary capacity, provided he then comprehends the nature, extent, and disposition of his estate and his relation to those who have or might have a claim on his bounty; and clearly, a person addicted to the use of drugs or of liquor, if lucid and sober when a will is made, does not lack testamentary capacity merely by reason of the habit. The general rule is that the admission of a will to probate will not be denied merely on proof that the testator was addicted to the excessive use of alcoholic liquors or drugs without showing that, at the time of the making of the will, he was so much under the influence of the intoxicants or drugs as to be unable to bring to the business at hand the calm judgment which the law requires of a testator, or unless the mind of the testator has been impaired by such habit to the extent that he is not of sound and disposing mind and memory. Habitual drunkenness does not give rise to a presumption that the testator was incapacitated at the time he executed the will. But where the testator has used intoxicating liquor or drugs excessively to such an extent as to impair his mind, so that, at the time the will is executed, he does not know the extent and value of his property, or the names of the persons who are the natural objects of his bounty, the instrument thus executed will be denied probate for lack of testamentary capacity.[49]

Art. 801. Supervening incapacity does not invalidate an effective will, nor is the will of an incapable validated by the supervening of capacity.[50]

[48]57 Am. Jur., Sec. 86, pp. 95-96.
[49]Ibid., Sec. 75, pp. 88-89.
[50]New provision.

Art. 802. A married woman may make a will without the consent of her husband, and without the authority of the court.[51]

Art. 803. A married woman may dispose by will of aft her separate property as well as her share of the conjugal partnership or absolute community property.[52]

Capacity of Spouse. — The provisions of Arts. 802 and 803 have been criticized on the ground that they are unnecessary. Undoubtedly, this criticism is logical because the provision of Art. 801 is already covered by that of Art. 796, while the provision of Art. 802 is also covered by that of Arts. 140 and 170. However, it must be noted that with respect to the right of a married woman (or a married man for that matter) to dispose of her share in the conjugal partnership or absolute community property, although there is no question regarding the existence of the right, nevertheless, such right of disposition is subject to the result of the settlement or liquidation of the partnership or of the community. Furthermore, what can be disposed of would be merely the ideal share of the spouse making the will and not any specific or determinate property belonging to the partnership or community.

Subsection 3. — Forms of Wills

Classification of Wills. — Under the Civil Code, a will may be classified as either ordinary (notarial) or holographic depending upon the formalities or solemnities which are observed by the testator in its execution.

An ordinary or notarial will is one which is executed in accordance with the formalities prescribed by Arts. 804 to 808 of the Civil Code. In other words, it is a written will, executed in a language or dialect known to the testator, 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, attested and subscribed by three or more credible witnesses in the presence of the testator and of one another, all of the pages of which

[51]New provision.
[52]New provision.

are signed, except the last, on the left margin by the testator or the person requested by him to write his name and by the instrumental witnesses, and numbered correlatively in letters placed on the upper part of each page, containing an attestation clause executed by the witnesses, and properly acknowledged before a notary public by the testator and the said witnesses.[1] A holographic will, on the other hand, is a written will which must be entirely written, dated, and signed by the hand of the testator himself, without the necessity of any witness.[2]

Object of Formalities. — The object of the solemnities surrounding the execution of wills is to close the door against bad faith and fraud, to avoid substitution of wills and testaments and to guarantee their truth and authenticity. Therefore, the laws on this subject should be interpreted in such a way as to attain these primordial ends. But on the other hand also, one must not lose sight of the fact that it is not the object of the law to restrain and curtail the exercise of the right to make a will. So when an interpretation already given assures such ends, any other interpretation whatsoever, that adds nothing but demands more requisites entirely unnecessary, useless and frustrative of the testator's will, must be disregarded.[3]

Art. 804. Every will must be in writing and executed in a language or dialect known to the testator.[4]

Common Formalities. — Under Art. 804, there are two formalities which must be complied with in the execution of wills, whether ordinary or holographic. They are: (1) the will must be in writing; and (2) it must be written in a language or dialect known to the testator.

Idem; Written form of wills. — Every will must be in writing. Whether the will is ordinary or holographic, this requirement is mandatory. It must be noted, however, that if the will is holographic, it is essential that it must be entirely written in the handwriting of the testator himself. If the will is ordinary, so long as it is in

[1]Arts. 804-805, Civil Code.

[2]Art. 810, Civil Code.

[3]Abangan vs. Abangan, 40 Phil. 476; Avera vs. Garcia, 42 Phil. 145; Aldaba vs. Roque, 43 Phil. 379; Unson vs. Abella, 43 Phil. 494; In re Will of Tan Duico, 45 Phil. 807.

[4]Taken from Sec. 618, Act No. 190, as amended by Act No. 2645.

writing it does not matter on what material, whether on paper or parchment, it is written. It may be written by hand or typewritten, or printed from plates or type. The validity of an instrument as a will is not affected by the fact that it is written partly in pen and partly in pencil, or that it was written wholly in lead pencil; such a will is as valid as if written in ink.[5]

The law does not specify that the testator himself must perform the act of writing. However, Art. 810 provides that in the case of holographic wills, the will must be written entirely in the handwriting of the testator himself. Consequently, it is only in the case of ordinary wills that whoever performs the mechanical act of writing or drafting the will becomes a matter of indifference.[6]

Idem; Language of wills. — Art. 804 also requires that every will must be executed in a language or dialect known to the testator. This requirement is applicable both to ordinary and holographic wills.

It must be noted that there is no statutory requirement that the testator's knowledge or understanding of the language or dialect in which the will is executed should be expressed either in the body of the will itself or in the attestation clause. Consequently, it is a matter that may be established by proof *aliunde*.[7] But where a will is drawn up in the dialect of a certain locality and it is established that the testator was living in or was a resident of that locality, there arises a presumption that the will is drawn up in a language or dialect known to the testator, in the absence of evidence to the contrary.[8]

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.

[5]57 Am. Jur., Sec. 221, pp. 187-188.

[6]Castañeda vs. Alemany, 3 Phil. 427.

[7]Lopez vs. Liboro, 46 Off. Gaz. 211; Javellana vs. Javellana, 106 Phil. 1073.

[8]Abangan vs. Abangan, 40 Phil. 476; Gonzales vs. Laurel, 45 Phil. 750; Acop vs. Piraso, 52 Phil. 660; Reyes vs. Vidal, 91 Phil. 126; Javellana vs. Javellana, *supra*.

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.[9]

Special Formalities of Ordinary Wills. — From the provisions of Arts. 805 to 806 as well as from that of Art. 804, it is evident that in the execution of an ordinary will the following formalities must be complied with:

(1) The will must be in writing;

(2) The will must be written in a language or dialect known to the testator;

(3) The 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;

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

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

(6) All the pages of the will shall be numbered correlatively in letters placed on the upper part of each page;

(7) The will must contain an attestation clause; and

[9]Taken from Sec. 618, Act No. 190, as amended by Act No. 2645.

(8) The will must be acknowledged before a notary public by the testator and the witnesses.

In addition to the above formalities, there are also other special safeguards or solemnities which are prescribed by the Code in case the testator is deaf, or a deaf-mute, or in case he is blind.[10]

Subscription by Testator. — According to the first part of the first paragraph of Art. 805, every will, other than a holographic will, must be subscribed at the end thereof by the testator or by the testator's name written by some other person in his presence, and by his express direction. It is of course axiomatic in the law of wills that subscription refers to the manual act of the testator and also of the instrumental witnesses of affixing their signatures to the instrument. As applied to the testator, the purpose of the statutory requirement of a signature is two-fold: it is to identify the testator and authenticate the documents.[11]

Idem; Manner of signing. — What constitutes a sufficient signature to a will depends largely on the custom of the time and place, the habit of the individual, and the circumstances of each particular case, but it should be manifest that whatever is used is actually intended as a signature. Generally speaking, the use of any signature intended by the testator to authenticate the instrument renders the will sufficiently signed by the testator.[12] It matters not how imperfect or illegible the testator's signature may be; it will be a sufficient signature if he intended it as his signature, and it should be manifest that whatever he used as his signature was intended for that purpose. Thus, it is sufficiently signed by writing his initials, or his first name only, or he may even use an assumed name or a name different from the one used to designate him as a testator in the body of the will. The fact that the testator's signature is imperfect or illegible does not invalidate the will if his name can be made out readily and he intended such name to be his signature. The will is not invalidated by the fact that the testator's name is abbreviated or misspelled. If the testator has been in the habit of using a rubber stamp or engraved die in making his signature, he may properly use the same in signing his will.[13]

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[10]Arts. 807, 808, Civil Code.
[11]57 Am. Jur., Sec. 243, p. 201.
[12]Ibid., pp. 201-202.
[13]Thompson on Wills, Sec. 108, pp. 171-173.

A complete signature is not essential to the validity of a will, provided the part of the name written was affixed to the instrument with intent to execute it as a will. Thus, in a case where the validity of a will which was presented for probate was questioned on the ground of insufficiency of the testatrix' signature, the Supreme Court, speaking through Justice Johnson, held:

> "We are of the opinion, and we think the law sustains our conclusion, that if the testatrix signed any portion of her name to the will, with the intention to *sign* the same, that will amount to a signature. It has been held time and time again that one who makes a will may sign the same by using a mark, the name having been written by others. If writing a mark simply upon a will is sufficient indication of the intention of the person to make and execute a will, then certainly the writing of a portion or all of her name ought to be accepted as a clear indication of her intention to execute the will."[14]

Idem; Signature by mark. — In American jurisdictions, practically all courts agree that any mark or combination of marks placed on a will by the testator as his signature is a sufficient compliance with a statute requiring a will to be subscribed by the testator.[15] To a certain extent, this doctrine has been followed in this jurisdiction. As stated by our Supreme Court, "The construction put upon the word 'signed' by most courts is the original meaning of a *signum* or sign, rather than the derivative meaning of a handwriting."[16] Thus, where the testator signs with his thumbmark[17] or affixes a cross against his name, intending such mark or cross to be his signature,[18] it has been held that there is a sufficient compliance with the statutory requirement. However, if the signature is only a mere cross, without any proof that it is the usual signature of the testator or at least one of the ways by which he signed his name, it is not a sufficient signature, because a mere cross cannot and does not have the trustworthiness of a thumbmark.[19] But if it can be properly established that it is the testator's usual signature or at least one of

[14]Yap Tua vs. Yap Ca Kuan, 27 Phil. 579.

[15]Thompson on Wills, Sec. 108, pp. 170-171; 57 Am. Jur., Sec. 250, 203.

[16]De Gala vs. Gonzales, 53 Phil. 104.

[17]De Gala vs. Gonzales, 53 Phil. 104; Dolor vs. Diancin, 54 Phil. 479; Payad vs. Tolentino, 62 Phil. 848; Abutan vs. Fernandez, (CA), 44 Off. Gaz. 1849.

[18]Abaya vs. Zalamero, 10 Phil. 357; Leano vs. Leano, 30 Phil. 612.

[19]Garcia vs. Lacuesta, 90 Phil. 489.

the ways by which he had signed his name before, there is no reason why it is not acceptable as a valid signature.

Idem; Signature by another. — Under our law, the requirement that the testator must subscribe the will at the end thereof is complied with not only when the testator affixes his signature thereto, but also when the testator's name is written by some other person in his presence, and by his express direction.[20] It must be noted, however, that this fact, among others, should be stated in the attestation clause.[21]

In the first place, it must be observed that it is the testator's name that must have been written by the third person. Consequently, if what is written is the third person's own name and not that of the testator, the will is not valid, even if it can be established that the document in question was in fact executed for and as the last will and testament of the testator.[22]

In the second place, it must be observed that the law requires that the testator's name must have been written in his presence. It is evident that such a requirement cannot be complied with unless the testator was conscious of what was going on at the time.

In the third place, the law requires that the third person must have affixed the testator's name at his express direction. The requirement of a signature at the direction of the testator means that the testator shall, by word of mouth or action, clearly indicate to the proxy a desire to have his name signed to the instrument, although in the absence of a specific requirement, any manner of signifying such desire will suffice. The testator's knowledge that his name was being signed for him, or his acquiescence in such an act, does not meet a requirement of this kind. Although an express direction to sign for the testator may be given by him without using words, a mere implied assent to the signing by another person is not sufficient to meet the requirement of an express direction. If the authorization is predicated upon conduct such as gestures, the conduct must be as clear and unambiguous as words authorizing the signature. A request addressed to the signer by a third person is sufficient where

[20]Art. 805, Civil Code.
[21]Ibid.
[22]Ex parte Santiago, 4 Phil. 692.

it was made in the presence of the testator and with his manifest approval.[23]

The law does not require any specific form in which the name of the testator should be affixed at the end of the will when written at his request by another person. The only requirement is that the will shall bear the name of the testator. In several cases, however, the Supreme Court has suggested that "where the testator does not know how, or is unable for any reason to sign the will himself, it shall be signed in the following manner: John Doe, by the testator,- Richard Roe, or in this form: By the testator, John Doe, Richard Roe."[24] Nevertheless, this formula ,which has been suggested by the Supreme Court, does not necessarily mean that other forms may not, be used. This, in the case of *In re Will of Siason,*[25] where the will which was presented for probate ends in this form: "At the request of Senora Maria Siason, Catalino Geva," followed by the signatures of the three witnesses and the attestation clause, the Supreme Court, answering the contention of the contestant that the signature is defective as held in previous decisions of the Court, declared:

> "The question presented in this case is: Are the words 'Señora Maria Siason' her name written by some other person? They undoubtedly are her name, but occurring as they do after the words 'at the request of,' it is contended that they form a part of the recital and not a signature, the only signature being the names of the witnesses themselves.
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> "In *Guison vs. Concepcion*, 9 Phil. 551, it was held that there was no signature although the attestation clause which followed the will contained the name of the testatrix and was thereafter signed by the witnesses. The distinction between that case and the present one is one of extreme nicety, and in the judgment of the writer of this opinion should not be attempted. The majority of the court, however, are of the opinion that the distinction is a tenable one inasmuch as in the Concepcion will, the name of the testatrix occurred only in the body of the attestation clause after the first signature of the witnesses, whereas in this will, it immediately follows the testament itself and precedes the names of the witnesses.

[23]57 Am. Jur., Sec. 259, p. 209.
[24]Ex parte Arcenas, 4 Phil. 700; Ex parte Ondevilla, 13 Phil. 470.
[25]10 Phil. 504.

> "In sustaining this form of signature, this court does not intend to qualify the decisions in *Ex parte Santiago, Ex parte Arcenas*, or *Abaya vs. Zalamero*. In the *Arcenas* case the court pointed out the correct formula for a signature which ought to be followed but did not mean to exclude any other form substantially equivalent."

Idem; Place of signature. — The law fixes the location of the signature and requires that it must be at the foot or end of the will. The purpose of such requirement is not only to show that the testamentary purpose therein expressed is completed, but also to prevent any opportunity for fraud or interpolations between the written matter and the signature. The position of the signature at the end of the will furnishes in itself internal evidence of finality or completion of intent. Consequently, a writing in the form of a will is a nullity where it is not signed at the end as required by law, and probate thereof should be denied.[26]

Idem; Presence of witnesses. — Although it is not expressly stated in the first paragraph of Art. 805, it is also required that the subscription of an ordinary will by the testator should take place in the presence of the instrumental witnesses. This statutory requirement which is also mandatory in character is prescribed by the third paragraph of the article which provides that the attestation clause shall state, among others, "the fact that the testator signed the will x x x or caused some other person to write his name, under his express direction, in the presence of the instrumental witnesses."

Attestation and subscription by witnesses. — Under Art. 805 of the Civil Code, it is also an indispensable requirement that an ordinary will must be attested and subscribed by three or more credible witnesses in the presence of the testator and of one another. This fact, according to the same article, must be stated, among others, in the attestation clause.

An instrumental witness may be defined as one who takes part in the execution of an instrument or writing.[27] Attestation of the will consists in the act of the witnesses of witnessing the execution of the will in order to see and take note mentally that such will has been executed in accordance with the requirements prescribed by

[26]57 Am. Jur., Sec. 267, p. 213.
[27]Cuevas vs. Achacoso, 88 Phil. 730; Gonzales vs. Gonzales, 90 Phil. 444.

law. Strictly speaking, it is the act of the witnesses not that of the testator, although it necessarily involves the acts of the testator in executing the will.[28] Its purpose is to render available proof during the probate proceedings that the will has been executed in accordance with the requirements prescribed by law and that the instrument offered for probate is authentic.[29] Subscription, on the other hand, as it is used in this part of the Code, consists in the manual act of the instrumental witnesses in affixing their signatures to the instrument. Its only purpose is identification.

It is, therefore, evident that attestation and subscription are different things and required for obviously different ends. They may be distinguished from each other in the following ways:

(1) Attestation is an act of the senses, while subscription is an act of the hand.

(2) The first is a mental act, while the second is a mechanical act.[30]

(3) The purpose of the first is to render available proof during the probate of the will, not only of the authenticity of the will, but also of its due execution, while the only purpose of the second is identification.

Idem; Order of signing. — Is it essential for the validity of the will that the testator or the person requested by him to write his name should sign the will at the end thereof ahead of the three attesting witnesses? In other words, will the fact that the testator signed the will after one, two, or all of the witnesses have already signed impair its validity? In the United States there are two conflicting opinions.

One opinion which is followed in several states holds that until the testator signs there is nothing to attest, since it is evident that the signature of the testator is the principal, if not the only matter, to which the attestation contemplated by law applies.[31] Hence, according to this view, everything required to be done by the testator shall precede in point of time the subscription by the attesting

[28]57 Am. Jur., Sec. 283, p. 219.
[29]*Ibid.,* Sec. 286, p. 221.
[30]Tobin vs. Hack, 79 Minn. 101; 81 N.W. 758.
[31]Brooks vs. Woodson, 87 Ga. 379.

witnesses.[32] Protection of the testator as well as of the witnesses demands that there shall be a signature before the attestation.[33]

The majority opinion which is followed in most of the states holds that where the execution of the will by the testator and the signing of the same by the subscribing witnesses constitute one continuous transaction, the signing by each, taking place in the presence of the others, is sufficient and is to all intents and purposes and attestation by the subscribing witnesses to a fact which has already taken place. This view, which is more in conformity with the liberal spirit which pervades the present Civil Code of the Philippines regarding the execution of wills, is illustrated by an American case, the case of *Gordon vs. Parker,*[34] In this case, it was established during the probate of the will that the instrumental witnesses had signed the will ahead of the testatrix. Is the defect fatal? According to Justice Anderson, representing the court:

> "There is a division among the courts on this question.. There is ample authority supporting either view. The courts adhering to the rule that the statute of wills should be construed strictly hold that the signing of the will by the testator must precede attestation and subscription by the witnesses, although part of the same transaction, 40 Cyc. 1102; 1 Underhill on Wills, p. 266, par. 95; 28 R.C.L., p. 128, par. 83. The authorities to the contrary hold that where the signing and publication of the will by the testator and the signing by the subscribing witnesses, is all one continuous transaction, each signing in the presence of the others, is sufficient, and the will is valid notwithstanding a subscribing witness may sign the will before the testator does.
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> "The court's holding to a strict construction of the statute proceed on the theory that there can be no attestation of the fact of the signing and publication of a will by the testator until such signing and publication have actually taken place; that the subscribing witnesses are supposed to sign attesting an act which has already taken place, and not one to be performed in the future. There is, of course, a good deal of force in that position. The contrary view, however, is, and we think it is supported by the better reasoned cases, that where the execution of the will by the testator and the signing of the same by the subscribing

[32]Gardner on Wills, p. 211.
[33]Lasy vs. Dobbs, 63 N.J. Eq. 325.
[34]931 Miss. 334, 104 So. 77, 39 A.L.R. 931, Costigan's Cases on Wills.

> witnesses constitute one continuous transaction, the signing by each, taking place in the presence of the others, is sufficient as is to all intents and purposes an attestation by the subscribing witnesses to a fact which has already taken place. In other words, that under those circumstances the time intervening between the placing of the different signatures to the will is not to be considered; it is too short for the law to take notice of. The statute of wills is a statute of frauds. One of the, reasons why wills are required to be in writing, and when not holographic, to be attested by subscribing witnesses, is to prevent frauds and perjuries. We are decidedly of the opinion that the better view is that where the execution and publication of a will by the testator or testatrix and its attestation: by the subscribing witnesses is one continuous transaction; the will is valid, notwithstanding the subscribing witness may sign their names before the testator does."

Idem; Meaning of presence. — The law also requires that the will must be attested and subscribed by the instrumental witnesses "in the presence of the testator and of one another." The purpose of such a requirement is evidently to prevent the substitution of a surreptitious will.[35]

Under this rule, it is essential that each one of the three instrumental witnesses must actually sign not only in the presence of the testator, but also in the presence of the other witnesses. In other words, the execution of a will is supposed to be a single act or transaction and cannot be legally effective if the various participants signed on various days or occasions and in various combinations of those present.[36] Hence, it is not sufficient if the witnesses merely acknowledged their previously affixed signatures in the presence of the testator or in the presence of each other.[37] It is not, however, essential that the testator must have actually seen the signing of the will by each one of the instrumental witnesses.[38]

It is, therefore, evident that the phrase "in the presence of the testator and of one another" has a technical meaning. Thus, according to Thompson:

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[35]57 Am. Jur., Sec. 338, p. 251.
[36]Andalis vs. Pulgueras, 59 Phil. 643.
[37]Calkins vs. Calkins, 216 Ill. 458, 75 NE 182; 108 Am. St. Rep. 233.
[38]In re Will of Siason, 10 Phil. 504; Yap Tua vs. Yap Ca Kuan, 27 Phil. 579.

"The words of the statute imply contiguity with an uninterrupted view between the testator and the witnesses, so that, if he so desires, he can see the act of attestation, whether in the same room or not, and an attestation in the same room with the testator is generally held to be a sufficient subscription in his presence, unless there is some obstruction or physical obstacle which intervenes and prevents him from knowing of his own knowledge or perceiving by his senses the act of attestation. It is often stated that the testator need not actually see the witnesses sign provided he could have seen them sign if he desired to do so, even though it would have been necessary for him to move slightly in order to do so. There is no signing in his presence where the testator for any reason is not aware of the nature of the act being done, no matter how close to him it may be done.

"The testator's consciousness of the fact that the attesting signatures are being written is held to be an indispensable requirement under a statute requiring attestation in the presence of the testator. It has also been said that the testator must have actually seen, or have been in such position that he could have seen, not only the witnesses but the instrument itself, considering both his position and the state of his health at the time, but, according to some authorities, if the testator is unable to move by reason of physical infirmities, this will not prevent the act of attestation being considered as performed in his presence.

"The witnesses must subscribe 'in his presence,' but in cases where the testator has lost or cannot use his sense of sight, if his mind and hearing are not affected, if he is sensible of what is being done, if the witnesses subscribe in the same room or in such close proximity as to be within the line of vision of one in his position who could see, and within his hearing, they subscribe in his presence. In case the testator is blind, the superintending control, which in other cases is exercised by sight, must be transferred to the other senses; and if they are, or may, at his discretion, be made sensible that the witnesses are subscribing the same will that he signed, it should be deemed a sufficient compliance with the statute."[39]

[39]Thompson on Wills, Sec. 130, pp. 207-208.

The following case, which is well-known in American jurisprudence, will more or less illustrate the above principle:

Riggs vs. Riggs
1883, 135 Mass. 938, 48 Am. Rep. 646
(Taken from Costigan's Cases on Wills)

Morton, C.J.: "The only question presented by this report is as to the sufficiency of the attestation by the witnesses to the will and codicil of the testator:

"It appeared at the hearing that the testator had received a severe injury, and was lying upon his bed unable to move. His sight was unimpaired, but he could only look upward, as he was incapable of turning his head so as to see what took place at his side. As to the codicil, it appeared that it was attested and subscribed by the three witnesses in the same room with the testator, at a table by the side of the bed about four feet from his head. The contestant contends that this attestation was insufficient, because the testator did not and could not see the witnesses subscribed their names. It has been held by some courts, upon the construction to similar statutes, that such an attestation is not sufficient. See Aikin vs. Weckerly, 19 Mich. 482, 505; Downie's Will, 42 Wis. 66; Tribe vs. Tribe, 13 Jur. 793; Jones vs. Tuck, 48 N.C. 219. But we are of the opinion that so nice and narrow a construction is not required by the latter, and would defeat the spirit of our statute.

"It is true that it is stated, in many cases, that witnesses are not in the presence of a testator unless they are within his sight; but these statements are made with reference to a testator who can see. As most men can see, vision is the usual and safest test of presence, but it is not the only test. A man may take note of the presence of another by the other senses, as hearing or touch. Certainly, if two blind men are in the same room, talking together, they are in each other's presence. If two men are in the same room, conversing together and either or both bandage or close their eyes, they do not cease to be in each other's presence.

"In England, where the tendency of the court has been to construe the statute with great strictness, it has always been held that a blind man can make a valid will, although of course he cannot see, if he is sensible of the presence of the witnesses through the other senses. Piercy's Goods, Irob. Ecc. 278; Fincham vs. Edwards, 3 Cur. Ecc. 63. It would be against the spirit

of our statutes to hold that because a man is blind, or because he is obliged to keep his eyes bandaged, or because, by an injury, he is prevented from using his sight, he is deprived of the right to make a will."

Idem; Test of presence. — What test, therefore, shall we apply in order to be able to determine whether or not the witnesses signed the will "in the presence of the testator and of one another?" This question has been answered several times by our highest court — notably in the cases of *Jaboneta vs. Gustilo, 5 Phil. 541; Nera vs. Rimando, 18 Phil. 450; Neyra vs. Neyra, 76 Phil. 296; and Dominador vs. Benedicto, 48 Off. Gaz. 213.*

Jaboneta vs. Gustilo
5 Phil. 541

In these proceedings, the will of Mario Jaboneta was denied probate by the lower court on the ground that Javellana, one of the witnesses, did not attach his signature thereto in the presence of Jena, another of the witnesses. It is admitted that after the testator and the witnesses Jalbuena and Jena had signed the will and all of the pages thereof, the latter stood up and left the room just as the third witness Javellana was signing the will and all of the pages thereof. The question now is — did Javellana sign his name in the presence of Jena as required by law? According to the Supreme Court, speaking through Justice Carson:

"We cannot agree with so much of the above finding of the facts as holds that the signature of Javellana was not signed in the presence of Jena. The fact that Jena was still in the room when he saw Javellana moving his hand and pen in the act of affixing his signature to the will, taken together with the testimony of the remaining witnesses, which shows that Javellana did in fact there and then sign his name to the will, convinces us that the signature was affixed in the presence of Jena. The fact that he was in the act of leaving, and that his back was turned, while a portion of the name of the witness was being written is of no importance. He, with the other witnesses and the testator, had assembled for the purpose of executing the testament, and were together in the same room for that purpose and at the moment when the witness, Javellana signed the document he was actually and physically present and in such position with relation to Javellana that he could see everything which took place

by merely casting his eyes in the proper direction, and without any physical obstruction to prevent his doing so, therefore, we are of the opinion that the document was in fact signed before he finally left the room.

"This conclusion is in accordance with American authorities which hold that the true test of presence of the testator and the witnesses in the execution of a will is not whether they actually saw each other sign, but whether they might have seen each other sign, had they chosen to do so, considering their mental and physical condition and position with relation to each other at the moment of inscription of each signature."

Nera vs. Rimando
18 Phil. 450

This case concerns the probate of the last will and testament of Pedro Rimando. The pertinent facts are embodied in the following opinion of the Supreme Court which was penned by Justice Carson:

"The only question raised by the evidence in this case, as to the due execution of the instrument propounded as a will in the court below, is whether one of the subscribing witnesses was present in the small room where it was executed at the time when the testator and other subscribing witnesses attached their signatures; or whether at that time he was outside, some eight or ten feet away, in a large room connecting with the smaller room by a doorway, across which was hung a curtain which made it impossible for one in the outside room to see the testator and the other subscribing witnesses in the act of attaching their signatures to the instrument.

"A majority of the members of the court is of the opinion that this subscribing witness was in the small room with the testator and the other subscribing witnesses at the time when they attached their signatures to the instrument, and this finding, of course, disposes of the appeal and necesitates the affirmance of the decree admitting the document to probate as the last will and testament of the deceased.

"The trial judge does not appear to have considered the determination of this question of fact of vital importance in the determination of this case, as he was of the opinion that under the doctrine laid down in the case of *Jaboneta vs. Gustilo, 5 Phil. 541,* the alleged fact that one of the subscribing witnesses was in the outer room when the testator and the other subscribing

witnesses signed the instrument in the inner room, had it been proven, would not be sufficient in itself to invalidate the execution of the will. But we are unanimously of opinion that had this subscribing witness been proven to have been in the outer room at the same time when the testator and the other subscribing witness attached their signatures to the instrument in the inner room, it would have been invalid as a will, the attaching of those signatures under such circumstances not being done in the presence of the witness in the outer room. This is because the line of vision from this witness to the testator and the other subscribing witnesses would necessarily have been impeded by the curtain separating the inner room from the outer one 'at the moment of inscription of each signature.'

"In the case just cited, on which the trial court relied, we held that: 'The true test of presence of the testator and the witnesses in the execution of wills is not whether they actually saw each other sign, but whether they might have seen each other sign, had they chosen to do so, considering their mental and physical condition and position with relation to each other at the moment of inscription of each signature.' "

Marginal Signatures. — According to the first part of the second paragraph of Art. 805, "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." Again, it must be observed that this requirement is mandatory in character. As a matter of fact, as an additional safeguard, the law also provides that the attestation clause shall state the fact.[40]

Under this requirement, it is essential that all of the pages of the will, except the last, should be signed not only by the testator but also by all of the instrumental witnesses. Consequently. if even one of the pages of the will does not contain the required marginal signature[41] or the pages are not signed by the witnesses although they are signed by the testator or such pages are not signed by the testator although they are signed by the witnesses,[42] the will which is offered for probate shall be disallowed.

[40]Art. 805, Civil Code.
[41]In re Estate of Saguinsin, 41 Phil. 875.
[42]In re Will of Prieto, 45 Phil. 700.

Icasiano vs. Icasiano
11 SCRA 422

The records show that the original of the will, which was surrendered simultaneously with the filing of the petition and marked as Exhibit "A" consists of five pages, and while signed at the end and in every page, it does not contain the signature of one of the attesting witnesses, Atty. Jose V. Natividad, on page three (3) thereof; but the duplicate copy attached to the amended and supplemental petition and marked as Exhibit "A-I" is signed by the testatrix and her three attesting witnesses in each and every page.

The testimony presented by the proponents of the will tends to show that the original of the will and its duplicate were subscribed at the end and on the left margin of each and every page thereof by the testatrix herself and attested and subscribed by the three mentioned witnesses in the testatrix's presence and in that of one another as witnesses (except for the missing signature of attorney Natividad on page three (3) of the original); that pages of the original and duplicate of said will were duly numbered; that the attestation clause thereof contains all the facts required by law to be recited therein and is signed by the aforesaid attesting witnesses; that the will is written in the language known to and spoken by the testatrix; that the attestation clause is in a language also known to and spoken by the witnesses; that the will was executed on one single occasion in duplicate copies; and that both the original and the duplicate copies were duly acknowledged before Notary Public Jose Oyengco of Manila on the same date — June 2, 1956.

Witness Natividad, who testified on his failure to sign page three (3) of the original, admits that he may have lifted two pages instead of one when he signed the same, but affirmed that page three (3) was signed in his presence.

Oppositors-appellants in turn introduced expert testimony to the effect that the signatures of the testatrix in the duplicate (Exhibit "A-1") are not genuine nor were they written or affixed on the same occasion as the original, and further aver that granting that the documents were genuine, they were executed through mistake and with undue influence and pressure because the testatrix was deceived into adopting as her last will and testament the wishes of those who will stand to benefit from the provisions of the will, as may be inferred from the facts and circumstances surrounding the execution of the will and provisions and dispositions thereof, whereby proponent-appellees

stand to profit from properties held by them as attorneys-in-fact of the deceased and not enumerated or mentioned therein, while oppositors-appellants are enjoined not to look for other properties mentioned in the will, and not to oppose the probate of it, on penalty of forfeiting their share in the portion of free disposal.

Speaking through Justice J.B.L. Reyes, the Supreme Court held:

"We have examined the record and are satisfied, as the trial court was, that the testatrix signed both original and duplicate copies (Exhibits "A" and "A-I", respectively) of the will spontaneously, on the same occasion, in the presence of the three attesting witnesses, the notary public who acknowledged the will; and Atty. Samson, who actually prepared the documents; that the will and its duplicate were executed in Tagalog, a language known to and spoken by both the testator and the witnesses, and read to and by the testatrix and Atty. Fermin Samson, together before they were actually signed; that the attestation clause is also in a language known to and spoken by the testatrix and the witnesses. The opinion of expert for oppositors, Mr. Felipe Logan, that the signatures of the testatrix appearing in the duplicate original were not written by the same hand which wrote the signatures in the original will leaves us unconvinced, not merely because it is directly contradicted by expert Martin Ramos for the proponents, but principally because of the paucity of the standards used by him to support the conclusion that the differences between the standard and questioned signatures are beyond the writer's range of normal scriptural variation. The expert has, in fact, used as standards only three other signatures of the testatrix besides those affixed to the original of the testament (Exh. A); and we feel that with so few standards the expert's opinion and the signatures in the duplicate could not be those of the testatrix becomes extremely hazardous. This is particularly so since the comparison charts Nos. 3 and 4 fail to show convincingly that there are radical differences that would justify the charge of forgery, taking into account the advanced age of the testatrix, the evident variability of her signatures, and the effect of writing fatigue, the duplicate being signed right after the original. These factors were not discussed by the expert.

"Similarly, the alleged slight variance in blueness of the ink in the admitted and questioned signatures does not appear reliable, considering the standard and challenged writings were affixed to different kinds of paper, with different surfaces and reflecting power. On the whole, therefore, we do not find the testimony of the oppositor's expert sufficient to overcome that

of the notary and the two instrumental witnesses, Torres and Natividad (Dr. Diy, being in the United States during the trial, did not testify).

"Nor do we find adequate evidence of fraud or undue influence. The fact that some heirs are more favored than others is proof of neither (see In re Butalid, 10 Phil. 27; Bugnao vs. Ubag, 14 Phil. 163; Pecson vs. Coronel, 45 Phil. 216). Diversity of apportionment is the usual reason for making a testament; otherwise, the decedent might as well die intestate. The testamentary dispositions 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 part do not suffice to prove fraud or undue influence. They 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 on another occasion. It is also well to note that, as remarked by the Court of Appeals in *Sideco*, 45 Off. Gaz. 168, fraud and undue influence are mutually repugnant and exclude each other; their joining as grounds for opposing probate shows absence of definite evidence against the validity of the will.

"On the question of law, we hold that the inadvertent failure of one witness to affix his signature to one page of a testament, due to the simultaneous lifting of two pages in the course of signing, is not *per se* sufficient to justify denial of probate. Impossibility of substitution of this page is assured not only by the fact that the testatrix and two other witnesses did sign the defective page, but also by its bearing to the coincident imprint of the seal of the notary public before whom the testament was ratified by testatrix and all three witnesses. The law should not be so strictly and literally intepreted 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, as stated in *Vda. de Gil vs. Murciano*, 49 Off. Gaz. 1459, at 1479 (decision on reconsideration) "witnesses may sabotage the will by muddling or bungling it in the attestation clause".

"That the failure of witness Natividad to sign page three (3) was entirely through pure oversight is shown by his own testimony as well as by the duplicate copy of the will, which

bears a complete set of signatures in every page. The test of the attestation clause and the acknowledgment before the Notary Public likewise evidence that no one was aware of the defect at the time.

"This would not be the first time that this Court departs from a strict and literal application of the statutory requirements, where the purposes of the law are otherwise satisfied. Thus, despite the literal tenor of the law, this Court has held that a testament, with the only page signed at its foot by testator and witnesses, but not in the left margin, could nevertheless be probated *(Abangan vs. Abangan, 41 Phil. 476)*; and that despite the requirement for the correlative lettering of the pages of a will, the failure to make the first page either by letter or numbers is not a fatal defect *(Lopez vs. Liboro, 81 Phil. 429)*. These precedents exemplify the Court's policy 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.

"The appellants also argue that since the original of the will is in existence and available, the duplicate (Exh. A-I) is not entitled to probate. Since they opposed probate of the original because it lacked one signature in its third page, it is easily discerned that oppositors-appellants run here into a dilemma; if the original is defective and invalid, then in law there is no other will but the duly signed carbon duplicate (Exh. A-I), and the same is probatable. If the original is valid and can be probated, then the objection to the signed duplicate need not be considered, being superfluous and irrelevant. At any rate, said duplicate, Exhibit A-I, serves to prove that the omission of one signature in the third page of the original testament was inadvertent and not intentional.

"The carbon duplicate, Exhibit A-I, was produced and admitted without a new publication does not affect the jurisdiction of the probate court, already conferred by the original publication of the petition for probate. The amended petition did not substantially alter the one first filed, but merely supplemented it by disclosing the existence of the duplicate, and no showing is made that new interests were involved (the contents of Exhibit A and A-I are admittedly identical); and appellants were duly notified of the proposed amendment. It is nowhere proved or claimed that the amendment deprived the appellants of any substantial right, and we see no error in admitting the amended petition.

> "IN VIEW OF THE FOREGOING, the decision appealed from is affirmed, with costs against appellants."

There are, however, certain exceptions to the rule that all of the pages of the will shall have to be signed on the left margin by the testator and the witnesses. Such requirement is not necessary: (1) in the last page, when the will consists of two or more pages; (2) when the will consists of only one page; and (3) when the will consists of two pages, the first of which contains all the testamentary dispositions and is signed at the bottom by the testator and the witnesses and the second contains only the attestation clause duly signed at the bottom by the witnesses.[43]

Idem; Location of signatures. — The law requires that the signatures of the testator and the instrumental witnesses should be on the left margin of every page of the will except the last. According to the weight of authority, this requirement regarding the location of the marginal signatures is not mandatory in character, provided, of course, that such signatures are present in every page of the will, except the last.[44] Thus, in *Avera vs. Garcia and Rodriguez,*[45] the Supreme Court, through Justice Street, declared:

> "It is true that the statute says that the testator and the instrumental witnesses shall sign their names on the left margin of each and every page; and it is undeniable that the general doctrine is to the effect that all the statutory requirements as to the execution of wills must be fully complied with. The same doctrine is also deducible from cases heretofore decided by this court. Still some details at times creep into legislative enactments which are so trivial that it would be absurd to suppose that the Legislature could have attached any decisive importance to them. The provision to the effect that the signature of the testator and witnesses shall be written on the left margin of each page rather than on the right margin — seems to be of this character. So far as concerns the authentication of the will and of every part thereof it can make no possible difference whether the names appear on the left or on the right margin provided they are on one or the other.

[43]Abangan vs. Abangan, 40 Phil. 476.
[44]Avera vs. Garcia, 42 Phil. 145; Nayre vs. Mojal, 47 Phil. 153.
[45]42 Phil. 145.

"The controlling considerations on the point now before us were stated in *In re Will of Abangan*, 40 Phil. 476, where the court, speaking through Justice Avancena, in a case where the signatures were placed at the bottom of the page and not in the margin, said:

"'The object of the solemnities surrounding the execution of wills is to close the door against bad faith and fraud, to avoid substitution of wills and testaments and to guarantee their truth and authenticity. Therefore, the laws on this subject should be interpreted in such a way as to attain these primordial ends. But, on the other hand, also one must not lose sight of the fact that it is not the object of the law to restrain and curtail the exercise of the right to make a will. So when an interpretation already given assures such ends, any other interpretation whatsoever, that adds nothing but demands more requisites entirely unnecessary, useless and frustrative of the testator's last will, must be disregarded.'

"In the case before us, where ingenuity could not suggest any possible prejudice to any person, as attendant upon the actual deviation from the letter of the law, such deviation must be considered too trivial to invalidate the instrument."

Numbering of Pages. — According to the last part of the second paragraph of Art. 805, it is also essential that "all of the pages of the will shall be numbered correlatively in letters placed on the upper part of each page." The principal object of this requirement is to forestall any attempt to suppress or substitute any of the pages of the will.[46] Again, it must be observed that this requirement is mandatory in character. However, it is not necessary when all of the dispositive parts of a will are written on one sheet only.[47] Neither is it necessary that the pages of the will shall be numbered correlatively in letters such as "one," "two" or "three." According to the weight of authority, substantial compliance with the statutory requirement is sufficient. Consequently, if the page of a will are numbered by mere alphabetical letters,[48] or by Arabic numerals,[49] or by any form

[46]Martir vs. Martir, 70 Phil. 89.

[47]Abangan vs. Abangan, 40 Phil. 476. Here the will consisted of two pages, the second of which contained only the attestation clause.

[48]Aldaba vs. Roque, 43 Phil. 379.

[49]Unson vs. Abella, 43 Phil. 494; Nayre vs. Mojal, 47 Phil. 152; Martir vs. Martir, 70 Phil. 89.

of identification,[50] there is sufficient compliance with the statutory requirement.

Attestation Clause. — Another essential requirement for the validity of an ordinary will is the attestation clause. Ever since the enactment of Act No. 2645 in 1916, amending the provision of Sec. 618 of the Code of Civil Procedure, the Supreme Court, in a long line of decisions, has uniformly held that there must be an attestation clause and that it must express the material matters mentioned in the law (now Art. 805 of the Civil Code) with substantial accuracy.[51] Absence of this clause will render the will a nullity.

The attestation clause is a memorandum or record of facts wherein the witnesses certify that the instrument has been executed before them, and that it has been executed in accordance with the formalities prescribed by law.[52] It is made for the purpose of preserving in permanent form, a record of the facts attending the execution of a will, so that in case of failure of the memory of the instrumental witnesses or in case such witnesses are no longer available, such facts may still be proved.[53]

Since the attestation clause is a declaration of the instrumental witnesses and not of the testator, it is, therefore, clear that it must be signed by the witnesses, not by the testator.[54] In the words of the Supreme Court, "the attestation clause is a memorandum of facts attending the execution of the will required by law to be made by the attesting witnesses, and it must necessarily bear their signatures."[55] As a matter of sequence or continuity, it must be located right after the signature of the testator at the end of the will. There is, however, no statutory provision which would make this rule a mandatory requirement; hence, it is elastic or flexible in character. Thus, where the attestation clause is written on a separate page and not on the last page in direct continuation of the body of the will, although there might still be a space at the bottom thereof not big enough to contain the whole clause, the defect, if it can be considered

[50]Lopez vs. Liboro, 46 Off. Gaz. 211.

[51]In re Will of Newmark, 45 Phil. 841

[52]Testate Estate of Toray vs. Abaja, 47 Off. Gaz. 327.

[53]Leynez vs. Leynez, 68 Phil. 745.

[54]Abangan vs. Abangan, 40 Phil. 476; Testate Estate of Toray vs. Abaja, 47 Off. Gaz. 327.

[55]Cagro vs. Cagro, 92 Phil. 1032.

a defect, is a matter of minor importance and will not invalidate the will.[56] As a matter of fact, where the clause is found in the body of the will itself followed by the signatures of the testator and of the instrumental witnesses, so that, on its face, it appears to be an attestation made by the testator himself more than by instrumental witnesses, it has been held that, although the attestation clause is clearly defective, the anomaly is not serious and substantial as to affect the validity of the will.[57] While perfection in the drafting of a will may be desirable, unsubstantial departure from the usual forms should be ignored, especially where the authenticity of the will is not assailed.[58]

Idem; Contents. — According to the third paragraph of Art. 805 of the Civil Code, "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." It is, therefore, clear that there are three essential facts which must necessarily appear in the attestation clause in order that it will properly constitute a real certification by the instrumental witnesses that the formalities which are required by law in the execution of an ordinary will have been complied with. These essential facts are:

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

(2) 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

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

[56]Villaflor vs. Tobias, 53 Phil. 714.

[57]Aldaba vs. Roque, 43 Phil. 378; Cuevas vs. Achacoso, 88 Phil. 730; Gonzales vs. Gonzales, 90 Phil. 444.

[58]Gonzales vs. Gonzales, 90 Phil. 444.

Idem; Effect of defects or imperfections. — If the defect of the attestation clause goes into the very essence of the clause itself or consists in the omission of one, some or all of the essential facts which, according to law, must be stated in such clause, and such omission cannot be cured by an examination of the will itself, the defect is substantial in character, as a consequence of which the will is invalidated. This is true even where the authenticity of the will which is offered for probate is not assailed. The reason for this is that the requirements regarding the attestation clause affords additional security against the danger that the will may be tampered with; and as the Legislature has seen fit to prescribe these requirements, they must be considered material in determining whether or not the will or instrument should be admitted to probate.[59]

In re Will of Andrada
42 Phil. 180

This case concerns the probate of the last will and testament of Lucina Andrada. The attestation clause of the will which is questioned, is incorporated in the will itself, constituting the last paragraph thereof; and its defect consists in the fact that it does not state the number of sheets or pages upon which the will is written. According to the contestant, the defect in the attestation clause goes into the very essence of the will itself, and therefore, it should be disallowed. The Supreme Court, speaking through Justice Street, held:

"The court is unanimous upon the point that the defect pointed out in the attesting clause is fatal. The law plainly says that the attestation clause shall state the number of sheets or pages used, the evident purpose being to safeguard the document from the possibility of the interpolation of additional pages or the omission of some of the pages actually used. It is true that this point is also safeguarded by the other two requirements that the pages shall be consecutively lettered and that each page shall be signed on the left margin by the testator and the witnesses. In the light of these requirements it is really difficult to see any practical necessity for the additional requirement that the attesting clause shall state the number of pages or sheets used. Nevertheless, it cannot be denied that the last mentioned requirement affords additional security against the danger that

[59]In re Will of Andrada, 42 Phil. 180.

the will may be tampered with; and as the Legislature has seen fit to prescribe this requirement, it must be considered material."

Cagro vs. Cagro
92 Phil. 1032

This is an appeal interposed by the oppositors from a decision of the lower court to probate the alleged will of Vicente Cagro. The main objection insisted upon by the appellants is that the will is fatally defective, because its attestation clause is not signed by the attesting witnesses. There is no question that the signatures of the three witnesses to the will do not appear at the bottom of the attestation clause, although the page containing the same is signed by the witnesses on the left-hand margin. The Supreme Court, through Chief Justice Paras, held:

"We are of the opinion that the position taken by the appellants is correct. The attestation clause is 'a memorandum of the facts attending the execution of the will' required by law to be made by the attesting witnesses, and it must necessarily bear their signatures. An unsigned attestation clause cannot be considered as an act of the witnesses, since the omission of their signatures at the bottom thereof negatives their participation.

"The petitioner-appellee contends that the signatures of the three witnesses on the left-hand margin conforms substantially to the law and may be deemed as their signatures to the attestation clause. This is untenable, because said signatures are in compliance with the legal mandate that the will be signed on the left-hand margin of all its pages. If an attestation clause not signed by the three witnesses at the bottom thereof, be admitted as sufficient, it would be easy to add such clause to a will on a subsequent occasion and in the absence of the testator and any or all of the witnesses."[60]

However, if the defects of the attestation clause do not go into the very essence of the clause itself or they consist in defects or imperfections in the form of the attestation or in the language used therein, such defects are merely formal in character, as a con-

[60]This case was still decided under the old law, not under the new. Considering the provision of Art. 809 of the new Civil Code which was not found in the old law, there are some who maintain that the above decision is of doubtful application under the present law. See dissenting opinion of Justice Angelo Bautista.

sequence of which the validity of the will is not affected, provided that it is proved that such will was in fact executed and attested in substantial compliance with all the requirements of Art. 805 of the Code. This rule which is sometimes known as the *doctrine of liberal interpretation* as distinguished from the *doctrine of strict interpretation* is now embodied in Art. 809 of the Code. It must be noted, however, that the rule is predicated upon the concurrence of two essential pre-requisites. In the first place, the will must have been executed and attested without bad faith, forgery, fraud, or undue and improper pressure and influence; and in the second place, it must be proved that the will was in fact executed and attested in substantial compliance with all the requirements of Art. 805.

Idem; Language of attestation. — Under our Code if the attestation clause is in a language not known to the witnesses, it shall be interpreted to them. This rule is different from that which is required of the will itself because in the case of the latter the rule is that it must be executed in a language or dialect known to the testator.[61]

> *Problem* – Clara, thinking of her mortality drafted a will and asked Roberta, Hannah, Luisa and Benjamin to be witnesses. During the day of the signing of her will, Clara fell down the stairs and broke both her arms. Coming from the hospital, Clara insisted on signing her will by thumbmark and said that she can sign her full name later. While the will was being signed, Roberta experienced a stomach ache and kept going to the restroom for long periods of time. Hannah, while waiting for her turn to sign the will, was reading the 7th Harry Potter Book on the couch, beside the table on which everyone was signing. Benjamin, aside from witnessing the will also offered to notarize it. A week later, Clara was run over by a drunk driver while crossing the street in Greenbelt. May the will of Clara be admitted to probate? Give your reasons briefly (2007).
>
> *Answer* — Yes, the will of Clara may be probated.
>
> A thumbmark has been considered by the SC as a valid signature if intended by the testator to be his signature (*Garcia vs. La Cuesta,* G.R. No. L-4067, Nov. 29, 1951; *De Gala vs. Gonzales*, G.R. No. L-37756, Nov. 28, 1933).

[61] Art. 804, Civil Code.

The three witness rule required for the validity of an ordinary will is satisfied, provided, either of the two following conditions exists:

1. Roberta could see Clara and the other witnesses sign the will at any time while she was in the toilet, had she wanted to.

2. If Roberta could not have seen Clara and the other witnesses sign the will, the same is valid if the will was acknowledged before a Notary Public other than Benjamin.

It is not necessary that the testator or the witnesses should actually see the others subscribe their names to the instrument, provided that he is in a position to see them sign if he chooses *(Nera vs. Rimando, G.R. No. 5971, Feb. 27, 1911;Yap Tua vs. Yap Ka Kuan, G.R. No. L-6845, Sept. 1, 1914)*. Thus, the signing must be considered to be in the presence of Hannah who was reading a book on the couch beside the table (*Suggested Answers to the 2007 Bar Examination Questions, PALS)*.

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.[62]

Notarial Acknowledgment. — Another mandatory requirement in the execution of an ordinary will is that it must be acknowledged before a notary public by the testator and the instrumental witnesses. The notary public in such case shall not be required to retain a copy of the will, or file another with the office of the Clerk of Court as in the case of other instruments.[63] Although the law speaks of "every will," it is apparent that the provision prescribing this requirement is applicable only to ordinary wills. Under the Spanish Civil Code, notarial intervention was also required, although it was subsequently abrogated by the Code of Civil Procedure.

Cruz vs. Villasor
54 SCRA 31

The only question presented for determination, on which the decision of the case hinges, is whether the supposed last will

[62]New provision.
[63]Art. 806, Civil Code.

and testament of Valente Z. Cruz (Exhibit "E") was executed in accordance with law, particularly Articles 805 and 806 of the new Civil Code, the first requiring at least three credible witnesses to attest and subscribe to the will, and the second requiring the testator and the witnesses to acknowledge the will before a notary public.

Of the three instrumental witnesses thereto, namely, Deogracias T. Jamaoas, Jr., Dr. Francisco Panares, and Atty. Angel H. Teves, Jr., one of them, the last named, is at the same time the Notary Public before whom the will was supposed to have acknowledged. Reduced to simpler terms, the will was attested and subscribed by at least three credible witnesses in the presence of the testator and of each other, considering that the three attesting witnesses must appear before the notary public to acknowledge the same. As the third witness is the notary public himself, petitioner argues that the result is that only two witnesses appeared before the notary public to acknowledge the will. On the other hand, private respondent-appellee, Manuel B. Lugay, who is the supposed executor of the will, following the reasoning of the trial court, maintains that there is substantial compliance with the legal requirement of having at least three attesting witnesses even if the notary public acted as one of them, bolstering up his stand with 57 American Jurisprudence, p. 227 which, insofar as pertinent, reads as follows:

"It is said that there are practical reasons for upholding a will as against the purely technical reason that one of the witnesses required by law signed as certifying to an acknowledgment of the testator's signature under oath rather than as attesting the execution of the instrument."

Speaking through Justice Esguerra, the Supreme Court held:

"After weighing the merits of the conflicting claims of the parties, We are inclined to sustain that of the appellant that the last will and testament in question was not executed in accordance with law. The notary public before whom the will was acknowledged cannot be considered as the third instrumental witness since he cannot acknowledge before himself his having signed the will. To acknowledge before means to avow (Javellana v. Ledesma, 97 Phil. 258, 262; Castro v. Castro, 100 Phil. 239, 247); to own as genuine, to assent, to admit; and "before" means in front or preceding in space or ahead of. (The New Webster Encyclopedic Dictionary of the English Language, p. 72; Funk & Wagnalls New Standard Dictionary of the English Language,

p. 252; Webster's New International Dictionary 2d. p. 245). Consequently, if the third witness were the notary public himself, he would have to avow, assent, or admit his having signed the will in front of himself. This cannot be done because he cannot split his personality into two so that one will appear before the other to acknowledge his participation in the making of the will. To permit such a situation to obtain would be sanctioning a sheer absurdity.

"Furthermore, the function of a notary public is, among others, to guard against any illegal or immoral arrangements. (Balinon v. de Leon, 50 O.G. 583). That function would be defeated if the notary public were one of the attesting or instrumental witnesses. For then he would be interested in sustaining the validity of the will as it directly involves himself and the validity of his own act. It would place him in an inconsistent position and the very purpose of the acknowledgment, which is to minimize fraud (Report of the Code Commission, p. 106-107), would be thwarted.

"Admittedly, there are American precedents holding that a notary public may, in addition, act as a witness to the execution of the document he has notarized. (Mahilum v. Court of Appeals, 64 O.G. 4017; 17 SCRA 482; Sawyer v. Cox, 43 III. 130). There are others holding that his signing merely as a notary in a will nonetheless makes him a witness thereunder (Ferguson v. Ferguson, 47 S. E. 2d. 346; In Re Douglas' Will, 83 N. Y. S. 2d, 641; Ragsdal v. Hill, 269 S. W. 2d. 911, Tyson v. Utterback, 122 So. 496; In Re Baybee's Estate 160 N. W. 900; Merill v. Boal, 132 A. 721; See also Trenswith v. Smallwood, 15 So. 1030). But these authorities do not serve the purpose of the law in this jurisdiction or are not decisive of the issue herein, because the notaries public and witnesses referred to in the aforecited cases merely acted as instrumental, subscribing or attesting witnesses, and not as acknowledging witnesses. Here the notary public acted not only as attesting witness but also as acknowledging witness, a situation not envisaged by Article 806 of the Civil Code which reads:

"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 filed another with the office of the Clerk of Court."

"To allow the notary public to act as third witness, or one of the attesting and acknowledging witnesses, would have the effect of having only two attesting witnesses to the will which

> would be a contravention of the provisions of Article 805 requiring at least three credible witnesses to act as such and of Article 806 which requires that the testator and the required number of witnesses must appear before the notary public to acknowledge the will. The result would be, as has been said, that only two witnesses appeared before the notary public for that purpose. In the circumstances, the law would not be duly observed.
>
> "FOR ALL THE FOREGOING, the judgment appealed from is hereby reversed and the probate of the last will and testament of Valente Z. Cruz (Exhibit "E") is declared not valid and hereby set aside."

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.[64]

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.[65]

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.[66]

Doctrine of Liberal Interpretation. — The rule stated in the above article is sometimes known as the *doctrine of liberal interpretation*. As a consequence of the adoption of this doctrine, the rule of *strict interpretation,* which used to be upheld by the Supreme Court during that period immediately following the enactment of Act No. 2645 which amended the provisions of Sec. 618 of the Code of Civil Procedure, is abrogated. Thus, according to the Code Commission:

[64]New provision.
[65]New provision.
[66]New provision.

"The Supreme Court of the Philippines had previously upheld the strict compliance with the legal formalities and had even said that the provisions of Section 618 of the Code of Civil Procedure, as amended, regarding the contents of the attestation clause were mandatory, and noncompliance, therewith invalidated the will *(Uy Coque vs. Sioca, 43 Phil. 405)*. The decisions necessarily restrained the freedom of the testator in disposing of his property.

"However, in recent years the Supreme Court changed its attitude and has become more liberal in the interpretation of the formalities in the execution of wills. This liberal view is enunciated in the cases of *Rodriguez vs. Yap, G.R. No. 45924, May 18, 1939; Leynez us. Leynez, G.R. No. 46097, October 18, 1939; Martir vs. Martir, G.R. No. 46995, June 21, 1940 and Alcala vs. Villa, G.R. No. 47351, April 18, 1941.*

"In the above mentioned decisions of our Supreme Court, it has practically gone back to the original provisions of Section 618 of the Code of Civil Procedure before its amendment by Act No. 2645 in the year 1916. To turn this attitude into a legislative declaration and to attain the main objective of the proposed Code in the liberalization of the manner of executing wills, Article 809 of the Project is recommended."[67]

Before the promulgation of the New Civil Code, there used to be two conflicting views with regard to the possible effect of the failure of the attestation clause to state one or some of the essential facts or matters which must appear in it as required by law. The question around which the conflict revolved was whether or not the failure of the instrumental witnesses to state one or some of the essential facts which, according to law, must be stated in the attestation clause, would be fatal to the validity of the will in spite of the fact that it can be established by either intrinsic or extrinsic evidence that all of the statutory requirements for the execution of a will have been complied with. One view *(the rule of strict interpretation)* held that the omission would be fatal to the validity of the will,[68] while the other view *(the rule of liberal interpretation)* held that it would not be fatal provided that it can be established or deduced from an

[67]Report of the Code Commission, pp. 104-105.

[68]See Uy Coque vs. Sloca, 43 Phil. 405; Sano vs. Quintana, 48 Phil. 506; Gumban vs. Gorecho, 50 Phil. 30; Quinto vs. Morata, 54 Phil. 841; Rodriguez vs. Alcala, 55 Phil. 105; Testate Estate of Toray vs. Abaja, 47 Off. Gaz. 327.

examination of the will itself that all of the statutory requirements have been complied with.[69]

The existence of these divergent views had been recognized in the past by the Supreme Court in several cases. Thus, in *Dichoso vs. Gorostiza, 57 Phil. 437,* it was noted "that there have been noticeable in the Philippines two divergent tendencies in the law of wills — the one being planted on strict construction and the other on liberal construction." These conflicting or divergent views may be illustrated by what happened in the case of *Gil vs. Murciano.* The will which presented for probate in this case had the following attestation clause, properly signed:

> "We, the undersigned, all of legal age, certify: that the foregoing will written in Spanish which is known to the testator, composed of two pages actually used including the attestation clause paged correlatively in letters and numbers of the upper part thereof as well as the pages of the same, in our presence and that each one of us have attested and signed said document and all the pages thereof in the presence of the testator and of each one of us." *(Translation)*

Counsel for the contestant contended that the phrase "have been signed by the testator" between the words "of the same" and the words "in our presence" should have been inserted if the attestation clause is to be complete and have sense. As it is, the last part of the clause is meaningless. On March 1, 1951, the Supreme Court, by a vote of six to five, reversed the order of the probate court admitting the will to probate. Speaking through Justice Jugo, the Court held:

> "It will be noted that the attestation clause abovequoted does not state that the alleged testator signed the will. It declares only that it was signed by the witnesses. This is a fatal defect, for the precise purpose of the attestation clause is to certify that the testator signed the will, this being the most essential element of the clause. Without it there is no attestation at all. It is said that the court may correct a mere clerical error. This is too much of a clerical error for it affects the very essence of the clause. Alleged errors may be overlooked or corrected only in matters of form which do not affect the substance of the statement.

[69]See *infra*.

> "It is claimed that the correction may be made by inference. If we cure a deficiency by means of inferences, when are we going to stop making inferences to supply fatal deficiencies in wills? Where are we to draw the line? Following that procedure we would be making interpolations by inferences, implications and even by *internal* circumstantial evidence. This would be done in the face of the clear, unequivocal language of the statute as to how the attestation clause should be made. It is to be supposed that the drafter of the alleged will read the clear words of the statute when he prepared it. For the court to supply alleged deficiencies would be against the evident policy of the law."[70]

There was, however, a strong dissenting opinion penned by Justice Mason. Subsequently, the proponent filed a motion for reconsideration of the Court's decision. By the time the motion was taken up, there was already a change in composition of the Court. Chief Justice Moran, who concurred with Justice Jugo, had already resigned and was replaced by Justice Labrador. In the motion for reconsideration, Justice Labrador concurred with Justice Tuason's dissenting opinion. The result was that the Court's decision of 1951 was reversed on March 20, 1953, with Justice Tuason's dissenting opinion becoming the majority opinion by a vote of six to five. Thus, as it finally stands, the Supreme Court's decision is as follows:

> "The problem posed by the omission in question is governed not by the law of wills which requires certain formalities to be fulfilled in the execution, but by the rules of construction applicable to statutes and documents in general. And this rule would obtain whether the omission occurred in the original documents or in the copy alone. In either case, the court may and should correct the error by supplying the omitted word or words.
>
> "But let it be assumed, for the sake of this decision only, that the attestation clause was drawn exactly as it was copied in Toledo's record on appeal, was the mistake fatal? Was it, or was it not cured by the testator's own declaration, to wit: In testimony whereof, I sign this my will and on the left margin of each of its two used pages including the attestation clause in the presence of the witnesses, who on their part signed one of said pages and the attestation clause in my presence and in the

[70]Gil vs. Murciano, 88 Phil. 260.

presence of one another, in Porac, Pampanga, P.I., this 27th day of March, nineteen hundred thirty-nine.'

"This Court noted in *Dichoso de Ticson vs. De Gorostiza (1922), 57 Phil. 437,* "that there have been noticeable in the Philippines two divergent tendencies in the law of wills — the one being planted on strict construction and the other on liberal construction. A late example of the former view may be found in the decision, in *Rodriguez vs. Alcala (1930), 55 Phil. 150,* sanctioning a literal enforcement of the law. The basic case in the other direction, predicated on reason, is *Abangan vs. Abangan (1919) 40 Phil. 476,* oft-cited approvingly in later decisions.'

"It is objected 'If we cure a deficiency by means of inferences, when are we going to stop making inferences to supply fatal deficiencies in wills? Where are we to draw the line? These same questions might well have been asked by the opponents of the new trends in the cases above cited. But the so-called liberal rule does not offer any puzzle or difficulty, nor does it open the door to serious consequences. The later decisions do tell us when and where to stop; they draw the dividing line with precision. They do not allow evidence *aliunde* to fill a void in any part of the document or supply missing details that should appear in the will itself. They only permit a probe into the will, an exploration within its confines, to ascertain its meaning or to determine the existence or absence of the requisite formalities of law. This clear, sharp limitation eliminates uncertainty and ought to banish any fear of dire results.

"The case at hand comes within the bounds thus defined."[71]

Idem; Limitation. — By virtue of the provision of Art. 809 of the New Civil Code, the *doctrine of liberal interpretation* has become part and parcel of the law on wills in this jurisdiction. One difficulty, however, still remains and that is with regard to the admissibility of evidence *aliunde* in order to prove or establish the fact that the will was in fact executed and attested in substantial compliance with all the requirements prescribed by law. The law states that "defects or 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 the requirements of Article 805." Does this mean that such defects

[71]Gil vs. Murciano, 88 Phil. 260.

or imperfections can be cured by evidence *aliunde?* If the attestation does not state that the testator had signed the will and all of the pages *in the presence* of the instrumental witnesses and nothing can be inferred of such fact from the context of the will itself, can evidence *aliunde* be presented in order to prove that the testator actually signed the will and all of the pages thereof in the presence of the instrumental witnesses? Under the old law, there was no question. According to the cases decided by the Supreme Court under the old law, whether applying the *doctrine of liberal interpretation* or the *doctrine of strict interpretation,* such evidence cannot be presented in order "to fill a void in any part of the document or supply missing details that should appear in the will itself." There can only be "a probe into the will, an exploration within its confines, to ascertain its meaning or to determine the existence or absence of the requisite formalities of law." Is this limitation still applicable under the present law considering the phraseology of Art. 809? It is submitted that the limitation is still applicable. It must be observed that the *doctrine of liberal interpretation,* as enunciated in Art. 809, can only be applied to defects or imperfections either in the form of the attestation or in the language used therein. It cannot be applied to defects which are substantial, such as when there is an absolute omission in the attestation clause of one, or some, or all of these essential facts, which, according to the law, must be stated in such clause, and such an omission cannot be cured by an examination of the entire will itself. It is evident that such an omission cannot be classified as a defect or imperfection in the form of the attestation or in the language used therein.

Idem; Illustrative cases. — The following cases will serve to illustrate the *rule of liberal interpretation* as applied by the Supreme Court.[72]

[72]See also: Abangan vs. Abangan, 40 Phil. 476; Pecson vs. Pecson, 45 Phil. 216; Nayve vs. Mojal, 47 Phil. 153; De Gala vs. Gonzales, 53 Phil. 104; Rey vs. Cartagena, 56 Phil. 282; Sebastian vs. Panganiban, 59 Phil. 653; Rodriguez vs. Yap, 68 Phil. 126; Leynez vs. Leynez, 68 Phil. 745; Martir vs. Martir, 70 Phil. 89; Alcala vs. Villa, 71 Phil. 561; Sabado vs. Fernandez, 72 Phil. 541; Mendoza vs. Pilapil, 72 Phil. 546; Testate of Rollos, (CA), 44 Off. Gaz. 4938; Singson vs. Florentino, 48 Off. Gaz. 4353; Dia v. Zuniga, 89 Phil. 129; Gonzales vs. Gonzales, 90 Phil. 444; Gil vs. Murciano, 88 Phil. 260.

Cuevas vs. Achacoso
88 Phil. 730

The attestation clause of the will which is offered for probate is as follows:

"In witness whereof, I sign this testament or last will in the municipality of Iba, Zambales, Philippines, this 10th day of October, 1945, in the presence of the three witnesses, namely Dr. Nestorio Trinidad, Don Baldomero Achacoso, and Mr. Proceso Cabal as instrumental witnesses to my signing; this instrument is written in three (3) sheets marked by letters 'A,' 'B,' and 'C' consecutively on top of each sheet and upon my request and in my presence and also in the presence of each of the aforesaid instrumental witnesses, they also sign this instrument already referred to.

(Sgd.) "Jose Venzon

Witnesses:

(Sgd.) "Nestorio Trinidad
(Sgd.) "Baldomero Achacoso
(Sgd.) "Proceso Cabal"

According to the contestant, the above clause is not an attestation clause, or if it is, the same is an attestation of the testator and not of the witnesses. The Supreme Court, however, speaking through Justice Bautista, held:

"The clause above quoted is the attestation clause referred to in the law which, in our opinion, substantially complies with its requirements. The only apparent anomaly we find is that it appears to be an attestation made by the testator himself more than by the instrumental witness. This apparent anomaly, however, is not in our opinion, serious nor substantial, as to affect the validity of the will, it appearing that right under the signature of the testator, there appear the signatures of the three instrumental witnesses.

"Instrumental witnesses," as defined by Escriche in his *Diccionario Razonado de Legislacion y Jurisprudencia, Vol. 4, p. 1115,* 'are those who take part in the execution of an instrument or writing.' An instrumental witness, therefore, does not merely attest to the signature of the testator but also to the proper execution of the will. The fact that the three instrumental witnesses have signed the will immediately under the signature of the testator, shows that they have in fact attested not only to

the genuineness of his signature but also to the due execution of the will as embodied in the attestation clause."

Dichoso vs. Gorostiza
57 Phil. 437

The attestation clause of the will which is offered for probate is as follows:

> "We, the undersigned attesting witnesses, whose residences are stated opposite our respective names, do hereby certify that the testatrix, whose name is signed herein above, has published unto us the foregoing will consisting of two pages as her last will and testament, and has signed the same in our presence, and in witness whereof we have each signed the same and each page thereof in the presence of said testatrix and in the presence of each other."

According to the contestant, the above clause is fatally defective because it fails to state that the testatrix signed every page of the will as required by law. The Supreme Court, however, speaking through Justice Malcolm, held:

"Placing the attestation clause under the judicial microscope, we observe, after analytical study, that it shows compliance with statutory provisions. We must reject as untenable the interpretation of the appellant relative to the word 'hereinabove,' for this simply has reference to the signature at the end of the will. We must reject also as untenable the interpretation of the appellant that the word 'same' refers back to 'pages' and not to for such an interpretation would be considered with the language used further in the attestation clause where mention is made of the signing by the witnesses of the same and each page thereof,' meaning the will and each page thereof. We are, however, clear that when the attestation clause states that the testatrix 'has published unto us the foregoing will consisting of two pages as her last will and testament, and has signed the same,' the word 'same' signifies the foregoing will consisting of two pages, which necessarily implies the signing by the testatrix of the will and every page thereof. In our judgment, an interpretation sustaining the validity of the attestation clause is neither forced nor illogical.

"Precision of language in the drafting of an attestation clause is desirable. However, it is not imperative that a par-

rot-like copy of the words of the statute be made. It is sufficient from the language employed if it can reasonably be deduced that the attestation clause fulfills what the law expects of it. Legalistic formalities should not be committed to obscure the use of good sound common sense in the consideration of wills and to frustrate the wishes of deceased persons solemnly expressed in testaments, regarding the execution of which there is not even a hint of bad faith or fraud. We find the attestation clause legally sufficient, and order that the will of the deceased Caridad Alcantara de Gorostiza be admitted to probate."

Merza vs. Porras
93 Phil. 142

The attestation clause of the will which is offered for probate is as follows:

> "The foregoing instrument consisting of three (3) pages, on the date above mentioned, was executed, signed and published by testatrix Pilar Montealegre and she declared that the said instrument is her last will and testament; that in our presence and also in the very presence of the said testatrix as likewise in the presence of two witnesses and the testatrix each of us three witnesses signed this testament."

According to the contestant, the above clause is fatally defective. The Supreme Court, however, speaking through Justice Tuason, held:

"The opponent objected that this clause did not state that the testatrix and the witnesses had signed each and every page of the will or that she had signed the instrument in the presence of the witnesses.

"The premise of this conclusion is, in our opinion, incorrect.

"It must be admitted that the attestation clause was very poorly drawn; its language exceedingly ungrammatical to the point of being difficult to understand; but from a close examination of the whole context in relation to its purpose the implication seems clear that the testatrix signed in the presence of the witnesses. Considering that the witnesses' only business at hand was to sign and attest to the testatrix's signing of the document, and that the only actors in the proceeding were the maker and the witnesses acting and speaking collectively and

in the first person, the phrase 'in the presence,' used as it was in connection with the process of signing, cannot imply anything but, that the testatrix signed before them. No other inference is possible. The propositional phrase 'in our presence' denotes an active verb and the verb a subject. The verb could be no other than signed and the subject no other than the testatrix.

"The use of the word 'also' is no less enlightening. It denotes that, as each of the witnesses signed in the presence of the testatrix and of one another, so the testatrix signed in similar or like manner — in their presence.

"In consonance with the *principle of liberal interpretation,* adhered to in numerous later decisions of this Court and affirmed and translated into enactment in the new Civil Code *(Art. 809),* we are constrained to hold that the attestation clause under consideration is sufficient and valid."

In the case of *Teodoro Caneda et al. vs. Hon. CA, G.R. No. 103554, May 28, 1993*, the SC ruled that there are two kinds of wills. One is the ordinary will which must be acknowledged before a notary public by the testator and the attesting witnesses, hence it is likewise known as a notarial will. Where the testator is deaf-mute, Art. 807 requires that he must personally read the will, if able to do so. Otherwise, he should designate two persons who will read the will and communicate its contents to him in a practicable manner. On the other hand, if the testator is blind, the will should be read to him twice; once, by anyone of the witnesses thereto, and then again, by the notary public before whom it is acknowledged. The other kind of will is the holographic will which Art. 10 defines as one that is entirely written, dated and signed by the hand of the testator himself. This kind of will unlike the ordinary type, requires no attestation by witnesses. A common requirement in both kinds of wills is that they should be in writing and must have been executed in a language or dialect known to the testator. However, in the case of an ordinary or attested will, its attestation clause need not be written in a language or dialect known to the testator since it does not form part of the testamentary disposition. Furthermore, the language used in the attestation clause likewise need not even be known to the attesting witnesses.

Problem – What is the effect of the failure to state the number of pages on which the will was written?

Answer – The failure of the attestation clause to state the number of pages on which the will was written is a fatal flaw, despite Art. 809. The purpose of the law in requiring the 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. The failure to state the number of pages equates with the absence of an averment on the part of the instrumental witnesses as to how many pages consisted the will, the execution of which they had ostensibly just witnessed and subscribed to. There is substantial compliance with this requirement if the will states elsewhere in it how many pages it is comprised of. However, in the case of *Felix Azuela vs. CA, et al., G.R. No. 122880, April 12, 2006* , there could have been no substantial compliance with the requirements under Art. 805 since there is no statement in the attestation clause or anywhere in the will itself as to the number of pages which comprise the will.

Problem – What is the effect of an unsigned attestation clause?

Answer – An unsigned attestation clause results in an unattested will. The attestation clause is a "memorandum of the facts attending the execution of the will" required by law to be made by the attesting witnesses, and it must necessarily bear their signatures. An unsigned attestation clause cannot be considered as an act of the witnesses since the omission of their signatures at the bottom thereof negates their participation. The signatures on the left-hand corner of every page signify that the witnesses are aware that the page they are signing forms part of the will. On the other hand, the signatures to the attestation clause establish that the witnesses are referring to the statements contained in the attestation clause itself. An unsigned attestation clause results in an unattested will *(Felix Azuela vs. CA, et al., supra)*.

Problem – What is the effect of a notarial will that has been subscribed and sworn to before a notary public but has not been acknowledged before the notary public by the testator and the witnesses?

Answer – A notarial will that is not acknowledged before a notary public by the testator and the witnesses is fatally defective, even if it is subscribed and sworn to before the notary public.

A *jurat* is that part of an affidavit where the notary public certifies that before him, the document was subscribed and sworn to by the executor. On the other hand, an *acknowledgment* 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 a document has attested to the notary that the same is his own free act and deed. *(Ibid)*.

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.[73]

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 declared 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 deems it necessary, expert testimony may be resorted to.[74]

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.[75]

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.[76]

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.[77]

Special Formalities of Holographic Wills. — From the provisions of Arts. 804 and 810 of the Code, it is clear that the testator, in the execution of a holographic will, must comply with the following formalities:

[73]New provision.
[74]New provision.
[75]New provision.
[76]New provision.
[77]New provision.

(1) The will must be entirely written by the hand of the testator himself;

(2) The will must be entirely dated by the hand of the testator himself; and

(3) The will must be entirely signed by the hand of the testator himself; and

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

It must be observed that in Art. 810 of the Civil Code, the word "entirely" modifies not only the word "written" but also the words "dated" and "signed". The purpose of the law is obvious. In addition to insuring and safeguarding the authenticity of the holographic will, it will also serve to deter or prevent any possible insertion or interpolation by others or any possible forgery. And this is logical because of the simplicity of the make-up or format of a holographic will. As Justice J.B.L. Reyes has so aptly put it: "Its simplicity is an invitation to forgery." Consequently, in order that a holographic will may be admitted to probate, it is essential that it must be *entirely written, dated and signed* in the handwriting of the testator himself. The law exacts literal compliance with these requirements. Hence, the doctrines of liberal interpretation and substantial compliance as applied to ordinary or notarial wills cannot be applied to holographic wills. Thus, if the holographic will is partly printed or typewritten and partly written in the handwriting of the testator, it is clearly void. The same is also true in case there are insertions or interpolations made by a third person at the time of the execution of the will. The will in such case is void. The same is also true if the date used is the printed date of a diary. The will is void because of non-compliance with an essential requisite. The same is also true if the signature of the testator is a mark, such as a cross or even a thumbmark. The will is also void because of non-compliance with an essential requisite. Of course, we must not go to extremes in applying the law literally. Thus, a blind testator can certainly execute a holographic will if he can still write despite his blindness. The same is also true in the case of one whose hands or arms have been amputated. So long as he has found an effective substitute for his hands so that he can still write, there is no reason why he cannot execute a holographic will.

However, in the case of insertions or interpolations by third persons, there are several possible situations which must be consid-

ered. According to Dr. Tolentino, citing Valverde and Castan, the following rules may be laid down:

(1) If the insertion was made *after* the execution of the will, but without the consent of the testator, such insertion is considered as not written, because the validity of the will cannot be defeated by the malice or caprice of a third person.

(2) If the insertion was made *after* the execution of the will with the consent of the testator, the will remains valid but the insertion is void.

(3) If the insertion was made *after* the execution of the will, and such insertion is validated by the testator by his signature thereon, it becomes part of the will, and therefore, the entire will becomes void, because of failure to comply with the requirement that it must be entirely written by the hand of the testator.

(4) If the insertion was made *contemporaneous* to the execution of the will, then the will is void because it is not entirely written by the hand of the testator.[78]

It must also be observed that Art. 810 does not require that the testator must sign the will with his full signature, although this is required when it comes to the authentication of an insertion, cancellation, erasure or alteration.[79] Consequently, the testator may sign the will with his initials, or nickname, or appellation. All that the law requires is that such signature must be entirely signed by the hand of the testator. To a certain extent this creates a sort of absurdity considering the fact that the authentication of the will is certainly more important than the authentication of a mere insertion, cancellation, erasure or alteration.

An interesting illustration of what may be considered as a holographic will is found in an American case — the case of *Milam vs. Stanley*.[80] The testator Fletcher, was convicted of rape, and sentenced to be hanged, Before his execution, he wrote the following letter to his daughters:

[78]Tolentino, 1973 Ed., 102.
[79]Art. 814, Civil Code.
[80]111 S.W. 296, 33 Ky. Law Rep. 783.

"My Dear Loving Daughters: I *guess my* last hope is gone. I don't want you all to grieve after me for I think I will be better off than to be in jail, for I am prepared to go and I want to ask one thing of you all is to meet me in heaven. Jennie, Lula and Bettie, and Mary, I want you to understand that I am as innocent of the charge which I have to die for as an angel in heaven and it does me good to know that God knows that I am not guilty. Jennie tell John to see that my body is taken home and buried in our graveyard and get Stinson to preach my funeral. Tell him I am at rest. I want to make you and Lula a deed to that house and lot and I don't want you and her to have any trouble over it. Jennie I don't do this because I think more of you and Lula than I do of Mary and Bettie, but I do it because you both attended to your dear old mother so good. I hope to soon meet her in heaven. Jennie, Mary has not enough for my money to bury me I guess. So this is from your father, W. R. Fletcher.

"To Jennie and Lula may God bless you all is my prayer. Yours, W.R.F."

After Fletcher's execution, the above letter was presented for probate as his last will and testament. The decision of the court is as follows:

"In determining whether the paper is testamentary or not the court will look not only at the language of the instrument, but at the situation of the maker and at his intention. W.R. Fletcher knew when he wrote this paper that he was to die on February 15th. His last hope of life was gone; and, knowing that he was to die on the 15th, he wrote this letter to his daughters. The letter shows on its face that it is inartistically written, but his meaning is sufficiently apparent. He did not have in mind that he was thereafter to make his daughters a deed to the house and lot, and not to have any trouble over it; for he added: 'I don't do this because I think more of you and Lula than I do of Mary and Bettie, but I do it because you both attended to your dear old mother so good.' These words show that he had in mind, not something that he was going to do, but something he was then doing. In other words, they show that he intended to give the house and lot by virtue of the letter he was then writing, and not by virtue of some instrument he was thereafter to write.

"A will may be in any form. The words in which the intention of the testator is expressed are immaterial, if it sufficiently appears from the instrument that he was making a disposition of his property testamentary in character. In *Clarke vs. Ran-*

som, 50 Cal. 595, the following note, written in expectation of death, was probated as a will: 'Dear old Nance, I wish to give you my watch, two shawls and also $5,000, your old friend, E.A. Gordon.' In *Byers vs. Hope, 61 Md. 206, 48 Am. Rep. 89,* the decedent wrote on the back of a business letter, addressed to a man and his wife, the following addressed to the wife: 'After my death you are to have $40,000. This you are to have will or no will. Take care of this until my death.' In *Hunt vs. Hunt, 4 N.H. 434, 17 Am. Dec. 438,* the decedent indorsed on the back of a note these words: 'If I am living at the time this note is paid, I order the contents to be paid to A.H.' He died before the note was paid. In *Fickle vs. Snepp, 97 Ind. 289, 49 Am. Rep. 449,* the instrument was in a form of a promissory note. In all these cases the papers were probated as a will, if properly executed, whatever its form be, if the intention of the maker to dispose of his estate after his death is sufficiently manifested. *Bobb vs. Harrison, 9 Rich. Eq. (S.C.) 111, 70 Am. Dec. 203.*

"Under these principles the circuit court properly admitted the paper to probate as the will of W. R. Fletcher. Judgment affirmed."

Probate of Holographic Wills. — According to Art. 811, if the probate of a holographic will is not contested, it shall be necessary that at least one witness who knows the handwriting and signature of the testator shall explicitly declare that the will and the signature of the testator are in the handwriting of the testator. If the probate is contested, at least three of such witnesses shall be required. Nevertheless, in the absence of any competent witness, expert testimony may be resorted to, if the court deems it necessary. There are, however, two interesting problems which will arise as a result of these requirements. They are:

First: If the testator himself, while he is still living, will present his holographic will for probate, shall the above requirements still have to be complied with? According to Sec. 12, Rule 76 of the Rules of Court: "Where the testator himself petitions for the probate of his holographic will and no contest is filed, the fact that he affirms that the holographic will and the signature are in his own handwriting, shall be sufficient evidence thereof. If the holographic will is contested, the burden of disproving the genuineness and due execution thereof, shall be on the contestant. The testator may, in his turn, present such additional proof as may be necessary to rebut the evidence for the contestant."

Second: If the holographic will was lost or was destroyed by a third person without any authorization given by the testator during the lifetime of the latter, or if it was lost or destroyed or stolen after his death, would it still be possible to have the will admitted to probate, granting that its loss or unauthorized destruction, as well as its due execution and contents can be properly established by secondary evidence in accordance with the Rules of Court? Again, our answer must be in the negative. While it is true that under the Rules of Court, the proof of lost or destroyed wills by secondary evidence, such as by the testimony of witnesses, in lieu of the original documents, is expressly recognized,[81] nevertheless, such Rules, which were promulgated in 1940, could not have contemplated holographic wills which were not then recognized. Furthermore, because of the special nature of holographic wills as stated in Art. 810 of the Civil Code as well as the special requirements for their probate as stated in Art. 811 of the same Code, it is clear that the law regards the document itself as material proof of authenticity. Consequently, a holographic will cannot be probated unless the document itself is presented to the probate court for examination and unless there is compliance with the special requirements stated in Art. 811.[82] It is, however, possible that a photostatic copy, or even a mimeographed or carbon copy may be substituted for the original document. This is so, because, after all, in these cases, compliance with the requirements stated in Art. 811 would still be possible. The authenticity of the handwriting and signature of the testator may still be examined and tested by the probate court.[83]

Gan vs. Yap
104 Phil. 509

> The records show that the alleged testatrix, Felicidad Esguerra Yap, died on Nov. 20, 1951, leaving considerable properties. A few months later, a petition for the probate of a holographic will allegedly executed by her was filed in the Court of First Instance of Manila. Her husband, Ildefonso Yap, opposed the probate, asserting that the deceased had not executed any will during her lifetime. The will itself was not presented, but the petitioner tried to establish its due execution and contents

[81]See Sec. 4, Rule 130, Rules of Court.
[82]Gan vs. Yap, 104 Phil. 509.
[83]Ibid.

by the testimony of witnesses, who declared that they had seen the will and had read its contents. After hearing, the lower court denied the probate of the will. Hence, this appeal. The question to be resolved, therefore, is whether or not a holographic will which is lost or destroyed may be admitted to probate upon the testimony of witnesses regarding its due execution and contents in accordance with Rule 77 of the Rules of Court. Holding that such provisions of the Rules of Court cannot be applied to holographic wills, not only because such wills could not have been contemplated by such provisions which were prepared long before the effectivity of the new Civil Code, but because of the special nature of holographic wills as stated in Art. 810 of the Civil Code as well as the special requirements for their probate as stated in Art. 811 of the same Code, the Supreme Court, affirming the decision of the lower court, declared:

"When ordinary wills are submitted to the courts for allowance, authenticity and due execution are the dominant requirements to be fulfilled. For that purpose the testimony of one of the subscribing witnesses would be sufficient, if there is no opposition. If there is, the three must testify, if available. In the matter of holographic wills, no such guaranties of truth and veracity are demanded, since they need no witnesses; provided, however, that they are 'entirely written, dated and signed by the hand of the testator himself.' The law, it is reasonable to suppose, regards *the document itself* as material proof of authenticity, and as its own safeguard, since it could at any time, be demonstrated to be — or not to be — in the hand of the testator himself. 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. The witnesses so presented do not need to have seen the execution of the holographic will. They may be mistaken in their opinion of the handwriting, or they may deliberately lie in affirming that it is in the testator's hand. However, the oppositor may present other witnesses who also know the testator's handwriting, or some expert witnesses, who after comparing the will with other writings or letters of the deceased, have come to the conclusion that such will has not been written by the hand of the deceased. And the court, in view of such contradictory testimony may use its own visual sense, and decide in the face of the document, whether the will submitted to it has indeed been written by the testator. Obviously, when the will itself is not submitted, these means of opposition, and of assessing the evidence are not available."

Azoala vs. Singson
109 Phil. 102

The records show that the probate of the holographic will of the late Fortunata S. Vda. de Yance was denied on the ground that under Art. 811 of the Civil Code, the proponent must present three witnesses who could declare that the will and the signature are in the writing of the testatrix, the probate being contested; and that the lone witness presented did not prove sufficiently that the will was written in the handwriting of said testatrix. The proponent appealed, urging: first, that he was not bound to produce more than one witness because the will's authenticity was not questioned; and second, that Art. 811 does not mandatorily require the production of three witnesses to identify the handwriting and signature of a holographic will, even if its authenticity should be denied by the adverse party.

Speaking through Justice J.B.L. Reyes, the Supreme Court held:

"We agree with the appellant that since the authenticity of the will was not contested, he was not required to produce more than one witness; but even if the genuineness of the holographic will were contested, we are of the opinion that Article 811 of our present Civil Code can not be interpreted as to require the compulsory presentation of three witnesses to identify the handwriting of the testator, under penalty of having the probate denied. Since no witness may have been present at the execution of a holographic will, none being required by law (Art. 810, new Civil Code), it becomes obvious that the existence of witnesses possessing the requisite qualifications is a matter beyond the control of the proponent. For it is not merely a question of finding and producing any three witnesses; they must be witnesses "who know the handwriting and signature of the testator" and who can declare (truthfully, of course, even if the law does not so express) "that the will and the signature are in the handwriting of the testator". There may be no available witness acquainted with the testator's hand; or even if so familiarized, the witnesses may be unwilling to give a positive opinion. Compliance with the rule of paragraph 1 of Article 811 may thus become an impossibility. That is evidently the reason why the second paragraph of Article 811 prescribes that

"In the absence of any competent witness referred to in the preceding paragraph, and if the court deems it necessary, expert testimony may be resorted to."

"As can be seen, the law foresees the possibility that no qualified witness may be found (or what amounts to the same thing, that no competent witness may be willing to testify to the authenticity of the will), and provides for resort to expert evidence to supply the deficiency.

"It may be true that the rule of this article (requiring that three witnesses be presented if the will is contested and only one if no contest is had) was derived from the rule established for ordinary testaments (cf. Cabang vs. Delfinado, 45 Phil., 291; Tolentino vs. Francisco, 57 Phil., 742). But it cannot be ignored that the requirement can be considered mandatory only in the case of ordinary testaments, precisely because the presence of at least three witnesses at the execution of ordinary wills is made by law essential to their validity (Art. 805). Where the will is holographic, no witness need be present (Art. 810), and the rule requiring production of three witnesses must be deemed merely permissive if absurd results are to be avoided.

"Again, under Article 811, the resort to expert evidence is conditioned by the word "if the Court deems it necessary", which reveal that what the law deems essential is that the Court should be convinced of the will's authenticity. Where the prescribed number of witnesses is produced and the court is convinced by their testimony that the will is genuine, it may consider it unnecessary to call for expert evidence. On the other hand, if no competent witness is available, or none of those produced is convincing, the Court may still, and in fact it should, resort to handwriting experts. The duty of the court, in fine, is to exhaust all available lines of inquiry, for the state is as much interested as the proponent that the true intention of the testator be carried into effect.

"Commenting on analogous provisions of Article 691 of the Spanish Civil Code of 1889, the noted commentator, Mucius Scaevola (Vol. 12, 2nd Ed., p. 421), sagely remarks:

> *"La manera como esta concebida la redaccion del ultimo apartado de dicho precepto induce la conclusion de que siempre o por lo menos, en la mayor parte de los casos, el Juez debe acudir al criterio pericial para que le ilustre acerca de la autenticidad del testamento olografo, aunque ya esten insertas en los auntos del expediente las declarations testificales. La prudencia con que el Juez debe de proceder en resolutions de transcendencia asi lo exige, y la indole*

delicada y peligrosa del testamento olografo lo hace necesario para mayor garantia de todos os intereses comprometidos en aquel.

En efecto, el cotejo pericial de letras peude ser una confirmation facultativa del dicho profano de los testigos y un modo de desvonecer las ultimas dudas que pudieran'ocurrir al Juez acerca de la autenticidad que trata de averiguar y declarar. Para eso se ha escrito la frase del citado ultimo apartado, (siempre que al Juez lo estime conveniente), haya habido o no testigos y dudaran o no estos respecto de los extremos por que son preguntados.

El arbitrio judicial en este caso debe de formarse con independencia de los sucesos y de su significacion, para responder debidamente de las resoluciones que haya de dictar."

"And because the law leaves it to the trial court to decide if experts are still needed, no unfavourable inference can be drawn from a party's failure to offer expert evidence, until and unless the court expresses dissatisfaction with the testimony of the lay witnesses.

"Our conclusion is that the rule of the first paragraph of Article 811 of the Civil Code is merely directory and is not mandatory.

"Considering, however, that this is the first occasion in which this Court has been called upon to construe the import of said article, the interest of justice would be better served, in our opinion, by giving the parties ample opportunity to adduce additional evidence, including expert witnesses, should the Court deem them necessary.

"In view of the foregoing, the decision appealed from is set aside, and the records ordered remanded to the Court of origin, with instructions to hold a new trial in conformity with this opinion. But evidence already on record shall not be retaken. No costs."

In the case of *Jose Rivera vs. Intermediate Appellate Court et al., G.R. Nos. 75005-06, February 15, 1990*, the Court ruled that the holographic wills of Venancio Rivera are valid because the Court found them to have been written, dated and signed by the testator himself in accordance with Art. 810 of the Civil Code. It also held that there was no necessity of presenting the

three witnesses required under Art. 811 because the authenticity of the wills had not been questioned. The Court determined that Jose Rivera was not the only surviving legitimate son of the deceased. Hence, being a mere stranger, he had no personality to contest the wills and his opposition thereto did not have the legal effect of requiring the three witnesses. The testimony of Zenaida and Venancio Rivera Jr., who authenticated the wills as having been written and signed by their father, was sufficient.

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.[84]

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.[85]

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.[86]

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.[87]

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.[88]

[84]New provision.
[85]New provision.
[86]Sec. 636, Act No. 190.
[87]Art. 669, Spanish Civil Code.
[88]Art. 733, Spanish Civil Code, in modified form.

Law Which Governs Formal Validity of Wills. — As a general rule, the formal validity of a will shall be governed by the law of the country in which it is executed. This rule is expressed in the first paragraph of Art. 17 of the Code, which provides that "the forms and solemnities of contracts, wills and other public instruments shall be governed by the laws of the country in which they are executed. This rule, however, is reiterated or supplemented by the provisions of Arts. 815 to 819.

Idem; Where testator is a Filipino. — If the testator is a Filipino citizen and he executes a will in the Philippines, the law which governs the formal validity of the will shall be the law of the Philippines.[89] If he executes a will outside of the Philippines, the law which governs shall be the law of the country in which it is executed.[90] Both of these rules are in accordance with the general rule prescribed in the first paragraph of Art. 17.

May a will executed in a foreign country in accordance with the formalities prescribed by the law of the Philippines, by a Filipino citizen, who is either a resident or a transient in that country, be probated in the Philippines? It is rather unfortunate that such a situation is not covered by the provision of Art. 815 nor by any other provision of the Civil Code. Hence, the question seems to require a negative answer. It is submitted, however, that a Filipino, who is either a resident or a transient in a foreign country, may execute a will in that country in accordance with any of the forms established by the law of the Philippines, because it would be absurd to allow a will which is executed in accordance with any of the forms established by the law of the country in which he may be and, at the same time, disallow one which is executed in accordance with any of the forms established by the law of his own country — a law with which he is presumed to be familiar. Besides, under Art. 816, the will of an alien which is executed abroad in conformity with the formalities which the Civil Code prescribes may be probated in the Philippines. Not to grant the same privilege to a Filipino citizen would be not only illogical, but unjust.

[89]Art. 17, par. 1, Civil Code.
[90]Art. 815, Civil Code.

Idem; Where testator is an alien. — If the testator is an alien and he executes a will in the Philippines, the laws which govern the formal validity of the will shall be either; (1) the law of the Philippines in accordance with the general rule established in Art. 17, or (2) the law of the country of which he is a citizen or subject in accordance with the special rule established in Art. 817. In the latter case, it is a prerequisite that the will which is presented for probate could have been proved and allowed by the law of his own country.[91] If he executes a will outside of the Philippines, the laws which govern shall be either: (1) the law of the place where the will is executed in accordance with the general rule established in Art. 17, or (2) the law of the place in which he resides in accordance with the special rule established in Art. 816, or (3) the law of his country in accordance with the special rule established in Art. 816, or (4) the law of the Philippines again in accordance with the special rule established in Art. 816.

Problem — X, a Spanish citizen but a resident in San Francisco, California, U.S.A., executed a will in Tokyo, Japan. May such will be probated in the Philippines and his estate in this country distributed in conformity with the provisions of the will? Explain your answer. (1973 Bar Problem)

Answer — Yes, the will of X may be probated in the Philippines and his estate in this country may be distributed in conformity with the provisions of the will, provided that said will was executed in accordance with the formalities prescribed by any of the following laws:

(1) The law of the place where X resides (San Francisco, California); or

(2) The law of his own country (Spain); or

(3) The Civil Code of the Philippines; or

(4) The law of the place where the will was made (Tokyo, Japan). (Arts. 17, par. 1, 816, Civil Code).

The first three are stated in Art. 816, while the last is stated in the first paragraph of Art. 17 of the Civil Code.

[91]Art. 817, Civil Code. See In re Estate of Johnson, 39 Phil. 156; Templeton vs. Babcock, 52 Phil. 130.

Idem; Joint wills. — According to Art. 818 of the Code, "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."

A "joint" will is defined as a single testamentary instrument which contains the wills of two or more persons, jointly executed by them, either for their reciprocal benefit or for the benefit of a third person.[92] It must not be confused with "mutual" or with "reciprocal" wills. "Mutual" wills are wills executed pursuant to an agreement between two or more persons to dispose of their property in a particular manner, each in consideration of the other.[93] "Reciprocal" wills are wills in which the testators name each other as beneficiaries under similar testamentary plans.[94] It is clear from these definitions that a joint will may be either mutual or reciprocal, although it is not necessarily so, just as mutual or reciprocal wills may be joint if they are contained in a single testamentary instrument.

In practice, husband and wife ordinarily make mutual or reciprocal wills contained in separate instruments. Such a practice is not prohibited by the provisions of Art. 818. What is prohibited is the execution of a joint will or a will contained *in the same instrument,* either for their reciprocal benefit or for the benefit of a third person. The reason for the prohibition, especially as regards husband and wife, "is that when a will is made jointly or in the same instrument, the spouse who is more aggressive, stronger in will or character and dominant is liable to dictate the terms of the will for his or her own benefit or for that of third persons whom he or she desires to favor. And, where the will not only joint but reciprocal either one of the spouses may happen to be unscrupulous, wicked, faithless, or desperate, knowing as he or she does the terms of the will whereby the whole property of the spouses both conjugal and paraphernal goes to the survivor, may be tempted to kill or dispose of the other."[95]

In its report, the Code Commission gives the following background and purpose of the provision:

[92]57 Am. Jur., Sec. 681, p. 458.
[93]Ibid., Sec. 681, p. 459.
[94]Ibid., Sec. 681, p. 459.
[95]In re Will of Bilbao, 47 Off. Gaz. 331; Dacanay vs. Florendo, 48 Off. Gaz. 81.

"The Spanish Civil Code expressly prohibits the execution of joint and mutual wills in its article 669. This article has an interesting background. The Fuero Real *(Ley 9, Tit. 6, Libro 3)* allowed this kind of will between husband and wife if they had no children. The Partidas *(Ley 335, Tit. 11, Partida 5)* prohibited the same because it might lead to the commission of parricide. In spite of this express prohibition, such kind of will was executed, hence, the enactment of article 669 of the Civil Code *(Spanish Civil Code)* which embodies not only the provisions of the Partidas but also makes the prohibition more extensive.

"In the Philippines, a similar kind of will has sometimes been used as a basis for the distribution of the estate, as in the case of *Macrohon vs. Saavedra, 51 Phil. 267 (1927)*. To eliminate all doubts, once and for all, and to establish a definite policy, Article 818 of this Code is inserted expressly prohibiting the execution of joint and mutual wills."

Under Art. 819 of the Code joint wills 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. It is evident that this rule is an exception to the rule stated in Art. 815. It is, however, in conformity with the provision of the third paragraph of Art. 17 of the Civil Code which states:

"Prohibitive laws concerning persons, their acts or property, and those which have for their objects public order, public policy and good customs shall not be rendered ineffective by laws or judgments promulgated, or by determinations or conventions agreed upon in a foreign country."

It must be noted that the provision of Art. 819 is applicable only to joint wills executed by Filipinos in a foreign country; it does not apply to joint wills executed by aliens.

Problem — A and B, a married couple of French citizenship but residents of the Philippines, went to Argentina and there executed a joint will, mutually instituting each other as sole heir, which will is valid according to the law of the state. Subsequently, they returned to the Philippines where A died. May the joint and mutual will executed in Argentina be probated as valid in the Philippines? Reasons. (1971 Bar Problem)

Answer — The joint and mutual will executed in Argentina by A and B may be probated as valid in the Philippines.

> True, Art. 818 of the Civil Code of the Philippines prohibits two or more persons from making a will jointly, or in the same instrument, either for their reciprocal benefit or for the benefit of a third person, and Art. 819 of the same Code extends this prohibition to joint wills executed by Filipinos in a foreign country, even though authorized by the laws of the country where they may have been executed. But then, from the phraseology of Art. 819 itself, there is a clear implication that the prohibition does not apply to foreigners, and certainly, A and B are foreigners. Therefore, the provision of the third paragraph of Art. 17 of the Civil Code which declares that prohibitive laws concerning persons, their acts or property, and those which have for their object public order, public policy and good customs shall not be rendered ineffective by laws or judgments promulgated or by determinations or conventions agreed upon in a foreign country, cannot be applied in the instant case. What is applicable is the first paragraph of the same article, which declares that forms and solemnities of contracts, wills, and other public instruments shall be governed by the laws of the country in which they are executed.

Law Which Governs Intrinsic Validity of Wills. — The intrinsic validity of wills is governed by the national law of the person whose succession is under consideration. This is the precept or principle which is enshrined in the second paragraph of Art. 16 of the Civil Code. According to this provision, "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 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."[96]

[96]For illustrative case, see Miciano vs. Brimo, 50 Phil. 867.

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.[1]

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.[2]

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.[3]

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.[4]

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.[5]

Qualifications of Witnesses. — According to Art. 820, a witness to the execution of any ordinary will must have the following qualifications: (1) He must be of sound mind; (2) he must be eighteen years of age or more; (3) he must not be blind, deaf or dumb; and (4) he must be able to read and write.

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[1]Taken from Sec. 620, Act No. 190.
[2]New provision.
[3]Taken from Sec. 621, Act No. 190.
[4]Taken from Sec. 622, Act No. 190.
[5]Taken from Sec. 622, Act No. 190.

The first two qualifications are also necessary for the making of a will. In the case of instrumental witnesses, the law adds two additional qualifications. Hence, even if a person has the capacity to make a will, it does not necessarily follow that he can qualify as an instrumental witness. A blind, deaf or dumb person or even a deaf-mute can make a will, but he cannot be a witness to the making of a will. A person who cannot read and write can make a will, but he cannot be a witness to the making of a will.

The reason for the inclusion of the last two requisites is evident. During the probate of the will, the testimony of the attesting witness will be required. Certainly, it will be quite difficult for an illiterate witness to give an intelligent testimony. The same thing can be said of a deaf-mute or a person who is either blind, deaf or dumb.

Is it necessary that the witnesses must know the contents of the will? The law does not require it. All that the law requires is that they must attest and subscribe the will in the presence of the testator and of each other. To attest and subscribe do not mean that they must read the will or comprehend the contents thereof. Hence, even if the will is written in a dialect or language unknown to them, the requirements of the law are still complied with.

Ibid; Competency and credibility of witnesses explained. — Is there a difference between the *competency* of a person to be an instrumental witness to a will and his *credibility?* This question is answered in the following case:

Gonzales vs. Court of Appeals
90 SCRA 183

Petitioner contends that competency and credibility of a witness are not synonymous terms and that one may be a competent witness and yet not a credible one. Therefore, since there is no evidence on record to show that the three witnesses are credible, such as the fact that they are of good standing in the community and are reputed to be trustworthy and reliable, such fact is fatal. Private respondents, on the other hand, maintains that the qualifications of the three or more "credible witnesses" under Art. 805 of the Civil Code are exactly the same as the qualifications of the witnesses mentioned in Arts. 820 and 821. Speaking through Justice Guerrero, the Supreme Court held:

"In *Molo-Pekson and Perez-Nable vs. Tanchuco, et al.*, 100 Phil. 344, the Supreme Court held that "Section 620 of the same

Code of Civil Procedure provides that 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. This same provision is reproduced in our New Civil Code of 1950, under Art. 820. The relation of employer and employee, or being a relative to the beneficiary in a will, does not disqualify one to be a witness to a will. The main qualification of a witness in the attestation of wills, if other qualifications as to age, mental capacity and literacy are present, is that said witness must be credible, that is to say, his testimony may be entitled to credence. There is a long line of authorities on this point, a few of which we may cite:

> "A 'credible witness' is one who is not disqualified to testify by mental incapacity, crime, or other cause. Historical Soc. of Dauphin Country vs. Kelker, 74 A. 619, 226 Pa. 16 134 Am. St. Rep. 1010." (Words and Phrases, Vol. 10, p. 340).
>
> "As construed by the common law, a 'credible witness' to a will means a 'competent witness.' Appeal of Clark, 95 A. 517, 114 Me. 105, Ann. Cas. 1917A, 837." (Ibid, p. 34).
>
> "Expression credible witness' in relation to attestation of wills means 'competent witness'; that is, one competent under the law to testify to fact of execution of will. Vernon's Ann. Civ. St. Art. 8283. Moos vs. First State Bankof Uvalde, Tx. Civ. App. 60 S.W. 2nd 888, 889." (Ibid. p. 342).
>
> "The term 'credible', used in the statute of wills requiring that a will shall be attested by two credible witnesses means competent witnesses who, at the time of attesting the will, are legally competent to testify, in court of justice, to the facts attested by subscribing will, the competency being determined as of the date of execution of the will and not of the time it is offered for probate. *Smith vs. Goodell,* 101 N.E. 255, 256, 258, III. 145." *(Ibid.).*
>
> "'Credible witnesses', as used in the statute relating to will, means competent witnesses — that is, such persons as are not legally disqualified from testifying in courts of justice, by reason of mental incapacity, interest, or the commission of crimes, or other cause excluding them from testifying generally, or rendering them incompetent in respect of the particular subject matter or in the particular suit. *Hill vs. Chicago Title & Trust Co.,* 152 N.E. 545, 546, 322 III. 42." (*Ibid*, p. 343).

> "In the strict sense, the competency of a person to an instrumental witness to a will is determined by the statute, that is Art. 820 and 821, Civil Code, whereas his credibility depends on the appreciation of his testimony and arises from the belief and conclusion of the Court that said witness is telling the truth. Thus, in the case of *Vda. de Arroyo vs. El Beaterio del Santissimo Rosario de Molo*, No. L-22005, May 3, 1968, and Supreme Court held and ruled that: "Competency as a witness is one thing, and it is another to be a credible witness, so credible that the Court must accept what he says. Trial courts may allow a person to testify as a witness upon a given matter because he is competent, but may thereafter decide whether to believe or not to believe his testimony."
>
> "In fine, We state the rule that the instrumental witnesses in order to be competent must be shown to have the qualifications under Article 820 of the Civil Code and none of the disqualifications under Article 821 and for their testimony to be credible, that is worthy of belief and entitled to credence, it is not mandatory that evidence be first established on record that the witnesses have a good standing in the community or that they are honest and upright or reputed to be trustworthy and reliable, for a person is presumed to be such unless the contrary is established otherwise. In other words, the instrumental witnesses, must be competent and their testimonies must be credible before the court allows the probate of the will they have attested. We, therefore, reject petitioner's position that it was fatal for respondent not to have introduced prior and independent proof of the fact that the witnesses were "credible witnesses," that is, that they have a good standing in the community and reputed to be trustworthy and reliable."

Disqualifications of Witnesses. — Under Arts. 820 and 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; (3) any person who is not of sound mind; (4) any person who is less than eighteen years of age; (5) any person who is blind, deaf, or dumb; and (6) any person who cannot read and write.

The purpose of the law is disqualifying the persons mentioned in Art. 821 from being instrumental witnesses is evident. A person not domiciled in the Philippines will practically be useless during the probate proceedings, while a person convicted of falsification of a document, perjury or false testimony is unworthy of credence.

Problem — Would a person who is qualified to make a will necessarily be qualified to be a witness to the will of another? Explain. (1968 Bar Question)

Answer — A person who is qualified to make a will is not necessarily qualified to be a witness to the will of another.

In order that a person can make a will, two requisites are necessary. They are: *first,* that the testator is at least 18 years old; and *second,* that he is of a sound mind. *(Arts. 797, 798, Civil Code).* In order that a person can act as a witness to the will of another, four requisites are necessary. They are: *first,* that he is at least 18 years of age; *second,* that he is of a sound mind; *third,* that he is not blind, deaf, or dumb; and *fourth,* that he is able to read and write *(Art. 820, Civil Code).* In addition, the law also declares the following are disqualified from being witnesses to a will: *first,* any person not domiciled in the Philippines; and *second,* those who have been convicted of falsification of a document, perjury or false testimony *(Art. 821, Civil Code).* It is clear, therefore, that even if a person can make a will because he can comply with the age and mental requirements imposed by law, he cannot be a witness to the will of another in *four specific cases.* They are: (1) where he is not domiciled in the Philippines; (2) where he had been convicted of falsification of a document, perjury or false testimony; (3) where he is blind, deaf, or dumb, and (4) where he is not able to read and/or write.

Effect of Subsequent Incompetency. — The competency of a witness to a will is to be determined as of the time of the execution of the instrument, and not as of the time when the will is presented for probate. To hold that the tests as to competency should be applied at the time when the will is presented for probate, and not at the date of its execution would defeat one of the most important and salutary purposes contemplated by the statute. If a witness is competent when he signs and attests the will, his subsequent incompetency, from whatever cause, will not prevent the probate of the will. Thus, where a witness was competent at the time the will was executed, the will is not invalidated by his subsequent death, by his subsequent blindness, by his intermarriage with a beneficiary, by acquiring a legacy under a later codicil, or by subsequently acquiring the interest of a beneficiary. Conversely, if the witness is incompetent when he signed the will, his subsequent competency, in the absence of an enabling statute, will be of no avail.[6]

[6]Thompson on Wills, Sec. 119, p. 189; Art. 822, Civil Code.

Competency of Interested Witness. — In American law, it is a rule of general application that interest will disqualify one as a subscribing witness to a will and that a will attested by an interested witness is invalid unless it is otherwise attested by a sufficient number of competent witnesses.[7] Thus, if a person is interested as legatee or devisee under the will, or is to derive a pecuniary benefit or advantage from any part of it, he is disqualified to act as an attesting witness. Under our law, however, the rule is different. According to Art. 823, he is competent. This is evident from the second sentence which states that such person so attesting shall be admitted as a witness. However, the validity of the devise or legacy is affected. In other words, the devise or legacy given to such person, or to his spouse, parent or child, shall be void, unless there are three other competent witnesses. This rule is reiterated in Art. 1027, No. 4, of the Civil Code, which states that any attesting witness to the execution of the will, as well as the spouse, parents, or children, or anyone claiming under such witness, spouse, parents, or children, are incapable of succeeding from the testator.

Competency of Creditor. — Under our law, a creditor is also competent, by express provision of Art. 824 of the Code, although the testator in his will may have imposed a charge upon his estate for the payment of his debts.

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.[1]

Art. 826. In order that a codicil may be effective, it shall be executed as in the case of a will.[2]

[7]57 Am. Jur., Sec. 314, pp. 239-240; Art. 823, Civil Code.

[1]New provision.
[2]New provision.

Codicils. — Art. 825 of the Code enunciates the definition of a codicil, while Art. 826 gives the requisites in order that the codicil may be effective.

The word "codicil" imports a reference to some prior paper as a will. There may, however, be a valid codicil to a revoked will. At first codicils were writings actually attached to the will, but this is no longer necessary; when they are separate documents, the codicil referring to and ratifying the will may be said to incorporate the will by reference, or to republish the will.

In order to operate as a republication of the will, it is sufficient if the codicil refers to the will in such a way as to leave no doubt as to the identity of that instrument. A reference to the will in the codicil constitutes a sufficient identification of the will.[3]

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.[4]

Incorporation by Reference. — Stated generally, the doctrine is that a will, duly executed and witnessed according to statutory requirements, may incorporate into itself by an appropriate reference a written paper or document which is in existence at the time of the execution of the will, irrespective of whether such document is one executed by the testator or a third person, whether it

[3]57 Am. Jur., Sec. 605, pp. 415-417.
[4]New provision.

is in and of itself a valid instrument, provided the document referred to is identified by clear and satisfactory proof. So incorporated, the extrinsic paper takes effect as part of the will and is admitted to probate as such.[5]

Subsection 6. — Revocation of Wills

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.[1]

Revocation Defined. — According to Gardner, revocation as applied to wills may be defined as an act of the mind, terminating the potential capacity of the will to operate at the death of the testator, manifested by some outward or visible act or sign, symbolic thereof.[2] According to some American decisions, it may simply be defined as an act to annul a will in whole or in part.[3]

Nature and Effect of Revocation. — As it is popularly stated by American authorities one of the most essential characteristics of a will is that it is revocable and ambulatory during the testator's lifetime. Thus, according to Thompson:

> "From the definition of a will heretofore given, it will be observed that the instrument does not pass a present interest or right in property, and that such right or interest does not take effect until after the death of the testator. During his lifetime it is entirely inoperative and is wholly ineffective for any purpose until his death.
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> "The axiom of Holy Writ that 'A testament is of force after men are dead; otherwise, it is of no strength at all while the testator liveth,' has never been changed by legislation or court decision. The characteristic of revocability is so strongly insisted upon that courts have held that a provision in a will against revocation does not deprive the testator of the power to revoke the will by a later instrument.

[5]57 Am. Jur., Sec. 233, p. 193.

[1]Art. 737, Spanish Civil Code, in modified form.
[2]Gardner on Wills, p. 224.
[3]57 Am. Jur., Sec. 445, p. 319.

> "A will being a unilateral disposition of property, acquiring binding force only at the death of the testator, it follows that no present rights are conferred at the time of its execution, and no title vests in the beneficiary during the life of the testator. Comparison may be made between a will and an undelivered deed or power of attorney containing an expression of a purpose not yet effective, but ceases to be ambulatory on the death of the maker, acquires a fixed status, and operates to pass title."[4]

Hence, under our Code, it is declared that "a will may be revoked by the testator at any time before his death. Any waiver or restriction of this right is void." Upon being revoked, the will or the testamentary disposition intended to be revoked, ceases to exist, and is as inoperative as if it has never been written.[5]

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.[6]

Law Which Governs Revocation. — It is evident from the provisions of Art. 829 that the only time when the testator may revoke his will either in accordance with the law of the place where the will was made or in accordance with the law of the place in which he had his domicile at the time is when he is not domiciled in the Philippines. In all other cases, the law which governs the revocation is the law of the Philippines. Consequently, the rules may be restated as follows:

(1) If the act of revocation takes place in the Philippines, it is essential that it must be done in accordance with the laws of the Philippines. This is true whether the testator is domiciled in this country or in some other country.

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[4]Thompson on Wills, Sec. 13, pp. 26-28.
[5]57 Am. Jur., Sec. 445, p. 319.
[6]New provision.

(2) If the act of revocation takes place outside of the Philippines by a testator who is domiciled in the Philippines, it is essential that it must be done in accordance with the laws of the Philippines.

(3) If the act of revocation takes place outside of the Philippines by a testator who is not domiciled in the Philippines, it is essential that it must be done either in accordance with the laws of the place where the will was made or in accordance with the laws of the place where the testator had his domicile at the time of revocation.

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.[7]

Art. 831. Subsequent wills which do not revoke the previous one 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.[8]

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.[9]

Modes of Revocation. — Under Art. 830 of the Code, there are three general modes of revoking wills. They are: (1) by

[7]Taken from Sec. 623, Act No. 190, in modified form.
[8]New provision.
[9]Art. 740, Spanish Civil Code, in modified form.

implication of law; (2) by some will, codicil, or other writing executed as provided in case of wills; and (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.[10]

Revocation by Implication of Law. — According to No. 1 of Art. 830 of the Code, a will may be revoked by implication of law.

The rule of revocation by implication of law recognizes that a will may be revoked by the occurrence of certain circumstances not specifically mentioned in the statutes which prescribe the methods of revocation. The doctrine is that the revocation of a will is to be implied from certain changes in the family or domestic relations of the testator, or in his property, or involving the beneficiaries of his will, from which the law infers or presumes that he intended a change, either total or partial, in the disposition of his property. The rule is based on the theory that by reason of such changes new moral duties and obligations have accrued to the testator subsequent to the date of the will. Although stated in terms of the presumed intent of the testator to change the disposition of his property to conform to the alteration of his circumstances, revocation by operation of law is usually regarded as a purely arbitrary rule. A revocation may occur by intendment of law contrary to the actual intent of the testator.[11]

Under the Civil Code, there are five instances when a will, or more accurately, a testamentary disposition may be revoked by implication of law. They are:

(1) When there is a decree of legal separation. In such case, provisions in favor of the offending spouse made in the will of the innocent spouse shall be revoked by operation of law.[12]

(2) Where there is a preterition of 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. In such case, the preterition shall annul and institution of heir.[13]

[10]Art. 830, Civil Code.
[11]57 Am. Jur., Sec. 521, pp. 362-363.
[12]Art. 106, No. 4, Civil Code.
[13]Art. 854, Civil Code.

(3) When in the testator's will there is a legacy of a credit against a third person or of the remission of a debt of the legatee, and subsequently, after the execution of the will, the testator brings an action against the debtor for the payment of his debt. In such case, the legacy is revoked.[14]

(4) When the testator transforms the thing bequeathed in such a manner that it does not retain either the form or denomination it had, or when he alienates by any title or for any cause the thing bequeathed or any part thereof, or when the thing bequeathed is totally lost during the testator's lifetime or after his death without the heir's fault. In such cases, the legacy is revoked.[15]

(5) When the heir, devisee or legatee commits any of the acts of unworthiness which by express provision of law will incapacitate a person to succeed. In such case, any testamentary disposition in favor of such heir, devisee or legatee is revoked.[16]

Revocation of Will, Codicil, or Writing. — According to No. 2 of Art. 830, a will may be revoked by some will, codicil, or other writing executed as provided in case of wills. This method of revocation may be either express or implied. It is express when in a subsequent will, or codicil, or other writing executed as provided in case of wills, there is a revocatory clause expressly revoking the will or a part thereof. It is implied when the provisions of the subsequent will or codicil are partially or absolutely inconsistent with those of the previous will. It is evident that while express revocation may be effected by a subsequent will, or a codicil, or a nontestamentary writing executed as provided in case of wills, implied revocation may be effected only by either a subsequent will or a codicil. It is also evident that whether the revocation is express or implied it may be either total or partial depending upon the circumstances of each case.

Idem; Express revocation. — As previously stated, express revocation may be effected by a subsequent will, or a codicil, or a nontestamentary writing executed as provided in case of wills. It is of course essential that in the revocatory clause contained in the subsequent will, codicil or other writing the intention of the testator

[14]Arts. 935, 936, Civil Code.
[15]Art. 957, Civil Code.
[16]Art. 1032, Civil Code.

to revoke the previous will must be clearly and unmistakably manifested.[17] As regards revocation by a codicil, it must be observed that ordinarily, a codicil to a will is a republication thereof. If the revocation is partial, it will have the effect of republishing the will as of the date of the codicil with respect to all parts not revoked. If the revocation is total, there is no republication.[18] As regards revocation by a nontestamentary writing executed as provided in case of wills, it is not essential that the writing should contain any affirmative disposition of property. Neither is it essential that a writing which is not in fact a will be erroneously characterized a will in order to be effective as a revoking instrument. Thus, a will may be revoked by express words of revocation contained in a deed of trust or in a letter, signed by the testator and executed in accordance with the formalities prescribed by law for the making of wills the exact wording of a revocatory writing is not so important, if the intent to revoke the will is clear from the language used, and the formalities of execution are observed.[19]

Idem; Id. — Effect if will is inoperative. — According to Art. 832, if the subsequent will which contains the revocatory clause should become inoperative either by reason of the incapacity of the heirs, devisees or legatees designated therein or by reason of their renunciation or repudiation, the revocation shall still take effect. This rule is logical, because, while the capacity or the desire of the heirs, devisees or legatees to succeed is absolutely beyond the control of the testator, the act of revocation is within his absolute control. Consequently, the revocatory clause must be entirely separated from the other testamentary dispositions which are affected by the incapacity or the renunciation of the heirs, devisees or legatees.

Idem; Id. — Effect if will is disallowed. — If a subsequent will, containing a clause revoking a previous will, is disallowed by the probate court on the ground that it has not been executed in accordance with the formalities prescribed by law, the revocatory clause will not produce any effect whatsoever.[20] This is logical, because, after all, the effect of the disallowance is to nullify the will altogether, including the revocatory clause contained in such will.

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[17]57 Am. Jur., Sec. 466, p. 326.
[18]Ibid., Sec. 467, p. 326.
[19]Ibid., Sec. 469, p. 328.
[20]Samson vs. Naval, 41 Phil. 838; Vda. de Molo vs. Molo, 90 Phil. 37.

Idem; Implied revocation. — As previously stated, implied revocation may be effected only by a subsequent will or a codicil. It is evident that it cannot be effected by a nontestamentary writing executed as provided in case of wills since such writing does not contain any affirmative disposition of property which can be said to be inconsistent with the dispositions contained in the will.

According to 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. The general rule, however, is that two or more instruments, each purporting to be a will, may be admitted to probate if they are not inconsistent with each other.[21] Thus, in one case, the Supreme Court declared that "in the absence of any legal provision to the contrary — and there is one in this jurisdiction — it is the general, well-established rule that two separate and distinct wills may be probated if one does not revoke the other and provided that the statutory requirements relative to the execution of wills have been complied with."[22]

As regards implied revocation by a codicil, it must be noted that although it is possible that there might be a revocation in whole or in part, as a rule a codicil should not be construed as a complete revocation of a will if any other conclusion can be reached consistent with the terms of the two instruments, since, if the testator intended to make an entire disposition of his property in substitution of that made by a prior will he probably would have proceeded to make a new will rather than a codicil. Consequently, in order that there will be an implied revocation there must be absolute inconsistently between the provisions of the will and the codicil.[23]

Revocation by Physical Destruction. — According to No. 3 of Art. 830, a will may also be revoked by burning, tearing, cancelling, or obliterating with the intention of revoking it. These methods of revoking a will require the concurrence of the following requisites:

[21]57 Am. Jur., Sec. 474, pp. 331-332.

[22]Merza vs. Forras, 93 Phil. 142; where the wills could not stand together — see Bustamante vs. Arevalo, 73 Phil. 635.

[23]57 Am. Jur., Sec. 484, pp. 337-339.

(1) The testator must have testamentary capacity at the time of performing the act of destruction;

(2) The act of destruction must have been performed with the intention of revoking the will;

(3) Such intention must have been accompanied by an actual physical act of destruction manifested by burning, or tearing, or cancelling, or obliterating of the will or a part thereof; and

(4) Such act of destruction must have been performed by the testator himself, or by some other person in his presence, and by his express direction.

Idem; Intention of revocation. — The intent to revoke is essential to a revocation by act of the testator. In order that an act shall have the effect of revoking a will, the intention to revoke must appear clearly and unequivocally; a will is not revoked by any act of destruction not deliberately done *animo revocandi*. An act of destruction which is done accidentally, by mistake, or as a result of fraud or undue influence, does not operate as a revocation. The same rule applies to the partial destruction of a will by accident. Even where one of the statutory methods for revoking a will is followed by the testator, his act is ineffectual unless his intent thereby to revoke or alter the will appears. The intent may be inferred from the nature of the act or it may be shown by extrinsic evidence, but it must in some competent way be made to appear. The mere act of destroying a will or a part thereof is of no legal effect, unless it is done *animo revocandi*. As a general rule, an intent to revoke a will in its entirety is necessary to effect an entire as distinguished from a partial revocation. A will, however, may be held to have been revoked where it has been so mutilated that the portion remaining, if probated, would cause a devolution of the property of the decedent in a manner entirely different from his express intent. The intention to revoke must concur with an act manifesting the intention. Aptly stated, neither destruction without intention nor intention without destruction will revoke a will.[24]

Idem; Actual physical destruction. — The revocation of a will is a matter of a mental process demonstrated by some

[24]Ibid., Sec. 494, pp. 343-344.

outward and visible sign. A revocation by an act to the document comprehends the performance of one or more of the acts specified in the statute as a means of revocation, with the intent to revoke. A symbolical destruction, cancellation or obliteration will not suffice. There must be the act as well as the intention. A literal destruction of the instrument, however, is not essential to effect a revocation. A will may be revoked in its entirety notwithstanding the act of revocation does not accomplish the complete physical destruction of the will. A will executed in duplicate, one copy being retained in the possession of the testator, is revoked by the destruction of such copy by the testator with intent to revoke the will. If any one of the acts prescribed by statute is performed in the slightest manner, joined with a declared intent to revoke, it may be an effectual revocation. An act of little significance from the standpoint of physical change in the instrument will constitute a revocation if it was performed with the purpose and intent to revoke the will. But in order for an act of destruction to effect an entire, as distinguished from a partial revocation, it must be directed against the whole or an essential part of it.[25]

The law requires that the act of physical destruction or cancellation must be performed by the testator himself, or by some other person in his presence, and by his express direction.[26] It is therefore clear that the act of revocation is a personal act of the testator. He cannot delegate to an agent authority to do the act for him. Another person, however, may be selected by him as an instrument and directed to do the revocatory acts in his presence, in which case any so done in his presence and by his direction is his personal act and operates to the same extent as if done by his own hands. Hence, a destruction not accomplished in the testator's presence is ineffective as a revocation of the will.[27] Thus, in *Diaz vs. De Leon,*[28] where the act of physical destruction was done by a servant of the testator, the Supreme Court, speaking through Justice Romualdez, held:

[25]Ibid., Sec. 495, p. 345.
[26]Art. 830, No. 3 Civil Code.
[27]57 Am. Jur., Sec. 496, pp. 345-346.
[28]43 Phil. 433.

"According to the statute governing the subject in this jurisdiction, the destruction of a will with *animo revocandi* constitutes, in itself, a sufficient revocation.

"From the evidence submitted in this case, it appears that the testator, shortly after the execution of the first will in question, asked that the same be returned to him. The instrument was returned to the testator who ordered his servant to tear the document. This was done in his presence and before a nurse who testified to this effect. After some time, the testator, being asked by Dr. Cornelio Mapa about the will, said that it had been destroyed.

"The intent to revoke a will is manifest from the established fact that the testator was anxious to withdraw or change the provisions he had made in his first will. This fact is disclosed by the testator's own statement to the witnesses Canto and the Mother Superior of the Hospital where he was confined.

"The original will herein presented for probate having been destroyed with *animo revocandi*, cannot now be probated, as the will and last testament of Jesus de Leon."

The law also provides that if the will is burned, torn, cancelled or obliterated by some other person without the express direction of the testator, it 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 in accordance with the Rules of Court.[29] Thus, in *Lipana vs. Court of First Instance,*[30] the proponent filed a petition for probate of the will, the carbon copy of which was attached. Opposition was entered on the ground that the original of the alleged will was destroyed and therefore revoked. Judgment was entered dismissing the petition on the ground that a carbon copy cannot be admitted to probate. On appeal, it was held by the Supreme Court that if a will is shown to have been torn by some other person without the express direction of the testator, it may be admitted to probate, if its contents, due execution and the fact of its unauthorized destruction are established by satisfactory evidence. The petitioner, therefore, was entitled to a hearing to prove the due execution of the original

[29]Art. 830, No. 3, Civil Code.
[30]70 Phil. 365.

will and its loss or destruction. Hence, the respondent court had no statutory authority to dismiss the petition without such hearing.

Idem; Id. — Revocation by burning. — The burning of a will by the testator or by someone else acting at the direction of the testator and in his presence, with intent to revoke the will, is one of the most efficient modes of destruction, and is therefore sufficient as a revocatory act. To constitute revocation by burning, it would seem that there must be at least a burning of a part of the paper on which the will is written, although a very slight burn will suffice.[31] Otherwise, there is no revocation. Thus, in a well-known English case, where the testator, with intent to revoke his will, threw it in a stove so that it would be burned, and a third person, who was one of the beneficiaries, was able to save the will, without the testator's knowledge, before any part of it could be burned, it was held that since there was no physical act of destruction, there was no revocation.[32] It must be noted, however, that in this jurisdiction, there would be a revocation, not by burning under No. 3 of Art. 830, but by implication of law under No. 1 of the same article, and only with respect to the testamentary disposition in favor of the beneficiary. The reason is that such beneficiary fraudulently prevented the testator from revoking his will. Hence, he has committed an act of unworthiness which will incapacitate him to inherit from the testator.[33] But the will itself is not revoked.

Idem; Id. — Revocation by tearing. — Tearing a will with the intent to revoke it is one of the recognized modes of revocation. The degree of tearing necessary to the revocation of a will is not fixed by statute. Consequently, a slight act of tearing is generally held sufficient, although the greater the degree of tearing the stronger is the presumption that the instrument was torn *animo revocandi*.[34] The act of tearing, however, must be a complete act. Otherwise, if the testator desists voluntarily or through the persuasion of others before the act of destruction could be consummated, it is clear that the act of revocation has not also been consummated. Consequently, it will not produce any effect. This principle is very well illustrated in

[31]57 Am. Jur., Sec. 501, p. 348.
[32]Reed vs. Harris, Court of King's Bench, 6 A & E., 209.
[33]Art. 1032, No. 7, Civil Code.
[34]57 Am. Jur., Sec. 500, pp. 347-348.

a classic English case — the case of *Perkes vs. Perkes,*[35] The records show that the testator, having had some quarrel with the principal beneficiary under his will, in a fit of passion, took the will from his desk, and then, with intent of revoking it, began to tear it. He was able to tear it twice through, but before he could tear it for the third time, he was persuaded by the pleas of the beneficiary and of some friends who were around to desist. He returned the torn will to his desk, declaring that it is still a good will. Has the will been revoked? According to Justice Best:

> "I am of opinion, that the verdict is right. Tearing is one of the modes by which a will may be cancelled; but it cannot be contended that every tearing is a cancellation for if it were, a testator, who took his will into his hands with intent to tear it, must, if he should tear it in the smallest degree and then stop, be considered as having cancelled it. The real question in these cases is whether the act be complete. If the testator here, after tearing it twice through, had thrown the fragments on the grounds, it might have been properly considered, that he intended to go no farther, and that the cancellation was complete; but here there is evidence, that he intended to go farther, and that he was only stopped from proceeding by an appeal made to his compassion by the person who was one of the objects of his bounty. The case in *Blackstone (Bibb vs. Thomas, 2 W. Black, 1043)* is very distinguishable; for there the testator completed his purpose, although the will was not destroyed. I see no reason, therefore, for disturbing the verdict."

Idem; Id. — Revocation by cancelling and obliterating. — Generally, revocation by cancellation is effected by diagonal or horizontal lines, or criss-crosses written upon the face of the will or upon any part thereof, while revocation by obliteration is effected by erasing or scraping off any word or disposition which the testator intends to revoke. Hence, in the first, as a rule, the words are still legible, while in the second the words are rendered illegible. Most American courts, however, consider the two terms synonymous.[36]

From the very nature of these two methods of revocation, it is evident that the revocation of the will may be either total or partial in

[35]Court of King's Bench, 3 B. & ald. 489.
[36]Rood on Wills, p. 289.

character. This is what differentiates them from revocation effected by burning or tearing. In the latter, the revocation is always total, while in the former, the revocation is total if it is directed against an essential part of the will and partial if it is directed against a nonessential part of the will.

Marks made upon a will by the testator are effective as a revocation by cancellation, regardless of their depth, faintness, or other characteristics, if they were placed there for the purpose of cancelling the will. The act of the testator in drawing lines across his will constitutes a revocation *in toto,* if so intended by him. It is necessary, however, that the testator, with an intention to revoke, must have caused some physical defacement of the will adopted to give expression to that purpose. The general rule is that revocation by cancellation or obliteration requires the making of marks or lines across the will, or of some portion thereof which is of such significance that its elimination would cause a material alteration in the meaning or legal effect of the will.[37]

The efficacy of marks or lines upon a will as a cancellation is not lessened by the fact that they are in the form of written and legible words. Thus, if words indicating an intent to revoke the will are written upon the instrument in such a manner that many words of the will are touched, there is an effective revocation by cancellation. Most American authorities make a distinction between a writing across the face of the will constituting a defacement of the used portion of the instrument and a similar writing upon a blank portion, and hold that while in the first there is a revocation, in the second there is none. Accordingly, a memorandum written upon the blank margin of the instrument stating that the will is "revoked" or that an indicated portion is "annulled" does not constitute a sufficient revocation.[38] If the memorandum, however, was executed in accordance with all of the formalities prescribed by law for the execution of wills, there would be a revocation, not by cancellation, but by a nontestamentary writing executed as provided in case of wills.

Presumptions of Revocation. — Because it is not only difficult but sometimes impossible to prove by competent evidence that

[37]57 Am. Jur., Sec. 503, pp. 349-350.
[38]Ibid., Sec. 506, p. 361.

a will has been destroyed or cancelled with intent to revoke, American courts have been compelled to recognize certain presumptions of revocation, which by their very nature are disputable in character. Some of these presumptions have been adopted in this jurisdiction.[39] They are:

(1) Where the will cannot be found following the death of the testator and it is shown that it was in the testator's possession when last seen, the presumption is, in the absence of other evidence, that he must have destroyed it *animo revocandi*.[40]

(2) Where the will cannot be found following the death of the testator and it is shown that the testator had ready access to it, the presumption is, in the absence of other evidence, that he must have destroyed it *animo revocandi*.[41]

(3) Where it is shown that the will was in the custody of the testator after its execution, and subsequently, it was found among the testator's effects after his death in such a state of mutilation, cancellation or obliteration as represents a sufficient act of revocation within the meaning of the applicable statute, it will be presumed, in the absence of evidence to the contrary, that such act was performed by the testator with the intention of revoking the will.[42]

Conditional or Dependent Relative Revocation. — There is also another presumption connected with revocation of wills which is recognized in this jurisdiction. This presumption is what is known as *"the doctrine of dependent relative revocation."* Under this doctrine, the established rule is that if a testator revokes a will with a present intention of making a new one immediately and as a substitute, and the new will is not made, or, if made, fails of effect for any reason, it will be presumed that the testator preferred the old will to intestacy, and the old one will be admitted to probate in the absence of evidence overcoming the presumption, provided its contents can be ascertained.

The doctrine of dependent relative revocation is a rule of presumed intention rather than a substantive rule of law. The presumption recognized by the doctrine is not artificial. Neither is

[39]Gago vs. Mamuyat, 49 Phil. 902.
[40]Ibid., 57 Am. Jur., Sec. 549, pp. 377-378.
[41]Ibid.
[42]57 Am. Jur., Sec. 550, pp. 378-379.

it conclusive; it does not prevail as against actual evidence of the testator's intention. Being merely a rule of presumed intention, the doctrine of dependent relative revocation cannot be carried so far as to defeat the real intention of the testator in a case where the facts in evidence do not support the presumption.[43]

Vda. de Molo vs. Molo
90 Phil. 37

This is an appeal from an order of the lower court admitting to probate the last will and testament of Mariano Molo. The proponent of the will is the widow of the testator, while the oppositors are nephews and nieces of the testator. The records show that after the death of Mariano Molo, his widow filed a petition seeking the probate of a will executed by the deceased on June 20, 1939. This will was denied probate on the ground that it was not executed in accordance with the formalities prescribed by law. In view of the disallowance the widow filed a second petition for the probate of a copy of another will executed by the deceased on August 17, 1918. This will was admitted to probate in spite of the opposition of the oppositors-appellants. The widow is the instituted heiress in both wills. It must also be added that the will of 1939 contains a revocatory clause expressly revoking of will of 1918. The oppositors contend, among others, that the will of 1918 cannot be given effect because there is a presumption that the testator, after executing the will of 1939, and with full knowledge of the revocatory clause contained in said will, deliberately destroyed and revoked the original of the will of 1918. The Supreme Court, however, speaking through Justice Bautista Angelo, held:

"Granting for the sake of argument that the earlier will was voluntarily destroyed by the testator after the execution of the second will, which revoked the first, could there be any doubt that said earlier will was destroyed by the testator in the honest belief that it was no longer necessary because he had expressly revoked it in his will of 1939? In other words, can we not say that the destruction of the earlier will was but the necessary consequence of the testator's belief that the revocatory clause contained in the subsequent will was valid and the latter would be given effect? If such is the case, then it is our opinion that the earlier will can still be admitted to probate under the principle of 'dependent relative revocation.' Under this doctrine

[43]Ibid., Sec. 514, pp. 356-357.

> the rule is established that where the act of destruction is connected with the making of another will so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition intended to be substituted, the revocation will be conditional and dependent upon the efficacy of the new disposition; and if, for any reason, the new will intended to be made as a substitute is inoperative, the revocation fails and the original will remains in full force.' *(Gardner, pp. 232-233)."*

Art. 833. A revocation of a will based on a false cause or an illegal cause is null and void.[44]

Revocation by Mistake. — In American jurisdiction, the rule stated in Art. 833 is known as "revocation by mistake." Thus, where a testator by a codicil or later will revokes a devise or legacy in his will, expressly grounding such revocation on the assumption of a fact which turns out to be false, as where it is stated that the legatees or devisees named in the will are dead, when, in fact, they are living, the revocation does not take effect.[45]

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.[46]

Effect of Revocation upon Recognition of Child. — Under Art. 834, the revocation of the will where an illegitimate child is acknowledged by the testator as his natural child will not affect the validity of the recognition or acknowledgment. This rule is of course logical considering the fact that even if the will is revoked, the instrument still constitutes an authentic instrument within the meaning of Art. 278 of the Civil Code, which states that recognition of natural children shall be made in the record of birth, or in a will, or in a statement before a court of record, or in an authentic writing.

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[44]New provision.

[45]Dunham vs. Averill, 45 Conn. 61, 29 Am. Rep. 624; Mendinhall's Appeal, 124 Pac. 387, 10 Am St. Rep. 590.

[46]New provision.

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.[1]

Art. 836. The execution of a codicil referring to a previous will has the effect of republishing the will as modified by the codicil.[2]

Republication of Wills. — Republication, as applied to wills, may be defined as "an act of the testator whereby he reproduces in a subsequent will the dispositions contained in a previous will which is void as to its form or executes a codicil to his will." It may be either express or constructive.[3] It is express if the testator reproduces in a subsequent will the dispositions contained in a previous one which is void as to its form. This is the republication which is referred to in Art. 835 of the Code. Its purpose is to cure the will of its formal defects. It is constructive if the testator for some reason or another executes a codicil to his will. This is the republication which is referred to in Art. 836 of the Code.

A duly executed codicil operates as a republication of the original will and makes it speak from the new date, in so far as it is not altered or revoked by the codicil, although such codicil is not physically annexed to the will, and although the will is not in the presence of the testator at the time of executing the codicil where it refer to the will in such a way as to identify that instrument beyond doubt. If a codicil revokes in terms portions of the will, it republishes the will as of the date of the codicil with respect to all parts not revoked.[4]

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.[5]

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[1]New provision.
[2]New provision.
[3]Jarman on Wills, p. 157.
[4]57 Jur., Sec. 626, p. 428.
[5]Art. 739, Spanish Civil Code, in modified form.

Revival of Wills. — Revival is the restoration to validity of a previously revoked will by operation of law. It differs from republication in that it takes place by operation of law, while the latter takes place by the act of the testator. It seems that under our law, the only way by which a previously revoked will may be revived is through another will or codicil.[6] This is tantamount to saying that the testator will have to make another will or codicil either reproducing the contents of the revoked will or incorporating thereto such revoked will by reference in accordance with the provisions of Art. 837 of the Code.

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. This rule is clearly stated in Art. 837. Suppose, however, that instead of an express revocatory clause, the dispositions found in the second will are merely inconsistent with those found in the first — shall the express revocation of the second will by a third will or a codicil result in the revival of the first will? It is rather unfortunate that while the Code provides for the effect of the revocation of the second will which expressly revoked a first will, it does not provide for the effect of the revocation of the second will in case the second will merely impliedly revoked the first will. The problem may be illustrated as follows: "A" executed three wills — the first in 1968, the second in 1969, and the third (a codicil) in 1970. The dispositions found in the second will are absolutely inconsistent with those found in the first. The codicil, on the other hand, contains nothing but a revocatory clause expressly revoking the will of 1969. Will such revocation result in the revival of the will of 1968? It must be noted that the effect of revocation is to annul the will or disposition which is revoked. Upon being revoked, the will or disposition which is revoked ceases to exist, and is as inoperative as if it had never been written. Consequently, with the revocation of the will of 1969 by the codicil of 1970, only one will — the will of 1968 — remains. It would, therefore, be absurd to speak of the revival of the will since it has never been validly revoked in the first place. Besides, under the doctrine of dependent relative revocation it will be presumed that the testator preferred the old will to intestacy.

[6]Art. 837, Civil Code.

Subsection 8. — Allowance and Disallowance of Wills

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.[1]

Concept of Probate of Wills. — The probate of a will may be defined as a special proceeding for establishing the validity of the will. It may also be defined as a special proceeding for the purpose of proving that the instrument offered for probate is the last will and testament of the testator, that it has been executed in accordance with the formalities prescribed by law, and that the testator had the necessary testamentary capacity at the time of the execution of the will.

Nature of Probate. — A proceeding on an application for the probate of a will is not an ordinary civil action. A will is nothing more than a species of conveyance whereby a person is permitted with the formalities prescribed by law, to control to a certain degree the dispositions of his property after his death. Out of the consideration for the important interests involved the execution and proof of wills has been surrounded by numerous safeguards, among which is the provision that after the death of the testator his will may be judicially established in court. The action of the court in admitting a will to probate has all the effects of a judgment; and as such is entitled to full faith and credit in other courts. The proceeding by which this

[1]New provision.

is accomplished is considered to be in the nature of a proceeding *in rem,* and upon this idea the decree of probate is held binding on all persons in interest, whether they appear to contest the probate or not. Notice of the time and place of hearing is required to be published (Sec. 3, Rule 76 in relation to Sec. 3, Rule 79, Rules of Court). The publication of the notice of the proceedings is constructive notice to the whole world.[2]

The proceeding is not a contentious litigations, and, although the persons in interest are given an opportunity to appear and reasonable precautions are taken for publicity, they are not impleaded or required to answer.[3]

Necessity of Probate. — According to the first paragraph of Art. 838, which is identical to the rule stated in Sec. 1 of Rule 75 of the New Rules of Court, no will shall pass either real or personal property unless it is proved and allowed in accordance with the Rules of Court. It is within the jurisdiction of a probate court to approve the sale of property of a deceased person by his prospective heirs or administrator before final adjudication; otherwise, such sale is null and void and title does not pass to the purchaser. (*Dillena vs. CA*, G.R. No. 77660, July 28, 1988.) Consequently, under our legal system the probate of a will is mandatory. Even if the decedent left no debts and nobody raises any question as to the authenticity and due execution of the will, none of the heirs may sue for the partition of the estate in accordance with that will without first securing its allowance or probate by the Court: *first,* because the law expressly provides that "no will shall pass either real or personal estate unless it is proved and allowed in the proper court"; and, *second,* because the probate of a will, which is a proceeding *in rem,* cannot be dispensed with the 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 are the publication and the personal notices to each and all of said heirs and legatees.[4]

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[2]Celedonia Solivio vs. the Honorable Court of Appeals and Concordia Javellana Villanueva, G.R. No. 83484, February 12, 1990.

[3]Riera vs. Palmaroli, 40 Phil. 105; see also Manalo vs. Paredes, 47 Phil. 938.

[4]Rosario Guevara vs. Ernesto Guevara, 74 Phil. 479, reiterated in Ernesto Guevara vs. Rosario Guevara, 98 Phil. 249, and Ventura vs. Ventura, 106 Phil. 1159. (unrep.).

Rosario Guevara vs. Ernesto Guevara
74 Phil. 479

This is an action commenced by Rosario Guevara to recover from Ernesto Guevara what she claims to be her strict legitime as an acknowledged natural daughter of the deceased Victorino Guevara. Ernesto Guevara is a legitimate son of the deceased. It appears that the deceased had left a will disposing of his properties in favor of the defendant and the rest of his relatives, the plaintiff among them. This will, however, has not been presented for probate. Rosario Guevara, who appears to have had her father's will in her custody, did nothing judicially to invoke the testamentary dispositions made there in her favor. But a little over four years after her father's death, she commenced this action for the purpose hereinbefore indicated. It was only during the trial of this case that she presented the will to the court, not for the purpose of having it probated, but only to prove that the deceased had acknowledged her as his natural daughter. Upon that proof of acknowledgment she claimed her share of the inheritance on the theory that the deceased died intestate, because the will had not been probated. Both the trial court and the Court of Appeals sustained the theory. Consequently, the principal question to determine in this appeal is whether the procedure adopted by the plaintiff is in accordance with law. Invoicing the provisions of the different sections of Rule 76 *(Now Rule 75)* of the Rules of Court, especially Sec. 1 *(now reproduced in Art. 838 of the Civil Code),* the Supreme Court, speaking through Justice Ozaeta, held:

"We cannot sanction the procedure adopted by the respondent Rosario Guevara it being in our opinion in violation of procedural law and an attempt to circumvent and disregard the last will and testament of the decedent.

"We hold that if the decedent left a will and no debts and the heirs and legatees desire to make an extrajudicial partition of the estate, they must first present that will to the court for probate and divide the estate in accordance with the will. They may not disregard the provisions of the will unless those provisions are contrary to law. Neither may they do away with the presentation of the will to the court for probate, because such suppression of the will is contrary to law and public policy.

"Even if the decedent left no debts and nobody raises any question as to the authenticity and due execution of the will, none of the heirs may sue for the partition of the estate in accordance with that will without first securing its allowance or probate by the court, *first,* because the law expressly provides

that 'no will shall pass either real or personal estate unless it is proved and allowed in the proper court'; and *second,* because the probate of a will, which is a proceedings *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 are the publication and the personal notice to each and all of said heirs and legatees. Nor may the court approve and allow the will presented in evidence in such an action for partition, which is one *in personam,* any more than it could decree the registration under the Torrens system of the land involved in an ordinary action for *reivindicacion* or partition."[5]

Imprescriptibility of Probate. — It must also be noted that the statute of limitations is not applicable to the probate of wills. According to the trend of authority, the applicability of the statute of limitations to probate proceedings must be rejected on the ground that such proceedings are not established in the interest of the surviving heirs, but primarily for the protection of the testator's expressed wishes. 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. It is of course true that the rights of the parties should not be left hanging in uncertainty for periods of time far in excess of the maximum period of ten years allowed by law, but the obvious remedy is for the other interested person either (1) to petition for the production of the will and for its probate, or (2) to inflict upon the guilty party the penalties prescribed by Rule 75 of the Rules of Court, or (3) to declare the unworthiness of the heir under Art. 1032 of the Civil Code for concealing or suppressing the will.[6]

Ernesto Guevara vs. Rosario Guevara
98 Phil. 249

This case is a sequel and aftermath of the case of Rosario Guevara vs. Ernesto Guevara, 74 Phil. 479. Pursuant to the decision of the Supreme Court in that case Rosario Guevara presented the will of the deceased Victorino Guevara for probate. A

[5]But read Justice Moran's concurring and dissenting opinion — Guevara vs. Guevara, 74 Phil. 496, 512.

[6]Ernesto Guevara vs. Rosario Guevara, 98 Phil. 249.

motion to dismiss was filed by Ernesto Guevara on the ground, among others, that the petition for probate is barred by the statute of limitations considering that the testator died on September 27, 1933, and that the petition was filed twelve years later, or, to be exact, on October 5, 1945. As a consequence, the lower court dismissed the petition. The petitioner thereupon appealed to the Court of Appeals which reversed the order of the lower court. The case was finally elevated to the Supreme Court for review by *certiorari*. Speaking through Justice Concepcion, the Supreme Court held:

"In holding the statute of limitations applicable to the probate of wills, the Court below failed to notice that its doctrine was destructive of the right of testamentary disposition and violative of the owner's right to control his property within the legal limits. The appealed order in fact leaves wills at the mercy and whim of custodians and heirs interested in their suppression. The lower Court would in effect abdicate the tutelary power that passed to the Republic from the former sovereigns, that *'potestad suprema que en mi reside para velar por el puntual cumplimento de las ultimas voluntades,'* asserted as one of the royal prerogatives in the 'Real Cedula' of March 18, 1776.

"It is not without purpose that Rule of Court 77 prescribes that any 'person interested in the estate may, at any time after the death of the testator, petition the Court having jurisdiction to have the will allowed.' Taken from the Code of Procedure in California, this provision has been interpreted (by a long line of decisions) as meaning that the statute of limitations has no application to probate of wills.

"These decisions are of high persuasive value; they represent the trend of authority (57 Am. *Jur. 535),* and enable us to conclude that reason and precedent reject the applicability of the Statute of Limitations to probate proceedings because these 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 his ownership and right of disposition. If the probate of validly executed will is required by public policy, as declared by the Supreme Court in the previous case, the state could not have intended the statute of limitations to defeat the policy."

Questions Determinable by Probate Court. — Under our law, there are only three possible questions which can be determined by the probate court. They are:

(1) Whether or not the instrument which is offered for probate is the last will and testament of the decedent; in other words, the question is one of identity.

(2) Whether or not the will has been executed in accordance with the formalities prescribed by law; in other words, the question is one of due execution.

(3) Whether the testator had testamentary capacity at the time of the execution of the will; in other words, the question is one of capacity.

Consequently, the probate court cannot inquire into the intrinsic validity of testamentary dispositions. Thus, according to the Supreme Court:

> "To establish conclusively as against everyone, and once and for all, the facts that a will was executed with the formalities required by law and that the testator was in a condition to make a will, is the only purpose of the proceedings under the new Code for the probate of a will. The judgment in such proceedings determines and can determine nothing more. In them the court has no power to pass upon the validity of any provisions made in the will. It cannot decide, for example, that a certain legacy is void, and another one valid. It could not in this case make any decision upon the question whether the testatrix had the power to appoint by will a guardian for the property of her children by her first husband, or whether the person so appointed was or was not a suitable person to discharge such trust.
>
> "All such questions must be decided in some other proceeding. The grounds on which a will may be disallowed are stated in Section 634 *(now Art. 839,* CC). Unless one of those grounds appears, the will must be allowed. They all have to do with the personal condition of the testator at the time of its execution and the formalities connected therewith. It follows that neither this court nor the court below has any jurisdiction in this proceedings to pass upon the questions raised by the appellants by the assignment of error relating to the appointment of a guardian for the children of the deceased."[7]

[7]Castañeda vs. Alemany, 3 Phil. 427. To the same effect — Montanano vs. Suesa, 14 Phil. 676; Palacios vs. Palacios, 106 Phil. 739; Nuguid vs. Nuguid, G.R. No. L-23445, June 23, 1966, 17 SCRA 449; Sumilang vs. Ramagosa, G.R. No. L-23135, Dec. 26, 1967, 27 SCRA 1369.

It was stressed in the case of Cuizon vs. Remolete (129 SCRA, 45, 1984) as cited in the case of Morales vs. Court of First Instance of Cavite, Branch V (146 SCRA, 373, 1986), as further cited in the case of Ofelia Parungao, et al. vs. Intermediate Appellate Court, et al., G.R. Nos. 73241-42, July 23, 1990 that:

> "It is a well-settled rule that a probate court or one in charge of proceedings, whether testate or intestate, cannot adjudicate or determine title to properties claimed to belong to outside parties. All that the said court could do as regards said properties is to determine whether they should or should not be included in the inventory or administration. If there is no dispute, well and good; but if there is, then the parties, the administrator, and the opposing parties have to resort to an ordinary action for a final determination of the conflicting claims of title because the probate court cannot do so."

Furthermore, it was held that a person who intervenes in the probate proceedings can be required to show his interest in the will or in the property affected thereby.[8] For such purpose, it is sufficient that he must show or produce *prima facie* evidence of his relationship to the testator, or of his right to the latter's estate. Consequently, if he claims to be an acknowledged natural child of the testator, the probate court will certainly allow him to produce evidence regarding his status, but the nature of the evidence submitted would nevertheless be only *prima facie,* and only for the purpose of justifying his intervention in the probate proceeding.[9] The reason for this is evident. The final determination of the status of such person can be made only during the proceedings for the distribution of the estate and not during the probate proceedings.

In the case, however, of *Celedonia Solivia vs. The Honorable Court of Appeals, et al.,* G.R. No. 83484, February 12, 1990, it was held that the probate court has exclusive jurisdiction to make just and legal distribution of the estate. In the interest of orderly procedure and to avoid confusing and conflicting dispositions of a decedent's estate, a court should not interfere with probate proceedings in a co-

[8]In re Cabigting, 14 Phil. 463; Paras vs. Narcisco, 35 Phil. 144; Ngo The Hua vs. Chung Kiat Hua, G.R. No. L-17091, Sept. 30, 1963, 9 SCRA 113; Teotico vs. Del Val, G.R. No. L-18753, March 26, 1965, 13 SCRA 406; Sumilang vs. Ramagosa, *supra*.

[9]Reyes vs. Ysip, 51 Off. Gaz. 2357.

equal court. This was earlier ruled in *Guilas vs. Judge of the Court of First Instance of Pampanga, L-26695, January 31, 1972*, which states that:

> "The better practice, however, for the heir who has not received his share is to demand his share through a proper motion in the same probate or administration proceedings, or for reopening of the probate or administrative proceedings if it had already been closed, and not through an independent action.

When Probate Commenced. — The probate of a will may be commenced either during the lifetime of the testator or after his death. In the first, it is the testator himself who files the petition for the probate of the will;[10] in the second, it is any person interested in the estate.[11] Consequently, we can very well say that there are two kinds of probate — probate *ante mortem* and probate *post mortem*. Explaining the reasons behind the inclusion of the former in our Code Commission says:

> "One of the principal innovations of the proposed Code is the allowance of a will during the lifetime of the testator.
>
> "Most of the cases that reach the courts involve either the testamentary capacity of the testator or the formalities adopted in the execution of wills. There are relatively few cases concerning the intrinsic validity of testamentary dispositions. It is far easier for the courts to determine the mental condition of a testator during his lifetime than after his death. Fraud, intimidation, and undue influence are minimized. Furthermore, if a will does not comply with the requirements prescribed by law, the same may be corrected at once. The probate during the testator's life, therefore, will lessen the number of contests upon wills. Once a will is probated during the lifetime of the testator, the only question that may remain for the courts to decide after the testator's death will refer to the intrinsic validity of the testamentary dispositions. It is possible, of course, that even when the testator himself asks for the allowance of the will, he may be acting under duress or undue influence, but these are rare cases.
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> "After a will has been probated during the lifetime of the testator it does not necessarily mean that he cannot alter or

[10]Art. 838, par. 1, Civil Code.
[11]Sec. 1, Rule 76, New Rules of Court.

> revoke the same before his death. Should he make a new will, it would also be allowance 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."[12]

Procedure in Probate Proceedings. — Whether the will is presented for probate during the lifetime of the testator or after his death, the procedure which is followed is that which is provided for in the New Rules of Court, although, with respect to the first, the third paragraph of Art. 838 of the Civil Code provides that the Supreme Court shall formulate such additional Rules of Court as may be necessary for the allowance of will on petition of the testator. In addition to these, the special rules provided for in Art. 811 of the Civil Code, which is now embodied in Sec. 5, Rule 76 of the New Rules of Court regarding the probate of holographic wills must be observed.

Effect of Allowance of Will. — A judgment or decree of a court with jurisdiction of a proceeding to probate a will, which admits the will to probate, is conclusive of the validity of the will; it is not subject to collateral attack, but stands as final, if not modified, set aside, or revoked by a direct proceeding, or reversed on appeal to a higher court. This is clear from the provision of the fourth paragraph of Art. 838 of the New Civil Code, a provision which is also found in Sec. 1 of Rule 75 of the New Rules of Court. Since a proceeding for the probate of a will is essentially one *in rem* which determines the status of the decedent's estate as testate or intestate, the judgment rendered by a court having jurisdiction is conclusive on the whole world, irrespective of who appeared as parties of record in the proceeding.[13]

The following case will serve to illustrate the conclusive character of the allowance of the will by the probate court.[14]

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[12]Report of the Code Commission, pp. 53-54.

[13]See 57 Am. Jur., 934, pp. 614-615.

[14]For other cases — see Castañeda vs. Alemany, 3 Phil. 838; Pimentel vs. Palanca, 5 Phil. 436; Sahagun vs. Corostiza, 7 Phil. 347; Limjuco vs. Ganara, 11 Phil. 393; Montano vs. Suesa. 14 Phil. 676; In re Estate of Johnson, 39 Phil. 156; Riera vs. Palmaroli, 40 Phil. 105; Austria vs. Ventanilla, 41 Phil. 180; Manahan vs. Manahan, 55 Phil. 448; Trillana vs. Crisostomo, 89 Phil. 710; Fernandez vs. Dimagiba, G.R. No. L-23638, Oct. 12, 1967, 21 SCRA 428.

Mercado vs. Santos
66 Phil. 215

The records show that the petitioner had presented a will purporting to be the last will and testament of his deceased wife for probate. The will was admitted to probate without any opposition. Sixteen months after the allowance of the will, a complaint for forgery of the probated will was instituted by the brothers and sisters of the deceased against the petitioner. The latter moved to dismiss claiming that the will alleged to have been forged had already been probated and that the order of allowance is conclusive as to its due execution. The motion was overruled. Whereupon the petitioner elevated the case to the Court of Appeals. The Court of Appeals denied the petition. As a result, the case was elevated to the Supreme Court for review by *certiorari*. The question to be resolved, therefore, is whether or not the probate of the will is a bar to the subsequent criminal prosecution of the petitioner for the alleged forgery of the said will. After citing the pertinent provision of the Code of Civil Procedure (all of which are reproduced in the Rules of Court, and now crystallized in the provision of the last paragraph of Art. 838) and examining all of the authorities and sources of the laws cited, the Supreme Court, speaking through Justice Laurel, held:

"American and English cases show a conflict of authorities on the question as to whether or not the probate of a will bars criminal prosecution of the alleged forger of the probated will. We have examined some important cases and have come to the conclusion that no fixed standard may be adopted or drawn therefrom, in view of the conflict no less than of diversity of statutory provisions obtaining in different jurisdictions. It behooves us, therefore, as the court of last resort, to choose that rule most consistent with our statutory law, having in view that needed stability of property rights and the public interest in general. To be sure, we have seriously reflected upon the dangers of evasion from punishment of culprits deserving of the severity of the law in case where, as here, forgery is discovered after the probate of the will and the prosecution is had before the prescription of the offense. By and large, however, the balance seems inclined in favor of the view that we have taken. Not only does the law surround the execution of the will with the necessary formalities and require probate to be made after an elaborate judicial proceeding, but it provides for an adequate remedy to any party who might have been adversely affected by the probate of a forged will, much in the same way as other parties

against whom a judgment is rendered under the same or similar circumstances. The aggrieved party may file an application for relief with the proper court within a reasonable time, but in no case exceeding six months after said court has rendered the judgment of probate, on the ground of mistake, inadvertence, surprise or excusable neglect. An appeal lies to review the action of a court of first instance when that court refuses to grant relief. After a judgment allowing a will to be probated has become final and unappealable, and after the period fixed by law has expired, the law as an expression of the legislative wisdom goes no further and the case ends there.

"We hold, therefore, that criminal action will not lie in this jurisdiction against the forger of a will which had been duly admitted to probate by a court of competent jurisdiction."

Idem; When allowance may be set aside. — Since a proceeding for the probate of a will is essentially one *in rem,* a judgment allowing a will shall be conclusive as to its due execution. Consequently, no question of the validity or invalidity of the will could be thereafter raised, except (1) by means of an appeal, or (2) by means of a petition for relief from the judgment by reason of fraud, accident, mistake, or excusable negligence, or (3) by means of a petition to set aside the judgment by reason of lack of jurisdiction or lack of procedural due process, or (4) by means of an action to annul and judgment by reason of extrinsic or collateral fraud.

The first exception is recognized by the provision of the fourth paragraph of Art. 838, as well as by the provision of Sec. 1, Rule 75, Rules of Court, while the second exception is recognized by the general provisions of Secs. 2 and 3, Rule 38, Rules of Court. These provisions recognizing the second are:

"Sec. 2. *Petition for relief from judgment, order, or other proceedings.* — When a judgment or final order is entered, or any other proceeding is thereafter taken against a party in any court through fraud, accident, mistake, or excusable negligence, he may file a petition in such court and in the same cause praying that the judgment, order, or proceeding be set aside.

"Sec. 3. *Time for filing petition; contents and verification.* — A petition provided for in either of the preceding sections of this Rule must be verified, filed within sixty (60) days after the petitioner learns of the judgment, final order, or other proceedings to be set aside, and not more than six (6) months after such

judgment or final order was entered, or such proceeding was taken; and must be accompanied with affidavits showing the fraud, accident, mistake, or excusable negligence relied upon, and the facts constituting the petitioner's good and substantial cause of action or defense, as the case may be."

Thus, in *In re Estate of Johnson,*[15] the Supreme Court, speaking through Justice Street, declared:

"The laws of these Islands, in contrast with the laws in force in perhaps all of the States of the American Union, contain no special provision, other than that allowing an appeal in the probate proceedings, under which relief of any sort can be obtained from an order of a court of first instance improperly allowing or disallowing a will. We do, however, have a provision of a general nature authorizing a court under certain circumstances to set aside any judgment, order, or other proceedings whatever. This provision is found in Section 113 of the Code of Civil Procedure *(now Secs. 2 and 3, Rule 38, Rules of Court).*

"The use of the words' judgment, order or other proceeding' in this section indicates an intention on the part of the Legislature to give a wide latitude to the remedy here provided, and in our opinion its operation is not to be restricted to judgments or orders entered in ordinary contentious litigation where a plaintiff impleads a defendant and brings him into court by personal service of process. In other words, the utility of the provision is not limited to actions proper but extends to all sorts of judicial proceedings.

"In the second section of the Code of Civil Procedure it is declared that the provisions of this Code shall be liberally construed to promote its objects and to assist the parties in obtaining speedy justice. We think that the intention thus exhibited should be applied in the interpretation of Section 113 *(now Secs. 2 and 3, Rule 38, Rules of Court);* and we hold that the word 'party' used in this section, means any person having an interest in the subject matter of the proceeding who is in a position to be concluded by the judgment, order or other proceeding taken."

[15]39 Phil. 156.

Gallanosa vs. Arcangel
83 SCRA 676

Florentino Hitosis executed a will in 1938 when he was eighty years old wherein he instituted as his only heirs his stepson Pedro Gallanosa and the latter's wife Corazon Grecia. He died in 1939, survived by his brother Leon Hitosis and several nephews and nieces. A petition for probate was duly filed by the testamentary heirs. Opposition to the probate was registered by the legal heirs. After hearing, the probate court admitted the will to probate and appointed Gallanosa as executor. In 1943, a project of partition of sixty-one (61) parcels of land constituting the bulk of the testator's estate was finally approved. There was no appeal from the decree of probate and from the order of partition and distribution. In 1952, the testator's legal heirs instituted an action for the recovery of the 61 parcels of land on the ground of acquisitive prescription. The action was dismissed. Again, there was no appeal from the order of dismissal. In 1967, said legal heirs instituted another action in the same court against the testamentary heirs for the "annulment" of the will and the recovery of the 61 parcels of land, alleging that the Gallanosa spouses caused the execution of the will through fraud and deceit. Upon motion of defendants, the court dismissed the action. Plaintiffs filed a motion for reconsideration. Respondent Judge granted it and set aside the order of dismissal. From this order of dismissal, defendants went up to the Supreme Court by *certiorari*. Petitioners (defendants) contend that private respondents (plaintiffs) do not have a cause of action for the "annulment" of the will and for the recovery of the 61 parcels of land by reason of *res judicata* and of prescription. On the other hand, private respondents contend that the will is void, and therefore their right of action is imprescriptible. Speaking through Justice Aquino, the Supreme Court held:

"It is evident from the allegations of the complaint and from defendants' motion to dismiss that plaintiffs' 1967 action is barred by *res judicata, a* double-barrelled defense, and by prescription, acquisitive and extinctive, or by what are known in the *jus civile* and the *jus gentium as usucapio, longi temporis possesio* and *praescriptio* (See *Ramos vs. Ramos*, L-19872, December 3, 1974, 61 SCRA 284).

"Our procedural law does not sanction an action for the "annulment" of a will. In order that a will may take effect, it has to be probated, legalized or allowed in the proper testamentary proceeding. The probate of the will is mandatory (Art. 838,

Civil Code; Sec. 1, Rule 75, formerly Sec. 1, Rule 76, Rules of Court; *Guevara vs. Guevara*, 74 Phil. 479; *Guevara vs. Guevara,* 98 Phil. 249).

"The testamentary proceeding is a special proceeding for the settlement of the testator's estate. A special proceeding is distinct and different from an ordinary action (Sec. 1, Rule 2 and Sec. 1, Rule 72, Rules of Court).

"We say that the defense of *res judicata,* as a ground for the dismissal of plaintiffs' 1967 complaint, is a two-pronged defense because (1) the 1939 and 1943 decrees of probate and distribution in Special Proceeding No. 3171 and (2) the 1952 order of dismissal in Civil Case No. 696 of the lower court constitute bars by former judgment. Rule 39 of the Rules of Court provides:

> "SEC. 49. Effect of judgments. — The effect of a judgment or final order rendered by a court or judge of the Philippines, having jurisdiction to pronounce the judgment or order, may be as follows:
>
> "(a) In case of a judgment or order against a specific thing, or in respect to the probate of a will or the administration of the estate of a deceased person, or in respect to the personal, political, or legal condition or status of a particular person or his relationship to another, the judgment or order is conclusive upon the title to the thing, the will or administration, or the condition, status or relationship of the person; however, the probate of a will or granting of letters of administration shall only be *prima facie* evidence of the death of the testator or intestate;
>
> "(b) In other cases the judgment or order is, with respect to the matter directly adjudged or as to any other matter that Could have been raised in relation thereto, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating of the same thing and under the same title and in the same capacity;
>
> "(c) In any other litigation between the same parties or their successors in interest, that only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

"The 1939 decree of probate is conclusive as to the due execution or formal validity of the will (Sec. 625, Act. 190; Sec.

1, Rule 76, now Sec. 1, Rule 75, Rules of Court; Last par. of Art. 838, Civil Code).

"That means that the testator was of sound and disposing mind at the time when he executed the will and was not acting under duress, menace, fraud, or undue influence; that the will was signed by him in the presence of the required number of witnesses, and that the will is genuine and is not a forgery. Accordingly, these facts cannot again be questioned in a subsequent proceeding, not even in a criminal action for the forgery of the will. (3 Moran's Comments on the Rules of Court, 1970 Edition, p. 395; *Manahan vs. Manahan*, 58 Phil. 448).

"After the finality of the allowance of a will, the issue as to the voluntariness of its execution cannot be raised anymore (*Santos vs. De Buenaventura*, L-22797, September 22, 1966, 18 SCRA 47).

"In *Austria vs. Ventenilla,* 21 Phil. 180, a "petition for annulment of a will" was not entertained after the decree of probate had become final. That case is summarized as follows":

> "Wills, Probate; Alleged Fraudulent Will; Appeal V. died. His will was admitted to probate without objection. No appeal was taken from said order. It was admitted that due and legal notice had been given to all parties. Fifteen months after the date of said order, a motion was presented in the lower court to have said will declared null and void, for the reason that fraud had been practiced upon the deceased in the making of his will.
>
> "Held: That under Section 625 of Act No. 190 the only time given parties who are displeased with the order admitting to probate a will, for an appeal is the time given for appeals in ordinary actions; but without deciding whether or not an order admitting a will of probate will be opened for fraud, after the time allowed for an appeal has expired, when no appeal is taken from an order probating a will, the heirs can not, in subsequent litigation in the same proceedings, raise questions relating to its due execution. The probate of a will is conclusive as to its due execution and as to the testamentary capacity of the testator." (See *Austria vs. Heirs of Ventenilla*, 99 Phil. 1069).

"On the other hand, the 1943 decree of adjudication rendered by the trial court in the testate proceeding for the settlement of the estate of Florentino, Hitosis, having been rendered

in a proceeding *in rem,* is under the above quoted Section 49(a), binding upon the whole world (*Manalo vs. Paredes*, 47 Phil. 938; *In re Estate of Johnson*, 39 Phil. 156; *De la Cerna vs. Potot,* 120 Phil. 1361, 1364; *McMaster vs. Hentry Reissmann & Co.*, 68 Phil. 142).

"It is not only the 1939 probate proceeding that can be interposed as *res judicata* with respect to private respondent's complaint. The 1952 order of dismissal rendered by Judge Manalac in Civil Case No. 696, a judgment *in personam,* was an adjudication on the merits (Sec. 4, Rule 30, old Rules of Court). It constitutes a bar by former judgment under the aforequoted Section 49(b) (*Anticamara vs. Ong,* L-29689, April 14, 1978).

"The plaintiffs or private respondents did not even bother to ask for the annulment of the testamentary proceeding and the proceeding in Civil Case No. 696. Obviously, they realized that the final adjudications in those cases have the binding force of *res judicata* and that there is no ground, nor is it timely, to ask for the nullification of the final orders and judgments in those two cases.

"It is a fundamental concept in the organization of every jural system, a principle of public policy, that, at the risk of occasional errors, judgments of courts should become final at some definite date fixed by law. *Interest rei publicae ut finis sit litum.* "The very object for which the courts were constituted was to put an end to controversies." (*Dy Cay vs. Crossfield and O'Brien*, 38 Phil. 521; *Peñalosa vs. Tuason*, 22 Phil. 303; *De la Cerna vs. Potot, supra*.).

"After the period for seeking relief from a final order or judgment under Rule 38 of the Rules of Court has expired, a final judgment or order can be set aside only on the grounds of (a) lack of jurisdiction or lack of due process of law or (b) that the judgment was obtained by means of extrinsic or collateral fraud. In the latter case, the period for annulling the judgment is four years from the discovery of the fraud (2 Moran's Comments on the Rules of Court, 1970 Edition, pp. 245-246; *Mauricio vs. Villanueva,* 106 Phil. 1159).

"To hurdle over the obstacle of prescription, the trial court, naively adopting the theory of plaintiffs' counsel, held that the action for the recovery of the lands had not prescribed because the rule in Article 1410 of the Civil Code, that "the action or defense for the declaration of the inexistence of a contract does not prescribe", applies to wills.

"That ruling is a glaring error. Article 1410 cannot possibly apply to last wills and testaments. The trial court and plaintiff's counsel relied upon the case of *Dingle vs. Guillermo*, 48 O.G. 4410, allegedly decided by this Court, which cited the ruling in *Tipton vs. Velasco*, 6 Phil. 67, that mere lapse of time cannot give efficacy to void contracts, a ruling elevated to the category of a codal provision in Article 1410. The *Dingle* case was decided by the Court of Appeals. Even the trial court did not take pains to verify the misrepresentation of plaintiffs' counsel that the *Dingle* case was decided by this Court. An elementary knowledge of civil law could have alerted the trial court to the egregious error of plaintiffs' counsel in arguing that Article 1410 applies to wills.

"WHEREFORE, the lower court's orders of May 3 and June 17, 1968 are reversed and set aside and its order of dismissal dated January 10, 1968 is affirmed. Costs against the private respondents. SO ORDERED."

Idem; Effect upon probate of codicil. — Is the probate of a will by final judgment prior to that of a codicil thereof a bar to the probate of the codicil? This question was resolved in the negative by the Supreme Court in the following case:

Macam vs. Gatmaitan
60 Phil. 358

The records show that Nicolasa Macam filed a petition in the Court of First Instance of Bulacan for the probate of a will and a codicil. Both will and codicil were executed by Leonardo Macam. The will was admitted to probate without any opposition, but with regard to the codicil, however, an opposition to its probate was filed by Juana Gatmaitan. After hearing, the court ordered the dismissal of the petition for the probate of the codicil as well as of the opposition thereto on the ground that since the allowance of the will had already become final and executory, it was too late to consider the codicil. Both parties appealed. The appellants' assignments of error, considered together, raise the following questions of law: (1) Is the probate of a will by final judgment prior to that of a codicil thereof a bar to the probate of said codicil? (2) Does the failure to file opposition to the probate of a will deprive the oppositor of the right to oppose the probate of the codicil? The Supreme Court, speaking through Justice Villareal, held:

"The fact that a will has been allowed without opposition and the order allowing the same has become final and executory is not a bar to the presentation of a codicil, provided it complies with all the necessary formalities for executing a will.

"It is not necessary that the will and the codicil be probated together as the codicil may be concealed by an interested party and it may not be discovered until after the will has already been allowed; and they may be presented and probated one after the other, since the purpose of the probate proceeding is merely to determine whether or not the will and the codicil meet all the statutory requirements for their extrinsic validity, leaving the validity of their provisions for further consideration.

"The appeal taken by the petitioner Nicolasa Macam is, therefore, well-founded and the court a *quo* erred in flatly denying her petition for the probate of the codicil on the erroneous ground that said codicil should have been presented at the same time as the will.

"With respect to the opposition of the oppositor-appellant Juana Gatmaitan, the fact that she failed to file opposition to the probate of the will does not prevent her from filing opposition to the probate of the codicil thereof, inasmuch as the will may satisfy all the external requisites necessary for its validity, but the codicil may, at the time of its execution, not be in conformity therewith. If the testator had testamentary capacity at the time of the execution of the will, and the will was executed in accordance with all the statutory requirements, opposition to its probate would not lie. On the contrary, if at the time of the execution of the codicil, the testator lacked some of the subjective requisites legally capacitating him to execute the same, or all the statutory requirements were not complied with in the execution thereof, opposition to its probate would lie.

"The court *a quo,* therefore, erred in dismissing the opposition filed by the oppositor-appellant Juana Gatmaitan to the probate of the codicil of the will of the deceased Leonarda Macam.

"In view of the foregoing, we are of the opinion and so hold: (1) That the fact a will has been probated, the order allowing the same having become final and executory, is not a bar to the presentation and probate of a codicil although its existence was known at the time of the probate of the will; and (2) that the failure of the oppositor to the probate of a codicil to file opposition to the probate of the will having knowledge of such proceeding, does not constitute an abandonment of a right, nor does it deprive her of the right to oppose the probate of said codicil."

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.[16]

Grounds for Disallowance of Wills. — The above article enumerates the different grounds for the disallowance of wills. The same grounds are also enumerated in Sec. 9 of Rule 76 of the New Rules of Court.

These grounds are exclusive. Since the first and second grounds have already been taken up under previous articles discussed in this text, only the other grounds will be discussed here.

Idem; Violence or intimidation. — One of the grounds for the disallowance of wills is if the will was executed through force or under duress, or the influence of fear, or threats. Since there is no definition of these terms under the law on wills, the definitions of violence and intimidation found under the law on contracts can, therefore, be applied. Hence, there is violence when in order to compel the testator to execute the will, serious or irresistible force is employed, and there is intimidation when the testator is compelled by a reasonable and well-grounded fear of an imminent and grave evil upon his person or property, or upon the person or property of his spouse, descendants or ascendants, to execute the will.[17]

[16]New provision.
[17]Art. 1335, Civil Code.

Whether the violence or intimidation is employed by a beneficiary or by a stranger is immaterial. The will must be disallowed. To determine the degree of intimidation, the age, sex and condition of the person upon whom it is employed shall be borne in mind. However, if the threat or intimidation is merely to enforce one's claim through competent authority, if the claim is just and legal, the will cannot be disallowed.[18]

Idem; Undue influence. — Another ground for the disallowance of wills is if the will was procured by undue and improper pressure and influence on the part of the beneficiary or of some other person.

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.[19] Concisely stated, undue influence invalidating a will is that which substitutes the wishes of another for those of the testator. Although it has often been stated that undue influence is an unlawful influence, it appears that no more is meant by the expression "unlawful influence," as used in this connection, than that it is the influence which deprives the testator of his free agency.[20]

No influence upon the testator is sufficient to invalidate a will unless it was directly connected with the execution of the instrument by the testator and was present and operating directly upon the mind of the testator so as to control the disposition of his property under the will. As stated by most authorities, to destroy the validity of a will the undue influence must be specially directly on the testamentary act, so that its effect may be registered there to the benefit of some persons and a corresponding detriment to others. A general influence over the testator, although strong and controlling, is not such undue influence as invalidates a will unless, it is brought to bear upon the testamentary act.[21]

Not every influence exerted by a beneficiary or a third person over the testator inducing him to make a will is an undue influence, authorizing the setting aside of the will. The law recognizes that

[18]Arts. 1335, 1336, Civil Code.
[19]Art. 1337, Civil Code.
[20]57 Am. Jur., Sec. 350, p. 258.
[21]Ibid., Sec. 352, p. 259.

a testator may act out of a sense of obligation to family or friends, even though his feelings in this respect are quickened by acts of kindness toward him, without having his will invalidated on the ground of undue influence. To establish undue influence it must be shown that the influence exerted upon the testator was such as to amount to force, coercion, or importunities which he could not resist. It is impossible to distinguish by arbitrary rule fitting all cases between that which is within the bounds of legitimate influence and that which makes the influence undue.[22] The following facts must 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 ignorance or in financial distress.[23] Thus, in *Barretto vs. Reyes,*[24] where the question that had to be resolved was whether or not the importunities employed by a daughter upon her mother to change her will constitutes undue influence so as to invalidate the will, the Supreme Court declared:

> "In our opinion, the alleged effort of Lucia Milagros Barretto in convincing her mother to change her will so as to leave all her properties to Milagros were legitimate. The alleged importunities merely constituted fair arguments, persuasion, appeal to emotions, and entreaties which, without fraud or deceit or actual coercion, compulsion or restraint, do not constitute undue influence sufficient to invalidate a will. Indeed, it was natural and proper for Milagros to exercise some influence over her mother. 'It is not enough to establish undue influence that the testator has been persuaded to make his will; it must be shown that he made his will under coercion, compulsion, or restraint, so that in fact the instrument does not represent his own wishes. A person has a right, by fair argument, persuasion, or appeal to the emotions, to induce another to make a will, and even to make it in his own favor, and such persuasion or argument addressed to the judgment or affections, in which there is no fraud or deceit, does not constitute undue influence. Moderate and reasonable solicitation and entreaty addressed to the testator do not constitute undue influence. Moderate and reasonable solicitation and entreaty addressed to the testator do not constitute undue influence even though they induce the

[22]Ibid., Sec. 357, pp. 261-262.
[23]Art. 1337, Civil Code.
[24]98 Phil. 996 (unrep.)

testator to make the kind of a will requested, if he yields intelligently and from a conviction of duty. Even earnest entreaty and persuasion may be employed upon the testator without affecting the validity of the will so long as they are not irresistible, (57 Am. *Jur., Wills, Sec. 361, pp. 264-265).*

"The influence of a child or spouse to make a will in their favor, in the absence of a showing that it was improperly exercised, does not vitiate the will, even though there may be proof that such a provision would not have been made but for such importunity. Indeed, it has been held to be natural and proper that persons occupying family relations should exercise some influence over each other and should remember each other in their wills." *(68 C.J., Wills, Sec. 442, p. 752).*

It can, therefore, be stated as a rule that every case wherein undue influence is an issue must be viewed in its own particular setting of fact, since in one case it takes but little to unduly influence another, while in another case it takes much more.[25]

Be that as it may, the following summary of the basic principles of undue influence as a ground for the disallowance of wills made by the Supreme Court in a recent case[26] should always be remembered:

"It is worthwhile to recall the basic principles on undue pressure and influence as laid down by the jurisprudence of this Court: that to be sufficient to avoid a will, the influence exerted must be of a kind that so overpowers and subjugates the mind of the testator as to destroy his free agency and make him express the will of another rather than his own (*Coso vs. Fernandez Deza,* 42 Phil. 596; *Icasiano vs. Icasiano*, L-18979, 30 June 1964; *Teotico vs. Del Val,* L-18753, 26 March 1956); that the contention that a will was obtained by undue influence or improper pressure cannot be sustained on mere conjecture or mere suspicion, as it is not enough that there was opportunity to exercise undue influence, or a possibility that it might have been exercised (*Ozaeta vs. Cuartero*, L-5597, 31 May 1956); that the exercise of improper pressure and undue influence must be supported by substantial evidence that it was actually exercised *(Ozaeta vs. Cuartero, ante; Teotico vs. Del Val, ante; Teotico vs. Del Val, ante);* that the burden is on the person challenging the

[25]57 Am. Jur., Sec. 357, p. 262.
[26]Pascual vs. De la Cruz, No. L-24819, May 30, 1969, 28 SCRA 421.

will to show that such influence was exerted at the time of its execution *(Teotico vs. Del Val, ante)* that mere general or reasonable influence is not sufficient to invalidate a will *(Coso vs. Fernandez, Deza, ante);* nor is moderate and reasonable solicitation and entreaty addressed to the testator (*Barretto vs. Reyes,* L-5830-31, 31 January 1956), or omission of relations, not forced heirs, evidence of undue influence (*Bugnao vs. Ubay*, 14 Phil. 163; *Pecson vs. Coronel*, 45 Phil. 415)."

Coso vs. Fernandez Deza
42 Phil. 585

This is an appeal from a decision of the lower court setting aside a will on the ground of undue influence alleged to have been exerted over the mind of the testator by one Rosario Lopez. The evidence shows that the testator, a married man, became acquainted with Rosario Lopez in Spain in 1898 and that he had illicit relations with her for several years thereafter. After his return to the Philippines, she followed him, and remained his mistress until his death in 1919. In his will, the *tercio libre disposicion* is given to their illegitimate son, while a certain sum of money is given to Rosario Lopez as payment for expenses incurred when he was sick in Spain. The oppositor claims that the will is invalid because it was procured by undue influence. The Supreme Court, speaking through Justice Ostrand, held:

"The burden is upon the parties challenging the will to show that undue influence existed at the time of its execution, and we do not think that this burden has been carried in the present case. While it is shown that the testator entertained strong affections for Rosario Lopez, it does not appear that her influence so overpowered and subjugated his mind as to 'destroy his free agency and make him express the will of another rather than his own.' He was an intelligent man, a lawyer by profession, appears to have known his own mind, and may well have been actuated only by a legitimate sense of duty in making provisions for the welfare of his illegitimate son and by a proper feeling of gratitude in repaying Rosario Lopez for the sacrifices she had made for him. Mere affection, even if illegitimate, is not undue influence and does not invalidate a will.

"For the reasons stated, the decision of the lower court disallowing the will of Federico Gimenez Zoboli is hereby reversed and it is ordered that the will be admitted to probate."[27]

[27]See also Sancho vs. Abella, 59 Phil. 728; Hilado vs. Ponce de Leon, CA, 50 Off. Gaz. 222; Barretto vs. Reyes, 98 Phil. 996 (unrep.)

Idem; Fraud. — Another ground for the disallowance of wills is if the signature of the testator was procured by fraud.

Fraud is present to invalidate a will if by misrepresentation and deception the testator is led into making a will different from what he would have made but for the misrepresentation and deception.[28] Fraud invalidating a will is said to be any trick, deception, or artifice by which the testator is so circumvented, cheated, or deceived as to fall into error respecting the disposition of his property. If the testator, under a belief of the truth of false and fraudulent statement made to him, is influenced by them, and makes a will disinheriting one who, but for the testator's belief in the truth of such false statements, would have been provided for in it, the will is the product of fraud and subject to be declared invalid on that ground. But intent to deceive the decedent is an essential element of fraud avoiding a will in the absence of any element of undue influence. Moreover, to invalidate a will it must have affected the testator in the very act of making his will and at the time the will was executed.[29]

Fraud in the sense of deceit is a ground of contest separate and distinct from that of undue influence. To make a case of undue influence, the free agency of the testator must be shown to have been destroyed; but to establish a ground of contest based on fraud, the free agency of the testator need not be shown to have been destroyed. It has been observed that fraud and undue influence are usually the very opposites of each other. Undue influence compels the testator to yield through fear and make a will which he would instantly repudiate if free and unconstrained, while fraud, although it may poison the mind of the testator, leads him to use his testamentary power not only willingly, but often with pleasure and satisfaction, to disinherit persons who have the strongest natural claims upon his affections. Concisely stated, fraud willfully deceives free agency, while undue influence overmasters it.[30]

Idem; Mistake. — Another ground for the disallowance of wills is if the testator acted by mistake or did not intend that the

[28]See definition of fraud as applied to contracts in Art. 1338, Civil Code.
[29]57 Am. Jur., Sec. 371, p. 270.
[30]Ibid., Sec. 370, pp. 269-270.

instrument he signed should be his will at the time of affixing his signature thereto.

In American jurisdiction, it is well-settled that mistake which will invalidate a will is a mistake as to the identity or character of the instrument which he signed, as well as a mistake as to the contents of the will itself. These mistakes are generally known as mistakes in the execution.[31] Hence, a will should not be denied probate merely because the testator was mistaken in his appreciation of the effect of the language thereof. Mistakes in the expression, as distinguished from mistakes in the execution, do not invalidate a will. As stated by one court —"It is against sound public policy to permit a pure mistake to defeat the duly solemnized and completely competent testamentary act. It is more important that the probate of wills of dead people be shielded effectively from the attacks of a multitude of fictitious mistakes than that it be purged of wills containing a few real ones. The latter a testator may by due care avoid in his lifetime. Against the former he would be helpless."[32]

Effect of Disallowance. — A decree in the solemn form rendered by a court having jurisdiction of a probate proceeding, is conclusive on the parties equally when the decree rejects the will and when it grants probate. Where an instrument purporting to be a will is propounded for probate by an authorized person, and there is a decree of the probate court, fairly obtained and pronounced on the merits, excluding the paper from probate, such decree is conclusive of the rights of the parties represented in the proceeding to propound the will for probate, either in the same or in another tribunal. Such a decree stands upon a footing analogous to a judgment *in rem*.[33]

Ratification. — Granting that the will should be disallowed under any of the grounds stated in Art. 839, would it be possible for the testator, before promulgation of the decree of disallowance, to ratify the will? It is submitted that our answer to this question should be qualified. With respect to a will which is void because of non-compliance with the formalities prescribed by law, ratification is not possible. That which is void or inexistent is not susceptible of ratification. Consequently, the only way by which such will

[31]See Page on Wills, Vol, I, p. 323.
[32]Re Gluckinan, 87 N.J. Eq. 638.
[33]57 Am. Jur., Sec. 935, pp. 615-616.

may be validated would be for the testator to republish the same in accordance with Art. 835 of the Code. However, with respect to a will which was executed through violence, intimidation, undue influence, fraud or mistake, since we cannot exactly say that the will is void or inexistent, ratification is possible. Thus, in *Ozaeta vs. Cuartero,*[34] it was held that the testator's failure to revoke or otherwise alter the questioned will as soon as he left the house of the person who is alleged to have unduly influenced him and moved to his own house where he lived up to five years after execution of the will, constitutes a silent ratification of its contents and refutes the claim of undue influence and improper pressure, even supposing that these circumstances were duly proved.

Section 2. — Institution of Heirs

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.[1]

Concept of Institution of Heirs. — The definition of institution of heir which is found in Art. 840 of the Code is a literal translation of Manresa's definition. According to the eminent commentator – *"La institucion de heredero es al acto en virtud del cual el estador designa la persona o personas que han de sucederle en sus derechos, acciones y obligaciones."*[2]

The fundamental basis of the law of testamentary succession is the doctrine that the will of the testator, freely expressed in his last will and testament, is, as a general rule, the supreme law which governs the succession. Undoubtedly, in order that such will shall have any effect, it must be manifested in a manner which is clear and precise. Consequently, all legislations have always imposed upon the testator the duty to designate his heirs in such a manner as to leave no doubt with regard to his intent.[3]

[34]99 Phil. 1041 (unrep.).

[1]New provision.
[2]6 Manresa, 7th Ed., p. 106.
[3]6 Manresa, 7th Ed., p. 108.

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.[4]

Effect of Lack of Institution. — In Roman law, it was considered ignominious to die without an heir. This attitude was of course a natural consequence of the principle that the heir is by legal fiction the continuation of the personality of the decedent. Consequently, the institution of heir was considered an essential part of a will. This antiquated rule, however, has long been discarded in Spanish law. Under Art. 764 of the Spanish Civil Code, from which Art. 841 of our Code is derived, the rule is that a will shall be valid although it may not contain an institution of heir. The same is true in case of a partial institution or in case of a vacancy in the inheritance due to repudiation or incapacity. The effect in all of these cases is that the testamentary dispositions which are made in accordance with law shall be complied, while the remainder shall pass to the legal heirs in accordance with the law of intestate succession. In other words, there is what is known as mixed succession.

Art. 842. 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.

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.[5]

Freedom of Disposition. — Art. 842 of the Code is a general provision which defines or delineates the testator's freedom of disposition depending upon whether or not he has compulsory heirs.

[4]Art. 764, Spanish Civil Code.
[5]Art. 763, Spanish Civil Code.

It is evident from the first paragraph of the article that if the testator has no compulsory heirs, his freedom of disposition is absolute in character. The whole estate is disposable. He can, therefore, dispose of the whole of his estate or any part of it in favor of any person, provided that such person has the capacity to succeed. Thus, in *Pecson vs. Coronel,*[6] the Supreme Court declared:

> "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. It is so provided in the first paragraph of Article 763 *(now Art. 842).*
>
> "Even ignoring the precedents of this legal precept, the Code embodying it has been in force in the Philippines for more than a quarter of a century, and for this reason it is not tenable to say that the exercise of the liberty thereby granted is necessarily exceptional, where it is not shown that the inhabitants of this country whose customs must have been taken into consideration by the legislator in adopting this legal precept, are averse to such a liberty."

If the testator has compulsory heirs, his freedom of disposition is not absolute in character. This is so, because under our system of compulsory succession, there is always a portion of the testator's estate known as the legitime which is reserved by operation of law for the benefit of certain heirs who are therefore called compulsory heirs,[7] and over which the testator as a general rule can have no testamentary control. The rule may be illustrated by a person who has a wife and only one legitimate child. According to the law on legitimes, the legitime of the child is one-half of the entire estate, that of his surviving spouse is one-fourth, while the remainder is free or disposable.[8] In such a case, it is evident that if he makes a will, he can dispose of in favor of any person with capacity to succeed only one-fourth of his entire estate. As a matter of fact, if in addition to the two above-mentioned compulsory heirs, the testator has one or more acknowledged natural children, we would have a case in which nothing would be left of the disposable free portion since according to the law, the legitime of an acknowledged natural child is equal

[6]45 Phil. 216.
[7]Art. 886, Civil Code.
[8]Arts. 888, 892, Civil Code.

to one-half of the legitime of a legitimate child.[9] In such a case, he would not be able to dispose of any part of his estate in favor of any person whom he would desire to succeed from him after his death.

It is, therefore, evident that if the testator has compulsory heirs, his freedom of disposition shall extend only to the disposable free portion of his estate, but not to the legal portion or legitime. According to the law, such legal portion or legitime is reserved for compulsory heirs. Consequently, the testator as a rule has no testamentary control over it; neither can he as a rule impair it. This untouchable character of the legitime is not only deducible from the second paragraph of Art. 842, but is expressly stated in other articles of the Code. Thus, according to 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." The only case in which the testator may, by his own act, deprive a compulsory heir of his legitime is by means of disinheritance for causes expressly stated by law,[10] while the only case in which the law recognizes a right of the testator to impose a charge upon the legitime is when it allows the said testator to prohibit the partition of the entire estate including the said legitime for a period which shall not exceed twenty years.[11]

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.[12]

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.

[9]Art. 895, Civil Code.
[10]Art. 915, Civil Code.
[11]Art. 1083, Civil Code.
[12]Art. 772, Spanish Civil Code.

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 proofs, the person instituted cannot be identified, none of them shall be an heir.[13]

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.[14]

Form of Institution. — The reason for the precept contained in the first paragraph of Art. 843 can easily be inferred from the fact that, under Art. 845 of the Code, dispositions in favor of an unknown person shall be void, unless by some event or circumstance his identity becomes certain. Therefore, in order to avoid such nullity, the law recommends that the designation should be made in the form indicated in the first paragraph of Art. 843. This form, however, is not mandatory. The designation may be made in any other form, so long as there will be no doubt as to the identity of the heir or heirs instituted.[15]

Validity of Institution. — The provisions of Arts. 843 and 844 should be applied in relation to the provision of Art. 789 of the Code. According to the latter article, 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. From these provisions it is clear that the proper test in order to determine the validity of an institution of heir is the possibility of finally ascertaining the identity of the instituted heir either by intrinsic or extrinsic evidence. This test is specially applicable to the following cases:

[13]Art. 773, Spanish Civil Code, in modified form.
[14]Art. 750, Spanish Civil Code, in modified form.
[15]6 Manresa, 7th Ed., p. 135.

(1) If the name and surname of the instituted heir has been omitted by the testator;[16]

(2) If there has been an error with respect to the name, surname, or circumstances of the instituted heirs;[17]

(3) If the name, surname, and circumstances of the instituted heir are the same as those of other persons ;[18] and

(4) If an unknown or uncertain person has been instituted.[19]

Idem; Dispositions in favor of unknown persons. — Although there is a difference in terminology between Art. 845 and the preceding article (Arts. 843 and 844) in the sense that, while the first refers to testamentary dispositions in general, the others refer merely to institutions of heirs, there is really no logical reason why any distinction should be made with respect to their scope or applicability. It is evident that the rules or precepts which are contained in all of these articles are applicable to designations of devisees and legatees as well as to institutions of heirs.

An unknown person *(persona incierta)* is one who is not determined or individualized and, therefore, cannot be identified. According to Art. 845, a disposition in favor of such person shall be void, unless by some event or circumstance his identity becomes certain. The article, therefore, states not only the general rule, but also the exception. Thus, if the testator institutes as his heirs "a group of veterans" or "some members of the bar" or "lovers of art" — it is evident that the institution shall be void, since there would be no possibility of ascertaining the identity of the instituted heirs. But if he institutes as his heir the person who saved his life during the last battle at Corregidor, or if he devises a certain house and lot to the present chief or head of a certain labor movement in Manila, or if he bequeaths his law library to the bar candidate who will top the first bar examination after his death — the institution, devise or legacy shall be valid, since it is possible to ascertain the identity of the designated heir, devisee or legatee either by a past, present or future event or circumstance.

[16]Art. 843, Civil Code.
[17]Art. 844, Civil Code.
[18]Art. 844, Civil Code.
[19]Art. 845, Civil Code.

Notwithstanding the general character of the exception, nevertheless, it may happen that the institution or disposition may not become effective even if the person instituted may turn out to be a certain or determinate person. This arises when the testator institutes as his heir any person designated by another person. By this disposition there is in reality a delegation to another person of the power to designate the instituted heir, and since this is prohibited by the provision of Art. 785, it is null and void.[20]

It is, therefore, clear that before the disposition can be considered valid, it is indispensable that the identity of the beneficiary can be ascertained either by a past, present or future event or circumstance. It must, however, be noted that his requisite is predicated on the fact that the beneficiary must be in existence at the time of the testator's death. Otherwise, even if it would be possible to determine his identity by some event or circumstance, the disposition would still be ineffective on the ground of absolute incapacity.[21]

Idem; Dispositions in favor of definite class. — Dispositions in favor of a definite class or group of persons are of course valid, although the particular persons comprising the specified class or group may be unknown. The second sentence of Art. 845 which recognizes the validity of such dispositions is complemented by the provisions of Arts. 786 and 1030 of the present Civil Code.

Art. 846. Heirs instituted without designation of shares shall inherit in equal parts.[22]

Institutions Without Designation of Shares. — The express or presumed will of the testator is the law which governs the succession. This principle which pervades the entire law of succession is reflected in the precept which is enunciated in Art. 846. If several heirs are instituted without designation of shares, the law presumes that the intention or wish of the testator is that they shall all inherit in equal shares. This rule, however, should not be interpreted in an absolute manner. On the contrary, it should be limited only to the case where all of the heirs are of the same class or juridi-

[20]6 Manresa, 7th Ed., p. 40.
[21]See Art. 1025, Civil Code.
[22]Art. 765, Spanish Civil Code.

cal condition, and where there are compulsory heirs among the heirs instituted, it should be applied only to the disposable free portion.[23]

These limitations upon the scope of the article are logical, because if we apply the rule in an absolute manner, the division of the inheritance in equal shares might actually result in the impairment of the legitimes of compulsory heirs, a result which would violate one of the most fundamental principles of testamentary succession. Such a consequence may be illustrated by a testator who institutes his legitimate child, his wife and a friend as his heirs without designating their respective shares. The child and the wife are compulsory heirs, while the friend is a voluntary heir. To hold that the inheritance shall be divided into three equal parts in accordance with the literal tenor of the provision of Art. 846 would result in the impairment of the legitime of the child which, according to the law, is one-half of the entire inheritance. Consequently, the only possible recourse is to satisfy the legitimes which correspond to the compulsory heirs and then apply the rule stated in Art. 846 with respect to the disposable free portion, which in the example given is one-fourth of the entire inheritance. In other words, the proper interpretation of the rule stated in the article is as follows: If the testator has no compulsory heirs, apply the provision literally; however, if he has compulsory heirs, first satisfy their legitime, then apply the provision with respect to the disposable free portion.

> *Problem* — "A" instituted "B" (his son) and his brothers "C" and "D" as his heirs to an estate of P600,000. Distribute the estate. Reasons. (1972 Bar Problem)
>
> *Answer* — Art. 846 of the Civil Code, which declares that heirs instituted without designation of shares shall inherit in equal parts, is applicable. It must be noted, however, that one of the instituted heirs ("B") is a compulsory heir while the other two ("C" and "D") are voluntary heirs. All commentators in this country agree that the rule enunciated in Art. 846 is applicable only to the disposable free portion and not to the legitime of compulsory heirs. Therefore, the estate of P600,000 of "A" shall be divided as follows: "B," being the son of the testator, shall be given his legitime of 1/2 of the estate, or P300,000. That leaves a disposable free portion of 1/2 of the estate, or P300,000. It is this portion which will be divided in equal parts among the three

[23]236 Manresa, 7th Ed., pp. 116-117.

instituted heirs pursuant to Art. 846 of the Civil Code. Thus, the division will be as follows:

"B".....	P 300,000,	as compulsory heir
	100,000,	as voluntary heir
"C".....	100,000,	as voluntary heir
"D"	100,000,	as voluntary heir
	P 600,000	

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.[24]

Individual and Collective Institutions. — In the absence of a more specific designation, the law presumes that those who are collectively designated shall be considered as individually instituted in accordance with the presumed will of the testator. Thus, if the testatrix institutes as her universal heirs all of her sisters and nieces, and after her death, there are several nieces concurring with several sisters, and some of them are children of sisters who are still living, it was held that all of such sisters and nieces are considered as individually instituted.[25]

The following problem will illustrate the application of the above article:

Problem — A died in 1980. He left a will which contains the following institution of heirs: "I designate as my heirs my son B, my daughter C, the children of my deceased son D, and my friend X." D, who died in 1969, is survived by his three legitimate children E, F and G. The net residue of A's estate is P180,000. How shall the distribution be made?

Answer — The provisions of Arts. 846 and 847 of the New Civil Code are applicable to the instant case. Manresa, commenting on Art. 846, maintains that where there are compulsory heirs among the heirs instituted, the rule that the heirs shall inherit in equal parts should be applied only to the dispos-

[24]Art. 769, Spanish Civil Code, in modified form.
[25]Nable Jose vs. Uson, 27 Phil. 73.

able free portion (6 Manresa, 7th Ed., pp. 116-117). Correlating this with the provision of Art. 847, the distribution of the estate shall be as follows:

First satisfy the legitime of B, C, E, F, and G. B and C shall be entitled to P30,000 each, in their own right, while E, F and G shall be entitled to P10,000 each, by right of representation (Arts. 888, 902, Civil Code). The disposable free portion of P90,000 will then be divided equally among the instituted heirs B, C, E, F, G, and X. Therefore, the shares of each will be:

B	–	P30,000,	as compulsory heir
		15,000,	as voluntary heir
C	–	P30,000,	as compulsory heir
		15,000,	as voluntary heir
E	–	P10,000,	by right of representation
		15,000,	as voluntary heir
F	–	P10,000,	by right of representation
		15,000,	as voluntary heir
G	–	P10,000,	by right of representation
		15,000,	as voluntary heir
X	–	P15,000,	as voluntary heir
		180,000	

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.[26]

Institution of Brothers and Sisters. — Under Art. 770 of the old Civil Code, each of the brothers and sisters of the full blood were given twice as much as each of those of the half blood, while under Art. 848 of the present Civil Code, there is no discrimination whatsoever. In case of intestate succession, however, 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.[27]

[26]Art. 770, Spanish Civil Code, in modified form.
[27]Art. 1006, Civil Code.

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.[28]

Institution of a Person and His Children. — Whenever the testator institutes as his heirs a certain person and his children, such institution must be interpreted to mean that they are all called to the succession simultaneously and not successively. Thus, if the testator institutes "A" and his five children as his heirs with respect to the disposable free portion of the inheritance, it is clear that such disposable portion shall be divided equally among "A" and the five children.

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.[29]

Institution Based on a False Cause. — If in the will there is statement of a false cause for the institution of an heir, such statement shall be considered as not written, unless it appears from the will that the testator would not have instituted such heir if he had known of the falsity of such cause. Consequently, if the validity of an institution of heir is attacked on the ground that it is based on a false cause, it is clear that the test which must be applied in order to resolve the question is to determine from the will itself whether or not the testator would not have made the institution had he known of the falsity of such cause.

Before the institution of heirs may be annulled under Art. 850 of the Civil Code, the following requisites must concur: *First,* the cause for the institution of heirs must be stated in the will; *second,* the cause must be shown to be false; and *third,* it must appear from the face of the will that the testator would not have made such institution if he had known of the falsity of the cause. Consequently, where the testator's will does not state in a specific or unequivocal manner the cause for such institution, the annulment of such institution cannot be availed of.[30]

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[28]Art. 771, Spanish Civil Code.
[29]Art. 767, Spanish Civil Code, in modified form.
[30]Austria vs. Reyes, 31 SCRA 754.

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.[31]

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 portions, 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 proportionally.[32]

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.[33]

Institutions in Aliquot Parts. — Arts. 851 and 852 refer to those institutions where the testator has instituted one or more persons as heirs to inherit in aliquot parts, but such parts are not sufficient to cover the entire inheritance, or the entire free portion while Art. 853 refers to those institutions where the testator has instituted several persons as heirs to inherit in aliquot parts, but such parts taken together exceed the entire inheritance, or the entire free portion, as the case may be.

Idem; Rule if entire inheritance not covered. — According to the first paragraph of Art. 851, if the testator has instituted only one heir, and the institution is limited to an aliquot part, legal succession takes place with respect to the remainder of the estate. There will, therefore, be what is known as a mixed succession. Thus, if the testator institutes A to 1/2 of the inheritance and there are no other heirs instituted, A shall receive 1/2 of the estate upon the

[31]New provision.
[32]New provision.
[33]New provision.

death of the testator, while the other half shall pass to the legal heirs.

The same rule also applies if the testator has instituted several heirs each being limited to an aliquot part. Thus, if the testator institutes A to 2/5 of the inheritance, B to 1/5, and C to 1/5, there will still be a remainder of 1/5 which shall pass to the legal heirs.

The rule, however, is different if it was the intention of the testator that the instituted heirs should become sole heirs of the entire estate, or the whole free portion, as the case may be. In such case, according to Art. 852, each part shall be increased proportionally. It is, therefore, evident that the rule stated in Art. 852 constitutes an exception to the rule stated in the second paragraph of Art. 851. It enunciates the principle that when there is a conflict between the intention of the testator and his mathematical computation, the former shall prevail. The following problem will serve to illustrate the rule:

Problem — The testator institutes A to 1/3 of the entire inheritance, B to 1/4, and C to 1/4, with the intention that all of them shall become the sole heirs of the whole estate. The net remainder of the estate after the death of the testator is P120,000. How much is the share of each of the instituted heirs?

Solution — Before we can compute the share of each of the instituted heirs, each aliquot part to which each heir was instituted shall have to be increased proportionately. According to the institution, A shall receive 1/3 of P120,000, or P40,000, B, 1/4 of P120,000, or P30,000, and C, 1/4 of P120,000, or P30,000, the aggregate amount of which is P100,000, which is less by P20,000 than the aggregate amount available for distribution. It is this amount of P20,000 which shall be distributed proportionately among the three heirs. The method which is used may be:

Arithmetical: Since the proportion in which A, B, and C had been instituted is 4:3:3, respectively, therefore, A shall be entitled to an additional 4/10 of P20,000 or P8,000, B to an additional 3/10 of P20,000, or P6,000, and C to an additional 3/10 of P20,000, or P6,000. Thus, A shall be entitled to a total amount of P48,000, B, to a total amount of P36,000, and C, to a total amount of P36,000.

Algebraic: The formula may be stated as follows: The increased share of an heir is equal to the aggregate amount avail-

able for distribution multiplied by the amount of the share of the heir given by the testator divided by the aggregate amount given to all. Thus —

$$\text{Share of A} = \frac{\text{P120,000 x P40,000}}{\text{P100,000}} = \text{P48,000}$$

$$\text{Share of B} = \frac{\text{P120,000 x P30,000}}{\text{P100,000}} = \text{P36,000}$$

$$\text{Share of C} = \frac{\text{P120,000 x P30,000}}{\text{P100,000}} = \text{P36,000}$$

Idem; Rule if more than inheritance covered. — If the aliquot parts are in excess of the entire inheritance, or the free portion, as the case may be, each part shall be reduced proportionately. The following problem will serve to illustrate this rule:

Problem — The testator institutes as his universal heirs A, B, C, and D. According to the institution, A shall inherit 1/2 of the entire inheritance, B, 1/3, C, 1/4, and D, 1/6. The net remainder of the entire inheritance after the death of the testator is P120,000. How much is the share of each of the instituted heirs?

Solution — Before we can compute the share of each of the instituted heirs, each aliquot part to which each heir was instituted shall have to be decreased proportionately. According to the institution, A shall receive 1/2 of P120,000, or P60,000, B, 1/3 of P120,000, or P40,000, C, 1/4 of P120,000, or P20,000, and D, 1/6 of P120,000, or P20,000, the aggregate amount of which is P150,000, which is more by P30,000 than the aggregate amount, available for distribution.

Arithmetical — Since the proportion in which the four heirs had been instituted is 6:4:3:2, therefore, A's share of P60,000 shall be reduced by 6/15 of P30,000, or P12,000; B's share of P40,000 shall be reduced by 4/15 of P30,000, or P8,000; C's share of P30,000, or shall be reduced by 3/15 of P30,000, or P6,000; and D's share of P20,000 shall be reduced by 2/15 of P30,000, or P4,000. Thus, A shall be entitled to only P48,000, B, to only P32,000, C, to only P24,000, and D, to only P16,000. The total amount will, therefore, be P120,000.

Algebraic — Using the same formula stated above the inheritance shall be distributed as follows:

$$\text{Share of A} = \frac{\text{P120,000 x P60,000}}{\text{P150,000}} = \text{P48,000}$$

$$\text{Share of B} = \frac{\text{P120,000 x P40,000}}{\text{P150,000}} = \text{P32,000}$$

$$\text{Share of C} = \frac{\text{P120,000 x P30,000}}{\text{P150,000}} = \text{P24,000}$$

$$\text{Share of D} = \frac{\text{P120,000 x P20,000}}{\text{P150,000}} = \text{P16,000}$$

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.[34]

Preterition of Heirs. — Preterition or pretermission of heirs may be defined as the omission in the testator's will 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. Stated in another way, it consists in the omission in the testator's will of the compulsory heirs in the direct line, or of anyone or some of them, either because they are not mentioned therein, or though mentioned they are neither instituted as heirs nor expressly disinherited.[35] Hence, the omission may be voluntary or involuntary, intentional or unintentional, although, as the Supreme Court once stated, "preterition, generally speaking, is due merely to mistake or inadvertence."[36]

Preterition must not be confused with disinheritance. The latter refers to the deprivation of a compulsory heir of his legitime

[34]Art. 814, Spanish Civil Code, in modified form.

[35]6 Manresa, 7th Ed., p. 424; 14 Scaevola, 360-361.

[36]Neri vs. Akutin, 72 Phil. 322; Nuguid vs. Nuguid, G.R. No. L-23445, June 23, 1966, 17 SCRA 449; Aznar vs. Duncan, G.R. L-24365, June 30, 1966, 17 SCRA 590.

for causes expressly stated by law.[37] The essential difference between the two consists in the fact that in the former the deprivation of a compulsory heir of his legitime is tacit or implied, while in the latter the deprivation is express.[38]

Requisites of Preterition. — In order that there will be a preterition as contemplated in Art. 854 of the Code, the following requisites must appear:

(1) The heir omitted must be a compulsory heir in the direct line;

(2) The omission must be complete and total in character in such a way that the omitted heir does not and has not received anything at all from the testator by any title whatsoever; and

(3) The compulsory heir omitted should survive the testator.

Idem; Character of omitted heir. — The first and most evident requisite of preterition is that the heir omitted must be a compulsory heir in the direct line. The interpretation that should be given to the phrase *compulsory heirs in the direct line* has been the subject of discussion among Spanish commentators since the Spanish Code was promulgated in 1889. The question is whether "compulsory heirs in the direct line" as contemplated by Art. 854 should include members of the illegitimate family or not. More specifically, as applied to our Code, shall the preterition of an acknowledged natural child, or a natural child by legal fiction, or an acknowledged illegitimate child who is not natural also result in the total annulment of the institution of heir as in the case of the preterition of a legitimate child? Spanish authorities are divided in their answers to this question.

According to some commentators, the preterition contemplated by Art. 814 *(now Art. 854)* is limited only to the omission of legitimate descendants or ascendants in the testator's will on the ground that it is only these heirs who are entitled as a matter of right to their legitime, while illegitimate children are entitled only as a matter of grace since their legitime must always be satisfied from the free portion; consequently, if an acknowledged natural child for in-

[37]Art. 915, Civil Code.
[38]6 Manresa, 7th Ed., 424.

stance is omitted in the testator's will, the only effect is to annul the institution of heir to the extent that his legitime is prejudiced.[39]

Other commentators, on the other hand, believe that since Art. 814 *(now Art. 854)* does not make any qualification or distinction whatsoever, it is immaterial whether the heir omitted in the testator's will is legitimate or illegitimate provided that he is a compulsory heir in the direct line; consequently, the preterition of an acknowledged natural child shall result in the total annulment of the institution of heir.[40] We believe that this view, which is supported by the great majority of Spanish Commentators, is more sound. As a matter of fact, this was the view which was applied by the Supreme Court in *Lajom vs. Leuterio,*[41] a case which was decided in 1960.

Hence, compulsory heirs in the direct line are: (a) legitimate children and descendants, with respect to their legitimate parents and ascendants; (b) legitimate parents and ascendants, with respect to their legitimate children and descendants; (c) acknowledged natural children, and natural children by legal fiction; (d) other illegitimate children referred to in Article 287 (under the Family Code, (c) and (d) are all classified as illegitimate children); and (e) the father or mother of illegitimate children of the three classes mentioned.[42] It must be observed that the surviving spouse is not included. This is rather regrettable considering the fact that under the present Civil Code, the surviving spouse has been raised to the same category as the other compulsory heirs. Under the Spanish Civil Code, the preterition of the widower or widow does not annul the institution of heir; nevertheless, he or she retains his or her usufructuary rights as provided by law.[43] Although there is no provision in the present Code regarding the effect of the preterition of the widower or widow, it is clear that it shall likewise result in the annulment of the institution of heir to the extent that his or her legitimate is prejudiced.

> *Problem* — X died leaving a will wherein he instituted as his heirs his three daughters, A, B and C without designating their shares. His widow, W, is omitted without being disinher-

[39]See 14 Scaevola, 361-363.
[40]See 6 Manresa, 7th Ed., p. 425; 6 Sanchez Roman 1136-1137.
[41]107 Phil. 651. But see Escuin vs. Escuin, 11 Phil. 322.
[42]See Art. 887, Civil Code.
[43]Art. 814, par. 2, Civil Code.

ited. In the will, X also bequeathed a legacy of P20,000 to A. The net value of his estate is P240,000. How shall such estate be distributed?

Answer — It must be observed that the omission of W in X's will does not constitute preterition within the meaning of Art. 854 of the Civil Code. The reason is obvious. She is not a compulsory heir in the direct line. Therefore, the only effect of her omission is a partial annulment of the institution of heirs to the extent that her legitime is prejudiced; in other words, she is still entitled to her legitime. Thus, the legitime of A, B and C is 1/2 of the entire estate of P240,000, or P120,000, or P40,000 each, while the legitime of W is the same as that of each of the legitimate children, or P40,000 also. Consequently, the disposable free portion is P80,000. It is clear that the legacy of P20,000 given to A is not inofficious because it can easily be contained in said disposable free portion. Therefore, it must be paid to her thus leaving a balance of P60,000. This balance shall then be divided equally among A, B and C in accordance with the testator's will. The distribution shall, therefore, be as follows:

A.....	P40,000,	as compulsory heir
	20,000,	as voluntary heir
	20,000,	as legatee
B.....	P 40,000,	as compulsory heir
	20,000,	as voluntary heir
C.....	P 40,000,	as compulsory heir
	20,000,	as voluntary heir
W.....	P 40,000,	as compulsory heir

How about an adopted child. — Will the omission of such child in the testator's will have the effect of totally annulling the institution of heirs in accordance with Art. 854? Our answer to this question depends upon whether an adopted child can be considered a compulsory heir in the direct line or not. It is submitted that an adopted child is by legal fiction considered a compulsory heir in the direct line. This is clear from the provisions of Arts. 979 and 984 which speak of the share of the adopted child in legal or intestate succession. These provisions fall under the subsection of *Descending Direct Line*. So, from the viewpoint of statutory construction, an adopted child is considered a member of the direct descending line and, therefore, must be classified as a compulsory heir in the direct line. Besides, since an adopted child is by law given all of the successional rights of a legitimate child, it is but logical that all of

the protection given or afforded by the law in order to protect such rights must also be applied to the case of an adopted child. If the purpose of the law on preterition is to protect a compulsory heir in the direct line from the neglect of the testator, with equal, if not with more, reason should such purpose be applied to the adopted child. Furthermore, if we look at the effects of preterition as a right, although negative in character, there seems to be no reason why such a right should not also be given to an adopted child.

Idem; Character of omission. — Before there can be any preterition, it is also essential that the omission of the compulsory heir must be complete and total in character so that he receives nothing from the testator at all. Consequently, if the testator leaves any property to the heir who is alleged to have been omitted by any title whatsoever, there can be no preterition. This is true even when he leaves to such compulsory heir a share which is less than his legitime. In such case, Art. 906 of the Code applies; he can ask for the completion of his legitime.

Aznar vs. Duncan
17 SCRA 590

Edward Chrisensen, a citizen of California with domicile in the Philippines, died leaving a will executed on March 5, 1951, wherein he declared that he has no living descendant or ascendant except a natural daughter Lucy Duncan; that he is leaving the residue of his estate to said Lucy Duncan; and that he is bequeathing the amount of P3,600.00 to Helen Garcia to whom he is not related in any way. The will was admitted to probate on February 28, 1954. In the decision allowing the will the court declared that Helen Garcia was a natural child of the deceased. Subsequently, on October 29, 1964, in the partition proceedings, an order was issued approving a project of partition wherein the estate was divided equally between Lucy Duncan, whom the testator had expressly recognized in his will as his natural daughter, and Helen Garcia, who had been judicially declared as such after his death. The said order was based on the proposition that Helen Garcia had been preterited in the will thus resulting in the annulment of the institution of Lucy Duncan as heir; hence the estate passed to both of them as if the deceased had died intestate. Lucy Duncan appealed on the sole question of whether the estate, after deducting the legacies, should pertain to her and to Helen Garcia in equal shares, or whether the inheritance of Lucy Duncan as instituted heirs should be merely reduced to the extent necessary to cover the

legitime of Helen Garcia to 1/4 of the entire estate. She contends that the case should be governed by Art. 906 of the Civil Code. Helen Garcia, on the other hand, contends that the case should be governed by Art. 854 of the Civil Code. Speaking through Justice Makalintal, the Supreme Court held:

"Appellant contends that this is not a case of preterition, but is governed by Article 906 of the Civil Code, which says: '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.' The question may be posed: In order that the right of a forced heir may be limited only to the completion of his legitime (instead of the annulment of the institution of heirs) is it necessary that what has been left to him in the will *by any title as* by legacy, be granted to him in his capacity as heir, that is, *titulo heredero?* In other words, should he be recognized or referred to in the will as heir? This question is pertinent because in the will of the deceased Edward Chrisensen, Helen Garcia is not mentioned as heir — indeed her status as such is denied — but she is given a legacy of P3,600.00.

"While the classical view, pursuant to the Roman law, give an affirmative answer to the question, according to both Manresa (6 Manresa, 7th Ed., p. 436) and Sanchez Roman (Tomo VI, p. 937), that view was changed by Article 645 of the *Proyecto de Codigo Civil de 1851* later on copied in Article 906 of our Code. Manresa cites particularly three decisions of the Supreme Court of Spain dated January 16, 1895, May 25, 1917, and April 23, 1932, respectively. In each one of these cases, the testator left to one who was a forced heir a legacy less than the legitime, but without referring to the legatee as an heir or even as a relative, and willed the rest of the estate to other persons. It was held that Article 815 *(now Art. 906)* applied, and the heir could not ask that the institution of heirs be annulled entirely, but only that the legitime be completed. (Manresa, pp. 438, 441.)

"The foregoing solution is indeed more in consonance with the expressed wishes of the testator in the present case as may be gathered very clearly from the provisions of his will. He refused to acknowledge Helen Garcia as his natural daughter, and limited her share to a legacy of P3,600.00. The fact that she was subsequently declared judicially to possess such status is no reason to assume that had the judicial declaration come during his lifetime his subjective attitude towards her would have undergone any change and that he would have willed her estate equally to her and to Lucy Duncan, who alone was expressly recognized by him.

"Wherefore, the order of the trial court x x x is hereby set aside; and the case is remanded with instructions to partition the hereditary estate anew as indicated in this decision, that is, by giving to oppositor-appellee Helen Garcia no more than the portion corresponding to her as her legitime, equivalent to one-fourth of the hereditary estate."

Problem — A has two compulsory heirs in the direct line — B, a legitimate child, and C, an acknowledged natural child. During his lifetime, A donated a parcel of land, worth P10,000, to C. Before his death, he executed a will wherein he instituted as sole heir B, omitting C altogether. The net residue or remainder of his estate is P50,000. Shall the omission of C in the will result in the annulment of the institution of B in accordance with the provisions of Art. 854?

Answer — It is submitted that in this case there is no preterition within the meaning of Art. 854 of the Civil Code. It is true that there is a total omission of the acknowledged natural child in the testator's will, and apparently the rule regarding preterition should, therefore, be applied. But then, we must consider the fact that a donation *inter vivos* is actually given to a compulsory heir as an advance on his inheritance. That is why in the partition of the estate of the donor upon the death of the latter, it must be collated and subsequently, it must be charged against the legitime of such compulsory heir. Consequently, there is no omission in this case which is complete and total in character. Hence, if there is an impairment of the legitime of the acknowledged natural child because the value of the property donated is less than the legitime to which he is entitled by operation of law, his remedy lies in the right granted in Art. 906 of the Civil Code. He can ask for the completion of his legitime. In the words of Manresa — "If Art. 906 is not applicable in such case, we do not know what article applies."[44] Thus, in the above

[44]See 6 Manresa, 7th Ed., pp. 424-245. Actually, this problem is rather controversial. The majority of Spanish commentators believe that there is no preterition. But in a case decided by the Supremo Tribunal of Spain, where the testator instituted his wife as sole heir, omitting his acknowledged natural child altogether, although during his lifetime, he had made some donations to such child, it was held that there is a preterition within the meaning of Art. 854. Sentencia of June 17, 1908. In two cases, Escuin vs. Escuin, 11 Phil. 332, and Eleazar vs. Eleazar, 67 Phil. 497, the Supreme Court ruled that the effect of the omission of a compulsory heir in the direct line is to annul the institution of heirs insofar as the omitted heir's legitime is affected. This doctrine, however, must be deemed to have been superseded by that promulgated by the same Court in Neri vs. Akutin, 72 Phil. 322, Lajom vs. Leuterio; 107 Phil. 651; and Nuguid vs. Nuguid, G.R. No. L-23445, June 23, 1966, 17 SCRA 449.

problem, after collating the P10,000 donation *inter vivos* given to C to the net value of the estate of A it is clear that the legitime of B is P30,000, while the legitime of C is P15,000 *(Arts. 888, 895, New Civil Code).* Consequently, C can still demand for an additional P5,000 in order to complete his legitime. The balance of the estate shall be given to B.

Idem: Survival of omitted heir. — It is also an essential condition that the compulsory heir who is omitted in the testator's will should survive the testator.

What will happen if the omitted compulsory heir dies before the testator? In such case, according to the second paragraph of Art. 854, the institution shall be effectual, but without prejudice to the right of representation when it properly takes place. Hence, when there is a surviving representative of the deceased compulsory heir who has been omitted in the testator's will, such as a child, the effect is that such child shall succeed to the legitime which would have gone to the heir omitted.

Effects of Preterition. — According to Art. 854, the preterition of a compulsory heir in the direct line shall have the effect of annulling the institution of heir, but the devises and legacies shall be valid insofar as they are not inofficious.

Neri vs. Akutin
72 Phil. 322

This is a case where the testator in his will left all his property by universal title to the children by his second marriage, the herein respondents, with preterition of the children by his first marriage. The Supreme Court annulled the institution of heirs and declared a total intestacy. A motion for reconsideration was subsequently filed by the respondents on the ground, among others, that even assuming that there has been a preterition, the effect would not be the annulment of the institution of heirs, but simply the reduction of the bequest made to them. Denying the motion for reconsideration, the Supreme Court, speaking through Justice Moran, held:

"The following example will make the question clearer: The testator has two legitimate sons, A and B, and in the will he leaves all his property to A, with total preterition of B. Upon these facts, shall we annul entirely the institution of heir in favor of A and declare a total intestacy or shall we merely refuse

the bequest left to A, giving him two-thirds of betterments, plus one-half of the other third as strict legitime, and awarding B only the remaining one-half of the strict legitime? If we do the first, we apply Article 814 *(now Art. 854);* if the second, we apply Article 851 or 817 *(now Art. 918 or 907)*. But Article 851 *(now Art. 918)* applies only in cases of unfounded disinheritance and all are agreed that the present case is not one of disinheritance but of preterition. Article 817 *(now Art. 907)* is merely a general rule inapplicable to specific cases provided by law, such as that of preterition or disinheritance.

"Manresa says that in case of preterition *(Art. 814, now Art. 854),* the nullity of the institution of heirs is total, whereas, in case of disinheritance *(Art. 851, now Art. 918),* the nullity is partial, that is, in so far as the institution affects the legitime of the disinherited heirs. He further makes it clear that in cases of preterition, the property bequeathed by universal title to the instituted heirs should not be merely reduced according to Art. 817 *(now Art. 907),* but instead, intestate succession should be opened in connection therewith under Article 814 *(now Art. 854)*. Sanchez Roman is of the same opinion.

"Of course, the annulment of the institution of heirs in cases of preterition does not always carry with it the ineffectiveness of the whole will. Neither Manresa nor Sanchez Roman nor this Court has ever said so. If, aside from the institution of heirs, there are in the will provisions leaving to the heirs so instituted or to other persons some specific properties in the form of legacies, such testamentary provisions shall be effective and the legacies and mejoras shall be respected in so far as they are not inofficious or excessive, according to Article 814 *(now Art. 854)*. In the instant case, however, no legacies or mejoras are provided in the will, the whole property of the deceased having been left by universal title to the children of the second marriage. The effect, therefore, of annulling the institution of heirs will be necessarily the opening of a total intestacy.

"It is clear, therefore, that Article 814 *(now Art. 354)* refers to two different things which are two different objects of its two different provisions. One of these objects cannot be made to merge in the other without mutilating the whole article with all its multifarious connections with a great number of provisions spread throughout the Civil Code on the matter of succession. It should be borne in mind, further, that although Article 814 *(now Art. 854)* contains two different provisions, its special purpose is to establish a specific rule concerning a specific testamentary provision, namely, the institution of heirs in a case of preter-

ition. Its other provisions regarding the validity of legacies and betterment if not inofficious is a mere reiteration of the general rule contained in other provision *(Arts. 815 and 817, now Arts. 906 and 907),* and signifies merely that it also applies in cases of preterition. As regards testamentary dispositions in general, the general rule is that all 'testamentary dispositions which diminish the legitime of the forced heirs shall be reduced on petition of the same in so far as they are inofficious or excessive.' *(Art. 817, now Art. 907).* But this general rule does not apply to the specific instance of a testamentary disposition containing an institution of heirs in a case of preterition which is made the main and specific subject of Article 814 *(now Art. 854).* In such instances, according to Article 814 *(now Art. 854),* the testamentary disposition containing the institution of heirs should not only be reduced but annulled in its entirety and all the forced heirs, including the omitted ones, are entitled to inherit in accordance with the law of intestate succession."

Nuguid vs. Nuguid
17 SCRA 449

Rosario Nuguid died in 1962, single, without descendants, legitimate or illegitimate. Surviving her were her legitimate parents and six brothers and sisters. She left a holographic will containing only one testamentary disposition by virtue of which she left all of her properties to a sister, Remedios Nuguid, omitting her parents entirely. When the will was presented for probate by Remedios, the latter registered their opposition and subsequently moved to dismiss the petition. The probate court granted the motion holding that the will is a complete nullity and will perforce create total intestacy. A motion to reconsider having been denied, Remedios appealed to the Supreme Court. The Court, speaking through Justice Sanchez, held:

"Right at the outset, a procedural aspect has engaged our attention. The case is for the probate of a will. The court's area of inquiry is limited — to an examination of, and resolution on, the extrinsic validity of the will. Said court at this stage of the proceedings is not called upon to rule on the intrinsic validity of the provisions of the will.

"A peculiar situation is here thrust upon us. The parties shunted aside the question of whether or not the will should be allowed probate. For them, the meat of the case is the intrinsic validity of the will. Is the will intrinsically a nullity? We pause to reflect. If the case were to be remanded for probate of the will,

nothing will be gained. The litigation will be protracted. In the event of probate or if the court rejects the will, probability exists that the case will come up again before us on the same issue of the intrinsic validity of nullity of the will. Result: waste of time, effort, expense, plus added anxiety. These are the considerations that induce us to a belief that we might as well meet head-on the issue of the validity of the provisions of the will in question.

"The deceased left no descendants, legitimate or illegitimate. But she left forced heirs in the direct ascending line — her parents, now oppositors. And the will completely omits both of them. They thus received nothing by the testament; tacitly, they were deprived of their legitime; neither were they expressly disinherited. This is a clear case of preterition. Such preterition in the words of Manresa *anulara siempre la institucion de heredero, dando caracter absoluto a este ordinamiento,* referring to the mandate of Article 814, now 854 of the Civil Code (6 Manresa, 7th Ed., 424). The one-sentence will here institutes petitioner as the sole universal heir — nothing more. No specific legacies or bequests are therein provided. It is in this posture that we say that the nullity is complete. Article 854 offers no leaving for inferential interpretation. Giving it an expansive meaning will tear up by the roots the fabric of the statute.

"We should not be led astray by the statement in Article 854 that, annulment notwithstanding, the devises and legacies shall be valid insofar as they are not inofficious. Legacies and devises merit consideration only when they are so expressly given as such in a will. Nothing in Article 854 suggests that the mere institution of a universal heir in a will — void because of preterition — would give the heir so instituted a share in the inheritance. As to him the will is inexistent. There must be, in addition to such institution, a testamentary disposition granting him bequests or legacies apart and separate from the nullified institution of heir. As aforesaid, there is no other provision in the will before us except the institution of petitioner as universal heir. That institution, by itself, is null and void. And, intestate succession ensues."

Problem — Jandon is twice a widower. He has three children by his first marriage, and two children by his second marriage. In his will, Jandon institutes as his exclusive heirs the children of his second marriage. What is the effect on the will of the preterition of Jandon's children by the first marriage? Upon Jandon's death, how will the hereditary estate be divided? (1974 Bar Problem)

Answer — The preterition of Jandon's children by the first marriage in his will shall annul entirely the institution of heirs as ordained by Art. 854 of the Civil Code. All of the three requisites of preterition or pretermission are present. The omitted heirs are compulsory heirs in the direct line; the omission is total and complete; and the omitted heirs have survived the testator. Assuming then that there are no legacies and devises in Jandon's will and that the only testamentary disposition thereof is the institution of the children of the second marriage, since such institution is void, the will itself, as far as the distribution of the hereditary estate is concerned, becomes useless. Total intestacy results. *(Nuguid v. Nuguid, 17 SCRA 449).*

The estate, therefore, shall be divided among the three children of the first marriage and the two children of the second marriage in accordance with the rules of intestate succession. Each of the five shall be entitled to one-fifth (1/5) of the entire *(Art. 980, Civil Code).*

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.

Article Applied. — The above article is out of place. It should be returned to where it belongs — as a continuation of Art. 1104 of the Civil Code.

Essentially, there is a great difference between the effects of the preterition of a compulsory heir in the direct line in the testator's will and the effects of the preterition of a compulsory heir in the partition of the testator's estate. In the former, if the testamentary dispositions in the testator's will consist entirely of institutions of heirs, the effect of preterition as contemplated in Art. 854 of the Civil Code would be total intestacy. If there are legacies and devises, only those which are inofficious will be reduced. In either case, the above article cannot be applied.

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.[45]

Effect of Predecease. — Under the law of testamentary succession, the general rule is that an heir who dies before the testator shall transmit no right to his own heirs. A distinction, however, must be made between the case of a voluntary heir and the case of a compulsory heir.

The rule is absolute with respect to a voluntary heir. It must be remembered that a voluntary heir is an heir who is called to the whole or to an aliquot part of the free portion of the inheritance by virtue of a will.[46] Since the right of representation, by virtue of which the representative is raised to the place and the degree of the person represented in case of either predecease or incapacity of the latter,[47] is a right which pertains only to the legitime of compulsory heirs, it necessarily follows that when a person who has been instituted as a voluntary heir dies before the testator, he can transmit no right whatsoever to his own heirs. The same is true in case a person has been designated as a devisee or a legatee with respect to a determinate property. Since a devise or legacy is a charge upon the free portion of the inheritance, it necessarily follows that when the designated devisee or legatee dies before the testator, no right whatsoever is transmitted to the heirs of such devisee or legatee.[48]

It is different in the case of a compulsory heir. This is evident from the provision of the second paragraph of Art. 856. The exception referred to is of course the right of representation. It must be noted, however, that what is transmitted to the representatives of the compulsory heir is his right to the legitime and not to the free portion in case he has also been instituted by the testator to the whole or to an aliquot part of such free portion. This is so, because of the principle that, in testamentary succession, the right of representation pertains only to the legitime and not to the free portion.

[45]Art. 766, Spanish Civil Code, in modified form.
[46]See comments under Art. 782, Civil Code.
[47]Art. 970, Civil Code.
[48]See Cuison vs. Villanueva, 90 Phil. 850.

The above rules may be illustrated by the following problems:

Problem No. 1 — A, a very wealthy man, executed a will wherein he instituted as his only heirs his three brothers, B, C and D without designating their shares. Before A died, both C and D were killed in a vehicular accident. C is survived by a son, E, while D is survived by two daughters, F and G. A died two days later without changing his will, survived only by B and the children of C and D. The net value of his estate is P6,000,000. How shall such estate be divided?

Answer — B alone is entitled to the entire estate. It must be noted that both C and D are voluntary heirs; they are not compulsory heirs. Consequently, they cannot transmit any right to their own heirs *(Art. 856, Civil Code)*. In other words, their children cannot inherit from the testator by right of representation. It would have been different had A died intestate. In such a case, the children of C and D would then represent them in the succession *(Arts. 972, 975, Civil Code)*. As it is, since A died testate and since both of the requisites prescribed by law for accretion to take place in testamentary succession are present, the shares of C and D, which were rendered vacant by reason of predecense, shall now pass to their co-heir B by right of accretion. *(Arts. 1015, et seq., Civil Code)*.

Problem No. 2 — In his will, widower Kano instituted his only child Luis and a friend Mario as his heirs. Mario died ahead of Kano. If Kano dies without changing his will, would the children of Mario step into the shoes of their father and inherit from Kano? (1974 Bar Problem)

Answer — The children of Mario cannot step into the shoes of their father and inherit from Kano; in other words, they cannot inherit from Kano by right of representation.

The following reasons are decisive:

(a) In testamentary succession, only a compulsory heir may be represented. Mario is not a compulsory heir; he is merely a voluntary heir whose share is chargeable against the free portion. Under the law, a voluntary heir who dies before the testator transmits nothing to his heirs *(Art. 856, Civil Code)*.

(b) The above case is one involving accretion and not representation. It must be observed that had Mario survived the testator, Luis would have been entitled to his legitime of one-half (1/2) of the hereditary estate in his capacity as compulsory

heir and one-half (1/2) of the one-half (1/2) disposable free portion in his capacity as voluntary heir; Mario, on the other hand, would have been entitled also to one-half (1/2) of the one-half (1/2) disposable free portion as voluntary heir. But then, the latter died before the testator. Therefore, the provisions of the Civil Code on accretion *(Art. 1015, et seq.)* are applicable and not the provisions on representation *(Art. 970, et seq.)*. Since the requisites of accretion in testamentary succession are present, Mario's share shall now accrue to Luis.

Effect of Incapacity. — Incapacity has the same effects as predecease. A voluntary heir who is incapacitated to succeed from the testator shall transmit no right whatsoever to his own heirs. A compulsory heir, on the other hand, may be represented, but only with respect to his legitime.[49] The same is true in case of disinheritance.[50]

Effect of Repudiation. — The effects of repudiation, on the other hand, are different from those of predecease or incapacity. Whether voluntary or compulsory, the heir who repudiates his inheritance cannot transmit any right to his own heirs.[51] This rule is absolute.

It is, therefore, apparent that in case of predecease, incapacity or repudiation, the logical result in a vacancy in the inheritance which may be total or partial depending upon the circumstances of each particular case. Art. 856 of the Code merely gives a general idea of the effects of such vacancy. There is no question, however, that the existence of such a vacancy is repugnant to the idea of succession. How this vacancy is filled up either by substitution, representation, accretion, or intestate succession will be taken up under subsequent provisions.

[49]Art. 1035, Civil Code.
[50]Art. 923, Civil Code.
[51]Art. 977, Civil Code.

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.[1]

Concept of Substitution of Heirs. — The testator may not only designate the heirs, devisees or legatees whom he desires to enter into the enjoyment of the inheritance after his death, but he is also permitted by law to make a second or subsequent designation in case the heirs, devisees or legatees originally appointed should die before him or should not want or cannot accept the inheritance. This power of making a new designation is known as substitution of heirs.[2] In the Code it is defined as the appointment of another heir so that he may enter into the inheritance in default of the heir originally instituted.[3] This definition, however, is not broad enough to cover fideicommissary substitutions. Hence, it would be more accurate to say that substitution is the appointment of another heir so that he may enter into the inheritance in default of or subsequent to the heir originally instituted.

In reality, substitution of heirs is nothing more than a subsidiary institution of a second or subsequent heir, devisee or legatee, subordinated to the principal or original institution and dependent upon some event which is more or less uncertain; in other words, it is a conditional institution.[4]

Originally, in Roman law, it was of fundamental importance that there must always be an heir to accept the inheritance because of the legal fiction that the heir is a continuation of the personality of the decedent. It was considered ignominious to die intestate. In order to forestall such an eventuality, the testator almost always availed himself of the remedy of appointing substitutes so that there would always be an heir who would accept and receive the inheritance. Although the institution of an heir is no longer necessary for the validity of a will, and dying intestate is no longer considered a disgrace, substitution of heirs still subsists under

[1]New provision.
[2]6 Manresa, 7th Ed., p. 139.
[3]Art. 857, Civil Code.
[4]6 Manresa, 7th Ed., pp. 140-141.

our laws as a recognition of the principle of freedom of disposition which, with certain limitations, is the supreme law in testamentary succession.[5]

General Limitation. — If the heir for whom a substitute is appointed is a compulsory heir, the rule is that the substitution cannot affect the legitime of such heir. Since the right to appoint a substitute for the heir instituted is based on the testator's freedom of disposition, the same limitation which is imposed upon such freedom of disposition must also be imposed upon such right to appoint a substitute. This is clear from the provisions of Arts. 842, 864, 872, and 904.

Art. 858. Substitution of heirs may be:

(1) Simple or common;

(2) Brief or compendious;

(3) Reciprocal; or

(4) Fideicommissary.[6]

Kinds of Substitution. — Under the Civil Code of the Philippines, there are only four classes of substitutions. Strictly speaking, however, the only distinct types of substitution are simple or common substitution and fideicommissary substitution. The others are merely variations of the first.

Simple or common *(vulgar)* substitution is that which takes place when the testator designates 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.[7] When there are two or more persons designated by the testator to substitute for only one heir, the substitution is called brief, but when there is only one person designated to substitute for two or more heirs, it is called compendious.[8] When two or more persons are not only instituted as heirs, but are also designated mutually as substitutes for each other, the substitution is called

[5]4 Castan, 6th Ed., pp. 451-452.
[6]New provision.
[7]Art. 859, Civil Code.
[8]Art. 860, Civil Code.

reciprocal.[9] Fideicommissary substitution, on the other hand, is that which takes place when 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, 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.[10]

Under the old Code, there were six classes of substitutions of heirs. They were known as *vulgar* or common, *pupilar, ejemplar, fideicomisaria, brevilocua o compendiosa,* and *reciproca*. All of these classes of substitutions are retained under the new Civil Code with the exception of the *pupilar* and *ejemplar*. The *pupilar* was a type of substitution by which parents and other ascendants may appoint substitutes to take the place of their descendants of both sexes under eighteen years of age in case the latter dies before attaining such age.[11] The *ejemplar* was one by which any ascendant may appoint a substitute for his descendant over eighteen years of age who has been legally declared to be incapacitated on account of mental alienation.[12] According to the Code Commission, these two classes of substitution were not retained in the New Civil Code because they are out of use and impracticable. This is evidenced by the fact that there has been no known record that any parent or ascendant in this country has ever made use of these two provisions of the Spanish Code.[13]

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.[14]

[9]Art. 861, Civil Code.
[10]Art. 863, Civil Code.
[11]Art. 775, Spanish Civil Code.
[12]Art. 776, Spanish Civil Code.
[13]Report of the Code Commission, p. 110.
[14]Art. 744, Spanish Civil Code.

Art. 860. Two or more persons may be instituted for one; and one person for two or more heirs.[15]

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.[16]

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.[17]

Simple or Common Substitution. — Simple or common substitution is defined as the designation made by the testator of 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. The true basis of this type of substitution, whether simple, brief or compendious, or reciprocal, rests, according to Manresa, not merely upon convenience, but upon the principle that the testator should have the freedom to reward those individuals, who, although they may not legally occupy the first place in his heart, yet they are more deserving of his liberality than those to whom the inheritance would pass if substitution is not allowed.[18] It is, therefore, clear that the purpose of this type of substitution is to prevent the inheritance from passing by operation of law to those to whom the same would pass either by right of representation, or by right of accretion, or by right of intestate succession, were it not for the substitution.

When Substitution Takes Place. — There are three cases or instances when simple or common substitution or any of its variations, such as brief, compendious, or reciprocal substitution may take place: *first,* in case the heir instituted should die before the testator; *second,* in case he should be incapacitated to succeed from the testator; and *third,* in case he should not wish to accept the

[15]Art. 778, Spanish Civil Code.
[16]Art. 779, Spanish Civil Code.
[17]Art. 780, Spanish Civil Code.
[18]6 Manresa, 7th Ed., pp. 144-145.

inheritance. If there is no statement of the case or cases to which the substitution refers, the presumption is that it shall comprise all of the three above-mentioned cases.[19]

Number of Substitutes. — There is no limitation upon the number of persons who may be designated as substitutes, just as there is no limitation upon the number of persons who may be instituted as heirs. If there are two or more persons who are designated as substitutes for only one heir; the substitution is brief *(breuiloeua);* if there is only one person who is designated as substitute for two or more heirs, it is compendious *(compendiosa).*[20] In either case, the substitution may take place if the instituted heir or heirs should die before the testator, or should not wish, or should be incapacitated to accept the inheritance.

Shares of Substitutes. — When two or more persons are instituted by the testator as heirs and they are also designated mutually or reciprocally as substitutes for each other, the substitution is reciprocal *(reciproca).* Like the other types of vulgar or common substitution, it may also take place in case anyone of the heirs dies before the testator, or repudiates his share of the inheritance, or is incapacitated to succeed from the testator.

If there are only two instituted heirs and they are designated mutually as substitutes for each other, the substitute shall acquire the entire share of the heir who dies, renounces, or is incapacitated, even if the shares of both are unequal.[21] Thus, if A is instituted to 2/3 of the entire inheritance and B is instituted to 1/3, and the former dies before the testator, or is incapacitated to inherit, or repudiates his inheritance, the result is that the latter shall acquire the 2/3 portion which is rendered vacant as a substitute and the remaining 1/3 as an instituted heir.

If there are three or more instituted heirs and they are designated mutually as substitutes for each other, the substitutes shall have the same share in the substitution as in the institution.[22]

[19]Art. 859, Civil Code.
[20]Art. 860, Civil Code.
[21]Art. 861, Civil Code.
[22]Art. 861, Civil Code.

Problem — The testator instituted A to 1/2 of the entire inheritance, B to 1/4, C to 1/6, and D to 1/12, and, at the same time, designated each and everyone of them as a substitute of the others. The net remainder of the estate is P36,000. B, however, repudiated his share. What will happen to this vacant share?

Solution — It is evident that as a result of B's repudiation, 1/4 of the inheritance, or P9,000, is rendered vacant. This vacant share shall pass to A, C, and D in proportion to their respective shares in the institution. Reducing such shares to their lowest common denominator, the share of A in the vacant portion becomes 6/12, the share of C becomes 2/12, while the share of D is 1/12. The proportion of their respective shares is, therefore, 6:2:1. As substitutes, A is entitled to 6/9 of P9,000, or P6,000, C is entitled to 2/9 of P9,000, or P2,000, and D is entitled to 1/9 of P9,000, or P1,000. As instituted heirs, A is entitled to 1/2 of P36,000 or P18,000, C is entitled to 1/6 of P36,000, or P6,000, and D is entitled to 1/12 of P36,000, or P3,000. Hence, A shall receive a total amount of P24,000, C, P8,000, and D, P4,000.

Effect of Substitution. — Once the substitution has taken place, the substitute shall not only take over the share that would have passed to the instituted heir, but he shall be subject to the same charges and conditions imposed upon such instituted heir. There are, however, two exceptions to the second rule: *first,* when the testator has expressly provided the contrary; and *second,* when the charges or conditions are personally applicable only to the heir instituted.[23] Thus, if the testator has imposed upon his nephew, whom he had instituted as heir to the entire free portion of his estate, the condition that he shall get married to a certain girl, and a niece of the testator is substituted for the nephew, it is evident that the condition is personally applicable only to such nephew.

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

[23]Art. 862, Civil Code.

instituted, and provided further, that the fiduciary or first heir and the second heir are living at the time of death of the testator.[24]

Art. 864. A fideicommissary substitution can never burden the legitime.[25]

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.[26]

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.[27]

Fideicommissary Substitution. — Art. 781 of the Spanish Civil Code, from which Art. 863 of the New Civil Code is derived, is as follows:

> "Fideicommissary substitutions, by virtue of which the heir is charged with the preservation and transmission to a third party of the whole or part of the inheritance, shall be valid and shall be effective, provided they do not go beyond the second degree, or they are made in favor of persons living at the time of the death of the testator."

Comparing the two provisions, it is evident that there are two principal changes, both of which refer to the two limitations imposed upon the fideicommissary substitution. In the first place, under the new Code, it is essential that the two limitations imposed upon the fideicommissary substitution must concur, while under the old Code the presence of one or the other is sufficient. In the second place, the rule under the new Code is that the substitution must not go beyond one degree from the heir originally instituted, while the rule under

[24]Art. 781, Spanish Civil Code, in modified form.
[25]Art. 782, Spanish Civil Code.
[26]Art. 783, Spanish Civil Code.
[27]Art. 784, Spanish Civil Code.

the old Code is that it must not go beyond the second degree. Commenting on these changes, the Commission states:

> "Fideicommissary substitution as provided by Article 781 of the Spanish Civil Code is retained but amended in this Project. This kind of substitution has been considered necessary for the prosperity and prestige of the family bearing in mind the lack of intelligence, weakness of character, 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 powerful stimulus to the accumulation of wealth, and thus maintains the tradition and the social standing of the family.
>
> "It is unquestionable that the provisions of this article of the Spanish Civil Code prevents the free circulation of the property because the testator may institute heirs and appoint substitutes under diversified terms and conditions which may render the ownership of property very unstable — an instance of suspended ownership. Aside from the fact that the property involved may be locked up or entailed in the same family for many years, it seems that the original purpose of this substitution 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.
>
> "As amended in this Code, fideicommissary substitutions cannot go beyond one degree for the heir originally instituted, and provided the first and second heirs are living at the time of the death of the testator. With this change, the property cannot stay in the family for the same length of time authorized in the provision of Article 781 of the Spanish Civil Code.
>
> "This modified fideicommissary substitution, together with the simple, brief and reciprocal substitutions *(Articles 859, 860, 861)* retained, the proposed Civil Code does not unreasonably impair the freedom of disposition of the property by the testator."[28]

In spite of the above changes, the nature and requisites of fideicommissary substitution are still the same.

Fideicommissary or indirect substitution as it is sometimes called may be defined as the substitution which takes place when-

[28]Report of the Code Commission, pp. 110-111.

ever the testator institutes a person as heir, entrusting him with the obligation to preserve and to transmit to a second heir the whole or a part of the inheritance. This substitution exists with the concurrence of three persons: the testator who orders the substitution, sometimes known as the *fideicomitente;* the first heir charged with the preservation and the transmission of the inheritance, known as the *heredero fiduciario* or fiduciary; and the second heir to whom the inheritance is transmitted, known as the *heredero fideicomisario* or fideicommissary.[29]

This type of substitution should not be confused with the Roman *fideicomiso.* The latter is used to designate an indirect method recognized in the Roman praetorian law by virtue of which the person to whom the property was given in accordance with the testator's will, acting as agent of the testator, disposes of its according to the wishes or instructions of the said testator. According to Manresa, the duality of heirs is the characteristic note which differentiates the fideicommissary substitution from the *fideicomiso romano.* In the former, the fiduciary is a true heir and, as such, enjoys the inheritance. On the contrary, in the *fideicomiso romano,* the fiduciary is only an agent of the testator, charged with turning over the properties to the true heir. Consequently, in the fideicommissary substitution there are two acts of liberality; in the *fideicomisum* there is but one let of liberality and only one instituted heir.[30]

Neither should fideicommissary substitution be confused with a trust. The essential difference between the two lies in the fact that, in the first, both the fiduciary and the fideicommissary heirs are true heirs of the testator, which cannot be said of the trustee. As a consequence, the fiduciary heir in fideicommissary substitutions is entitled to the enjoyment of the property, while the trustee in trusts is not.[31]

Requisites. — In order that there is a valid fideicommissary substitution, the following requisites must concur:

(1) There must be a first heir primarily called to the enjoyment of the estate.

[29]6 Manresa, 7th Ed., pp. 169, 173.
[30]6 Manresa, 7th Ed., p. 173.
[31]Perez vs. Garchitorena, 54 Phil. 431.

(2) There must be a second heir.

(3) There must be an obligation clearly imposed upon the first heir to preserve the estate and to transmit it to the second heir.[32]

To the above requisites, a fourth is sometimes added that the second heir or fideicommissary should be entitled to the estate from the time the testator dies, since he is to inherit from the latter and not from the fiduciary. This is, however, not a requisite, but merely a consequence of the substitution.[33]

Limitations. — There are four limitations which the Code has imposed upon fideicommissary substitutions. They are: *first,* the substitution must not go beyond one degree from the heir originally instituted;[34] *second,* the fiduciary and the fideicommissary must be living at the time of the death of the testator;[35] *third,* the substitution must not burden the legitime of compulsory heirs;[36] and *fourth,* the substitution must be made expressly.[37]

Idem; First Limitation. — The first limitation imposed upon fideicommissary substitutions is that "the substitution must not go beyond one degree from the heir originally instituted." This limitation is much more restricted than that which is imposed in the Spanish Civil Code which states that the substitution must not go beyond the second degree.[38]

How shall the word "degree" be interpreted? It is a pity that the Code Commission made no attempt to resolve this question when it retained the terminology used in the Spanish Code. As it stands, we can only fall back upon Spanish jurisprudence in order to interpret the phrase "does not go beyond one degree from the heir originally instituted."

According to some Spanish commentators, "degree" means "degree of relationship."[39] Hence, according to this view, which we

[32]Ibid.
[33]Ibid.
[34]Art. 863, Civil Code.
[35]Ibid.
[36]Art. 864, Civil Code.
[37]Art. 865, Civil Code.
[38]Art. 781, Spanish Civil Code.
[39]6 Manresa, 7th Ed., p. 182.

might as well call the traditional view, when the law says that the substitution must not go beyond one degree from the heir originally instituted, what is meant is that the fideicommissary substitute must not be beyond one degree of relationship from the fiduciary heir. Consequently, only the child or parent of the latter can be appointed as fideicommissary heir.

According to other Spanish commentators, "degree" *(grado)* is the equivalent of designation or transmission *(llamamiento)*. Hence, according to this view, which we might as well call the modern view, when the law says that the substitution must not go beyond one degree from he heir originally instituted, what is meant is that the substitution must not extend beyond one degree of designation from the heir originally instituted.[40] Consequently, any person, whether natural or juridical, or any entity not disqualified by law to inherit from the testator can be appointed as fideicomissary heir. What is, therefore, prohibited by the law to inherit from the testator can be appointed as fideicomissary heir. What is, therefore, prohibited by the law under this view is a case where three or more persons including the fiduciary heir would be entitled to the successive enjoyment of the estate.

Which of these two views is correct? Undoubtedly, when the Code Commission prepared the project of the New Civil Code, the members adhered to the traditional view. This can be implied from its report when it described fideicommissary substitution as "an instance of suspended ownership, aside from the fact that the property involved is locked up or entailed in the same family for many years." As a matter of fact, this is the view which is advocated by some eminent commentators on the New Civil Code, such as Dr. Tolentino and Dr. Padilla.[41] We believe, however, that the modern view is more sound for the following reasons:

(1) It is more in conformity with public policy which is designed to increase the circulation or socialization of wealth.

(2) The law itself says that the "substitution" (it does not use the word "substitute") must not go beyond one degree from the heir originally instituted. If we accept the traditional view, the law would

[40]Ibid.

[41]See 3 Tolentino, Civil Code, 1956 Ed., pp. 190-191; 2 Padilla Civil Code, 1956 Ed., p. 645.

read as follows: "provided that the substitution does not go beyond one degree of relationship from the heir originally instituted," which would not make any sense at all, where as if we accept the modern view the law would read as follows "provided that the substitution does not go beyond one degree of transfer from the heir originally instituted," which would certainly make sense.

(3) Besides, construing No. 3 of Art. 867 of the Code in relation to Art. 863, it is clear that the only way by which the first limitation prescribed in the latter article can possibly be violated by the testamentary disposition referred to in the former would be to interpret the phrase "one degree" as "one degree of transfer" and not as "one degree of relationship."

(4) Finally, although this is merely persuasive in character, the modern view has been upheld by the Supreme Tribunal of Spain in decisions promulgated in 1940 and 1949.[42]

Idem; Second Limitation. — Besides the rule that the substitution must not go beyond one degree from the heir originally instituted, it is also essential that the fiduciary and the fideicommissary must be living at the time of the death of the testator. This rule is in conformity with the requirement that there must be a duality of heirs or a double institution of heirs in the substitution. Since both the fiduciary and the fideicommissary are true heirs of the testator, it is essential that "in order to be capacitated to inherit" both of them "must be living at the moment the succession opens."[43]

Idem; Third limitation. — The rule stated in Art. 864 is a reiteration of the principle that the legitime of compulsory heirs cannot be impaired. As heretofore noted, the same principle is stated in other provisions of the Code, such as Arts. 842, 872, and 904. Thus, if the testator institutes his own son as the first heir or fiduciary imposing upon him the obligation to preserve and to transmit to the second heir or fideicommissary the whole or part of the inheritance, the substitution shall be understood to refer only to the disposable free portion of such inheritance.

Idem; Fourth limitation. — According to the first paragraph of Art. 865, it is essential for the validity of a fideicommissary

[42]Sentencias, June 23, 1940, March 6, 1944, and Oct. 29, 1949.
[43]Art. 1025, Civil Code.

substitution that it must be expressly made. Although this provision does not specifically state how the substitution can be made expressly, it can be clearly inferred from the provision of No. 1 of Art. 867 that there are two ways whereby the substitution may be expressly made. The first is by giving it the name of a fideicomissary substitution and the second is by imposing upon the fiduciary the absolute obligation to preserve and to deliver the property to a second heir. Thus, if the testator institutes two heirs and he calls one the fiduciary heir and the other the fideicommissary substitute, or if he imposes upon the former the absolute obligation to preserve the estate for a stated period and, after the expiration of the period, to transmit it to the latter, it is evident that the substitution is a fideicommissary substitution. However, if the testator merely designates a second heir to succeed in default of the first heir, or merely provides that the second heir shall succeed in case of the death of the first heir, there is only a simple or common substitution. The same is true if the testator institutes two heirs and it is provided that in case of the death of one or of both, the portion rendered vacant shall be assigned to the legal heirs or to other persons. In all of these cases, there can be no fideicommissary substitution, because the substitution has not been made expressly.[44]

Crisologo vs. Singson
4 SCRA 491

Leona Singson died with a will wherein she devised one-half of a big parcel of land to her three brothers, Evaristo, Manuel and Dionisio, and the other one-half to a grandniece, Consolacion Florentino, but subject to the condition that upon Consolacion's death, whether before or after that of the testatrix, said one-half of the property devised to her shall be delivered to Evaristo, Manuel and Dionisio, or their heirs should anyone of them die before Leona and Consolacion. After the will was admitted to. probate, Consolacion demanded for the partition of the property. Evaristo, Manuel and Dionisio, however, contended that since she is only a usufructuary she cannot demand for the partition of the property. Is this contention tenable?

Held: This contention is untenable. Art. 785 *(now Art. 865)* of the Civil Code provides that a fideicommissary substitution

[44]6 Manresa, 7th Ed., p. 174; Crisologo vs. Singson, G.R. No. L-13826, Feb. 28, 1962, 4 SCRA 491.

> shall have no effect unless it is made expressly either by giving it such name or by imposing upon the first heir the absolute obligation to deliver the inheritance to the second heir. The testamentary clause under consideration does not call the institution a fideicommissary substitution nor does it contain a clear statement that Consolacion enjoys only a usufructuary right the naked ownership being vested in the brothers of the testatrix. The will therefore, establishes a simple or common substitution, the necessary result of which is that, upon the death of the testatrix, Consolacion became the owner of an undivided half of the property. She can, therefore, demand for partition.

Rights of Fiduciary. — The Code does not expressly state what is the nature of the right of the first heir or fiduciary over the property or inheritance pending its transmission or delivery to the second heir or fideicommissary. Undoubtedly, he cannot be a mere agent of the *fideicomitente* or a mere administrator of the property. He is the "first heir," although charged with the obligation "to preserve and to transmit" the property to a second heir. As such, he acquires upon the death of the *fideicomitente* all of the rights of a usufructuary until the moment of delivery to the fideicommissary. In other words, pending the transmission or delivery, he possesses the beneficial ownership of the property, although the naked ownership is vested in the fideicommissary.[45]

Obligations of Fiduciary. — It is evident from the provisions of Art. 863 that there are two obligations of the first heir or fiduciary. The first is to preserve the property or inheritance and the second is to transmit the said property or inheritance to the second heir or fideicommissary. In order that the fideicommissary substitution shall be valid, it is essential that such obligation must be clearly imposed.[46] In other words, it is required that there must be an order or charge upon the first heir to preserve and transmit to a third person or entity the entire inheritance or a part thereof.[47]

Idem; Preservation of inheritance. — Although the first heir or fiduciary is a true heir of the testator, his rights as such over the property which is transmitted to him upon the death of the testator

[45]Ibid., pp. 178-179.
[46]Perez vs. Garchitorena, 54 Phil. 431.
[47]6 Manresa, 7th Ed., p. 173.

is necessarily limited by his obligation to preserve the said property. The obligation to preserve excludes the right to dispose the property either by an act *inter vivos* or an act *mortis causa*. As Scaevola says, "the fiduciary heir has all the qualities of a usufructuary, but he also has those of an absolute owner, without the power of alienation?[48] However, he may alienate his right of usufruct over the property.

Corollary to the obligation of the fiduciary heir to preserve is the obligation to make an inventory. Art. 865, par. 2, impliedly recognizes this obligation, since it would be impossible for the fiduciary to make the necessary deductions for legitimate expenses, credits and improvements once the property is delivered to the fideicommissary unless there had been a previous inventory.[49]

Idem; Transmission of inheritance. — The Code is silent with regard to the time when the property or inheritance shall be transmitted by the fiduciary to the fideicomissary. According to Spanish commentators, the reason for this is the fact that the same is subject to the testator's freedom of disposition. Consequently, the testator can make the substitution purely, with a term, or even conditionally. If he designates a day for the transmission or delivery by limiting the period in which the fiduciary heir may enjoy the property or inheritance, such designation shall be respected. If he does not fix a period for the transmission or delivery, it is presumed that he leaves the matter to the discretion of the fiduciary. And if there is doubt or litigation regarding the time for such transmission or delivery, it is presumed that it will be made after the death of such fiduciary. When the substitution is conditional, the fideicommissary has only a mere hope or expectancy pending the fulfillment of the condition, but once the condition is fulfilled, the obligation to transmit or deliver the property arises.[50]

Idem; — Right to deductions. — "Legitimate expenses" as used in the second paragraph of Art. 865, refer to those which were made for the acquisition and preservation of the property or inheritance. "Improvements," on the other hand, refer to necessary as well as to useful expenses. Other expenses, such as those for pure luxury or mere pleasure, are excluded. The amount of the deductions to

[48]Ibid., p. 194.
[49]6 Sanchez Roman, 2nd Ed., p. 702.
[50]6 Manresa, 7th Ed., pp. 181-182.

which the fiduciary is entitled, however, is not the actual amount of the expenses, but the increase in value of the property or inheritance. Consequently, the property is really preserved.[51]

Rights of Fideicommissary. — The provisions of Art. 866 of the Code decides once and for all the question as to whether the fideicommissary is an heir of the fiduciary or of the *fideicomitente*. Under this article, the second heir or fideicommissary inherits, not from the first heir or fiduciary, but from the testator or *fideicomitente*. As a matter of fact, in a decision of the Spanish Supreme Tribunal,[52] the provision of this article was included as a requisite of fideicommissary substitutions. The Supreme Court of the Philippines in *Perez vs. Garchitorena,*[53] however, rightly observed that the fact that the fideicommissary is entitled to the estate from the time the testator dies, since he is to inherit from the latter and not from the fiduciary, is a natural consequence of a fideicommissary substitution rather than a requisite.

What is the nature a the right of the fideicommissary heir pending the delivery or transmission of the property or inheritance? It is evident from the provision of Art. 866 that he acquires a right to the inheritance from the moment of the death of the testator. It must be noted, however, that this right is subject or without prejudice to the corresponding right of the fiduciary heir. Stated in another way, if the fiduciary is entitled to all of the rights of a usufructuary, the fideicommissary is also entitled to all of the rights of a naked owner. Thus, if the testator designates A and B as the fiduciary and fideicommissary heirs, respectively, of his entire state, imposing the obligation upon A to preserve and to transmit the entire estate to B after the expiration of ten years, there is no question that the latter shall be entitled to the entire estate from the moment of the death of the testator. If he dies before the expiration of the period and before the death of the fiduciary, his right to the estate shall be transmitted to his own heirs.

> *Problem* — X died in 1960 leaving a will wherein he devised a house and lot, now valued at P2,000,000, to his friend, A, as fiduciary heir and to B, the eldest son of A, as fideicommis-

[51]6 Sanchez Roman, 2nd Ed., pp. 201-202; 6 Manresa, 7th Ed., p. 195.
[52]Sentencia, Nov. 18, 1918.
[53]54 Phil. 481.

sary substitute or second heir. B died in 1975, survived by two legitimate children, E and F. In 1980, A died intestate survived by: (a) his two sons, C and D, and (b) his two grandchildren, E and F. C and D now claim that the house and lot (subject matter of the fideicommissary substitution) should be divided in accordance with, the rules of intestacy; in other words, C is entitled to 1/3 of the property; D, to 1/3; and E and F, also to 1/3 by right of representation. E and F, on the other hand, contend that they are entitled to the property to the exclusion of all others. Decide.

Answer — E and F are correct. It must be observed that B, as fideicommissary substitute or second heir, acquired a right to the subject property upon the death of the testator, X. This is ordained by Art. 866 of the Civil Code. When he died in 1975, this right passed to his children, E and F. This is also ordained by Art. 866 of the Civil Code. Therefore, E and F are now entitled to the subject property to the exclusion of all others.

When the fideicommissary substitution is conditional, however, the fideicommissary heir has only a mere hope or expectancy. Consequently, if the fideicommissary dies before the condition has been fulfilled, he acquires no right to the object of the *fideicomisum,* and, as a consequence, he transmits no right whatsoever to his own heirs.[54]

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 obligations 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

[54]Manresa, 7th Ed., pp. 181-182.

according to secret instructions communicated to him by the testator.[55]

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.[56]

Void Substitutions. — The four rules which are contained in Art. 867 are intended to implement the limitations upon fideicommissary substitutions which are prescribed in Art. 863 as well as the requirement which is stated in the first paragraph of Art. 865. These rules are necessary because, evidently, without sanction or implementation, it would be relatively easy for the testator to attain by indirect means those ends or objects which such limitations or requirements are intended to prevent.

The first rule has already been discussed in a previous section. It is clear that, besides being a logical corollary to the rule stated in the first paragraph of Art. 865, it is also a confirmation of the principle that in fideicommissary substitutions there must always be an obligation clearly imposed upon the first heir or fiduciary to preserve and to transmit the property or inheritance to the second heir or fideicommissary.[57]

The second rule is evidently designed to prevent the perpetual or temporary entailment by the testator of his property. Unfortunately, the phraseology of the law is rather confusing. Provisions which contain a perpetual prohibition to alienate, and even a temporary one, beyond the limit fixed in Art. 863 are void. What is the limitation referred to? That the substitution must not go beyond one degree from the heir originally instituted? Violation of this limitation would be impossible in prohibitions to alienate. That both the first heir and the second heir must be living at the time of the death of the testator? Violation of this limitation would also be impossible in prohibitions to alienate. The only limitation which can possibly be violated is that provided for in Art. 870 of the Code. The prohibition

[55]Art. 785, Spanish Civil Code, in modified form.
[56]Art. 786, Spanish Civil Code.
[57]6 Manresa, 7th Ed., p. 206.

to alienate is good only for twenty years. Beyond that, it is void. It is submitted that this is what is really meant by the law. Thus, if the testator had appointed A as the fiduciary heir and B as the fideicommissary substitute, and in the will, there is a provision prohibiting the alienation of the estate for a period of forty years, it is clear that there is no violation or infringement of any of the limitations prescribed in Art. 863. It is, however, evident that there is a violation of the limitation prescribed in Art. 870. Consequently, if the testator died in 1960 and A, the fiduciary heir, died in 1965, the prohibition imposed by the testator would still be good up to 1980 in conformity with the rule stated in Art. 870. B, the fideicomissary substitute, will still be bound by the prohibition to alienate up to 1980. It must be observed, however, that if the testator died in 1950, although the prohibition to alienate ceased to apply in 1970 in conformity with the rule stated in Art. 870, A, the fiduciary heir, could not yet alienate the property. This is so, because of another mandate of the testator — that he must preserve and transmit the property to B, the fideicomissary heir. Once the property is transmitted to B, it becomes free property.

The third rule seeks to implement the limitations prescribed in Art. 863 by declaring as ineffective those dispositions which would render such limitations illusory. In this case, there is in reality no substitution but an institution of an heir with a charge; however, the Code applies by analogy to the beneficiaries the same limitations which are applied to fideicommissary substitutions.[58]

The fourth rule has for its object the prevention of the transmission of property by secret instructions so that it may not be applied for purposes which are illegal or illicit or in order that it may not pass to those who are incapacitated to inherit from the testator. Here, there is no fideicomissary substitution since there is no duality of heirs; in reality, there is a simple institution of heirs, but the inheritance is not for the benefit of the instituted heir since it will be applied or invested according to the secret instructions which had been communicated to such heir by the testator. In such case, the institution of heir is valid, although the instructions are void.[59]

[58]Ibid., pp. 208-209.
[59]Ibid., p. 209.

It must be noted that according to Art. 786 of the Code, 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. Is there no conflict between this rule and the rule stated in No. 4 of Art. 867? According to Manresa, there is no conflict. When the testator has already determined the persons to whom the property shall go, such as the poor, relatives, establishments, and so forth, and merely empowers another person to make the distribution among such poor, relatives or establishments, the provision of Art. 786 shall apply. When the testator does not determine, but instead institutes an heir with a charge upon his conscience regarding the destination, application or investment of the property, without saying precisely to what or in whose favor such property shall be given or applied, the act does not fall within the purview of Art. 786, but enters the sphere of Art. 867. The law considers that there is a substitution in such case since the property shall pass from a first heir to a second heir, but inasmuch as the second heir is not known, it declares the substitution to be without effect.[60]

Effect of Void Fideicommissary Substitutions. — According to Art. 868, the nullity of the fideicomissary substitution does not prejudice the validity of the institution of the heirs first designated; the fideicomissary clause shall simply be considered as not written. This rule is of course logical considering that the fideicomissary substitution is the subsidiary institution, while the first institution of heirs is the principal institution.

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.[61]

Disposition of Usufruct to Various Persons. — The rule stated in the first sentence of Art. 869 is a logical consequence of

[60]Ibid., p. 214.
[61]Art. 787, Spanish Civil Code.

the principle that the owner of a thing has the power to dispose of not only the whole but also any part of his right of ownership over the thing. With regard to the rule stated in the second sentence, although the rules regarding fideicomissary substitution are applicable, in reality, there is no fideicommissary substitution, but merely a simple institution of heir combined with a legacy.[62]

Art. 870. The dispositions of the testator declaring all or part of the estate inalienable for more than twenty years are void.[63]

Disposition Declaring Estate Inalienable. — Art. 870 is a new provision. According to the Code Commission, this provision is added in order "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."[64] Thus, if the testator states in his will that the property bequeathed or devised shall not be alienated for a period of fifty years, under this provision, the prohibition shall be valid only for twenty years, but with respect to the excess it is null and void. If the prohibition to alienate is perpetual, there is no reason why the entire prohibition should be nullified. In order to effectuate the testatorial intent, it shall be valid but only for twenty years. And if it so happens that in addition to the prohibition to alienate there is a fideicomissary substitution expressly made, such prohibition shall not only be limited to twenty years but it shall have to be complemented by another mandate of the testator — the obligation of the first heir to preserve the property for the benefit of the second heir. Consequently, there can be no conflict between the provision of this article and that of No. 2 of Art. 867.

[62]6 Sanchez Roman, 2nd Ed., pp. 702-703.
[63]New provision.
[64]Report of the Code Commission, p. 111.

Section 4 — Conditional Testamentary Dispositions

Art. 871. The institution of an heir may be made conditionally, or for a certain purpose or cause.[1]

Freedom of Disposition. — The provision of Art. 871 is a restatement of the testator's freedom of disposition. Although the article speaks only of institution of heirs, there is no reason why the provision cannot be applied to any kind of testamentary disposition. Consequently, whether the testamentary disposition is an institution of heir, or a devise or legacy, under this article, the testator is free to impose any condition, or mode, or term.[2]

Conditional Testamentary Dispositions. — A testamentary disposition is conditional when its effectivity is subordinated to the fulfillment or nonfulfillment of a future and uncertain fact or event. This future and uncertain fact or event upon the fulfillment of which the testamentary disposition is made to depend is what is known as a condition.[3]

Before a testamentary disposition is considered conditional, it is necessary that the condition must fairly appear from the language used in the will.[4] If it does not appear in the will itself, or in a document executed with the same formalities as a will, it is not binding. In such case the testamentary disposition is pure, and not conditional.[5] Thus, in *Morente vs. De la Santa,*[6] where the testatrix merely orders her husband, who is the principal beneficiary in her will, not to marry again after her death, without attaching such order to the legacies and devises, or without stating that failure to comply with the order shall result in the nullity of the legacies and devices, and subsequently, four months after her death, the husband married again, it was held that such legacies and devises are not conditional, since the condition does not fairly appear from the language used in the will. The result, however, would be different if the condition

[1]Art. 790, Spanish Civil Code, in modified form.
[2]Manresa, 7th Ed., p. 226.
[3]This is based on the general definition of condition as a future and uncertain fact or event upon the fulfillment of which a juridical act is made to depend. *(Ibid.).*
[4]Morente vs. De la Santa, 9 Phil. 387.
[5]13 Scaevola 595-596.
[6]9 Phil. 387.

not to marry again is attached to the testamentary disposition or if the testator declared that failure to comply with the condition will nullify the testamentary disposition. Thus, in *Broce vs. Marcallana,*[7] where the testatrix, in her will, expressly directed her husband not to get married again, after her death, or if he desires to get married again, he must choose any of her relatives within the sixth degree, otherwise, he shall lose his right to the properties bequeathed or devised to him, and subsequently, after her death, the husband got married again, but not to any of her relatives, it was held that the legacies and devises are conditional, and as a consequence of the violation of the condition, the husband loses his right to the properties given to him without prejudice to his legitime.

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.[8]

Conditions Which Impair Legitime. — The rule stated in Art. 872 merely reiterates the principle of the untouchability of the legitime of compulsory heirs.[9] There is only one instance under our law where the testator is allowed to impose a charge upon the legitime of compulsory heirs and that is when the testator declares that the hereditary estate shall not be partitioned for a period which shall not exceed twenty years. According to Art. 1083 of the Code, this power of the testator to prohibit the division of the estate applies even to the legitime of compulsory heirs.

It must also be observed that a condition imposed upon the legitime of a compulsory heir is a condition which is contrary to law. Consequently, even looking at it from the viewpoint of Art. 873, the same shall be considered as not imposed.

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.[10]

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[7]CA, G.R. No. 10896-R, June 21, 1954.
[8]Art. 816, Spanish Civil Code.
[9]See Art. 904, Civil Code
[10]Art. 792, Spanish Civil Code.

Impossible Conditions. — If the condition is impossible in the sense that it is not possible of realization because it is contrary to either physical, juridical or moral laws, it shall be considered as not imposed. However, the institution of heir or the devise or legacy is not affected. There is a presumption in this case that the condition is due to a mistake or oversight, or merely a whim or caprice of the testator. Consequently, it must be disregarded as a matter of justice to the instituted heirs, devisees or legatees.[11]

What time shall be considered in determining whether the condition is impossible or not? According to Sanchez Roman, there is only one moment to consider and that is the time when the condition is to be fulfilled.[12]

The difference between the effect of an impossible condition when it is attached to a testamentary disposition and its effect when it is attached to a civil obligation must be noted. According to the first paragraph of Art. 1183 of the Civil Code: "Impossible conditions, those contrary to good customs or public policy and those prohibited by law shall annul the obligation which depends upon them." It is evident that under Art. 873, the condition is void but the disposition is valid, while under Art. 1183, the conditional obligation itself is void. Thus, if the testator bequeaths to a certain woman P10,000 if she will consent to be the mistress of a certain person, the condition is void, but the legacy is valid. However, if A obligates himself to give P10,000 to B if the latter consents to be his mistress for six months, the obligation is a complete nullity. The reason for the difference lies in the fact that under the first article, the testamentary disposition, strictly speaking, does not depend upon the fulfillment of the condition for its perfection but upon the death of the testator, while under the second article, the obligation depends for its perfection upon the condition which is impossible or which is contrary to law or good customs.

The principles which we have just noted are illustrated by the case of *Acciano vs. Brimo*.[13] In this case, the testator, a Turkish subject, executed a will which contains a provision that the estate shall be distributed in accordance with the laws of the Philippines.

[11]6 Sanchez Roman. 2nd Ed., p. 606.
[12]Ibid., p. 607.
[13]50 Phil. 867. See also Bellis vs. Bellis, 20 SCRA 358.

It also contains a provision that if anyone of the legatees should disregard the order, whatever disposition is found in the will in favor of such legatee shall be annulled and cancelled altogether. One of the legatees, a brother of the testator, questioned the validity of the order on the ground that the designation of legatees is subject to a condition which is contrary to law because it contravenes the provisions of the second paragraph of what is now Art. 16 of the Civil Code which states that it is the national law of the person whose succession is under consideration which shall govern the intrinsic validity of testamentary provisions. The Supreme Court, speaking through Justice Romualdez, held:

> "The institution of legatees in this will is conditional and the condition is that the instituted legatees must respect the testator's will to distribute his property, not in accordance with the laws of his nationality, but in accordance with the laws of the Philippines.
>
> "If this condition as it is expressed were legal and valid, any oppositor who fails to comply with it, as the herein oppositor who, by his attitude in these proceedings, has not respected the will of the testator, as expressed, is prevented from receiving his legacy.
>
> "The fact, is, however, that the said condition is void, being contrary to law, for Article 792 *(now Art. 873 of the Civil Code)* provides the following:
>
> "Impossible conditions, and those contrary to law or good morals shall be considered as not imposed and shall not prejudice the heir or legatee in any manner whatsoever, even though the testator otherwise provides.'
>
> "And said condition is contrary to law because it expressly ignores the testator's national law, when according to Article 10 *(now Art. 16)* of the Civil Code, such national law of the testator is the one to govern his testamentary dispositions.
>
> "Said condition then, in the light of the legal provision above cited, is considered unwritten, and the institution of legatee in said will is unconditional and, consequently, valid and effective even as to the herein oppositor."

There is, however, an interesting question which up to now has remained unresolved in this jurisdiction. Suppose that the testator in his will bequeaths or devises a certain property to a

certain beneficiary but subject to the condition that if the designated legatee or devisee opposes the probate of the will, he will then forfeit the legacy or devise, is much a condition valid or is it contrary to public policy? More specifically, suppose that the testator dies, and the designated legatee or devisee interposes his opposition to the probate of the, and subsequently, after hearing, the probate court issues an order allowing the will, has the legatee or devisee forfeited his right under the "no-contest and forfeiture" clause found in the will? There are conflicting theories. We are more inclined to adhere to the view that under the doctrine of the testator's freedom of disposition, such a clause or condition is valid. Ultimately, however, everything will depend upon whether the beneficiary had acted in good faith in opposing the probate of the will or not. If he had acted in good faith, he does not forfeit the legacy or devise; if he had acted in bad faith, he forfeits the legacy or devise.

Santos vs. Buenaventura
18 SCRA 47

The records show that when the 1966 will of the late Maxima Santos Vda. de Blas, which revoked her 1853 will, was presented for probate, Flora Blas de Buenaventura, one of the devisees, interposed her opposition thereto on the grounds that undue and improper pressure and influence was exerted upon the testatrix in the execution thereof; that the testatrix' signature was secured through fraud; and that at the time of the execution of the will, the testatrix was mentally incapable of making a will. Subsequently, however, she withdrew her opposition. The circumstances which led to said withdrawal are as follows: In order to pay for stenographic notes, she had to sell her house for P5,000.00. Thereafter, Rosalina Santos, the biggest beneficiary under the will, gave a party at the Manila Hotel aimed at settling the case amicably. The lawyer of Rosalina was able to convince Flora to withdraw her opposition. When the order admitting the will to probate became final and executory, Flora filed a motion praying for delivery of the fishpond devised to her. Rosalina, however, opposed the motion on the ground that said devise has been forfeited in favor of the residuary heirs pursuant to the "no-contest and forfeiture" clause in the will wherein it is stated that should any of the heirs, devisees or legatees contest or oppose its probate, the latter shall lose his or her right to receive any inheritance or benefit under it, which shall be forfeited in favor of the other heirs, devisees and legatees. Sustaining the

view of Rosalina, the trial court denied the motion of Flora. A motion for reconsideration was filed. The court also denied the motion. Flora appealed to the Court of Appeals, which certified the appeal to the Supreme Court for determination of questions purely of law. Issues: (1) Did Flora's actuations amount to a violation of the "no-contest and forfeiture" clause of the will? (2) Is the "no-contest and forfeiture" provision of the will valid?

Speaking through Justice J. Bengzon, the Supreme Court held:

"Anent the second issue, the parties herein, relying mostly upon Spanish and Anglo-American authorities, advance conflicting theories. Petitioner-appellee argues that the "no-contest and forefeiture" clause is a valid, legal and efficacious testamentary condition. Against this position, however, the devisee-appellant maintains that such provision in a will is null and void because it is contrary to public policy.

"It is, however, the first issue that we will now discuss. For this purpose, the point to determine initially is whether or not appellant's filing of her opposition was justified under the particular circumstances of the case; and then, whether or not a timely withdrawal of said opposition had precluded violation of the "no-contest and forfeiture clause".

"The court a *quo's* conclusion is that "there is no justification for her to oppose or contest the probate of said will" because "from the evidence given by her and by her witnesses during the pendency of the probate of the will xxx, it appears that Flora Blas was aware of the true facts surrounding the execution of the will and of the mental state of mind of the said testatrix at the time of the execution of the will in question, and yet she has charged her benefactor, the late Maxima Santos, as not enjoying sound mind when the latter executed her will on September 22, 1956", and that "there is no proof to show that the said Flora Blas was in any manner related by blood to Maxima Santos Vda. de Blas so that her contest of the will cannot benefit her."

"We disagree with the above conclusion of the lower court, which is not the inference borne out by the facts and the evidence — both testimonial and documentary — adduced in the case.

"Appellant knew about the existence of another will executed earlier in 1953 in which she stood to receive more — much more — than what is devised to her in the 1956 will. Since 1953 up to the death of the testatrix, appellant did not fall out of the

good graces of the deceased. Their relationship stayed as close as ever. She did not give any cause to alienate the deceased's affections. Why, then, the supposed change of heart?

"She was addressed as Flora Buendia in the will, yet she has been using the name Flora Blas as far as she could remember, apparently with the knowledge and consent of the deceased. This is supported by her school records from grade school up to first year pharmacy. Admittedly, it was the deceased who reared and spent for the education of the appellant, and therefore she must have known that the latter was using the family name Blas. If, indeed, the testatrix was not agreeable to such an arrangement, why did she not take steps to correct the same? We can only conclude that appellant's use of the family name Blas was with the acquiescence of the testatrix. Why should she change her mind after all the years and speak of appellant in her will as Flora Buendia instead of Flora Blas?

"There was also the coincidence that the three attesting witnesses to the will, all brothers, are likewise the lawyers of the executrix (who will receive the biggest single share under the will) and *compadres* of the assistant executrix, while the notary public is also a *compadre* of one of the attesting brothers-lawyers.

"Furthermore, the nurse who attended to the deceased on September 22, 1956 — the date when the will was supposedly typed and signed by that testarix in her room at the Manila Doctors Hospital — told the appellant that there was no one inside the testatrix's room when she went to administer medications to the old woman at the precise time when the attesting witnesses and the notary public testified they were inside the said room. The nurse admitted this likewise under oath (Tsn., June 10, 1957, p. 23).

"But the most important single factor that should engender reasonable doubt as to the physical and mental capacity of a person to execute a will, was the condition of Maxima Blas as gleaned from the records of the case. She was an old woman more than 86 years old who suffered from various ailments like rheumatoid arthritis, catarrh of the eyes, jaundice, cirrhosis of the liver, anemia, edema of the lower legs and fracture in the vertebrae. From August 1, 1956 to September 23, 1956 she received seven blood transfusions, as follows: one on August 1; two on September 22 (the alleged date of the execution of the will), with barely three hours intervening; one each on September 24, 25, 26 and 29, 1956. She was also given dextrose vinoc-

lysis on September 22, because she could not take food through the mouth; and on September 23, 1956 she started to bleed by mouth, compelling her doctor to cancel her trip to the United States scheduled for September 25, 1956. Several documents executed by her before the alleged date of execution of the will were no longer signed but merely thumbmarked by her, whereas the will appeared to have been signed.

"It is difficult for us to imagine that one situated and equally faced with the above enumerated facts and circumstances as the appellant was, should keep her peace. She had her doubts, and to resolve them she had to conduct inquiries and investigations. Her findings all the more strengthened her belief that there was something untoward about the execution of the will. Thus, in her desire to known the truth and to protect her rights, she opposed the probate of the will.

"After all, had the contest been continued and the will held invalid on any of the grounds provided by law for the disallowance of a will, she would have contributed in no small measure to the cause of the truth which the courts have been in a position to apply the proper legal provisions which are for the greater interests of the testatrix — since all of them are ordained to the idea that the truth of her last thoughts may be duly assured and guaranteed.

"Above all, the factor that preponderates in favor of appellant is that, after realizing her mistake in contesting the will — a mistake committed in good faith because grounded on strong doubts — she withdrew her opposition and joined the appellee in the latter's petition for the probate of the will. She must not now be penalized for rectifying her error. After all, the intentions of the testatrix had been fulfilled, her will had been admitted and allowed probate within a reasonably short period, and the disposition of her property can now be effected.

"It should be pointed out that, contrary to the translation accorded to Paragraph Fourteen of the will, the testatrix enjoins not a mere contest opposition to its probate, but a contest or opposition to the probate of the will and the carrying out of its provisions. This is so because the questioned clause speaks of "pagpapatibay at pagbibigay-bisa" instead of "pagpapatibay o pag-bibigay-bisa." This furnishes a significant index into the intention of the testatrix, namely, that she was more concerned in insuring the carrying out of her testamentary provisions than in precluding any contest or opposition to it. By the withdrawal of the contest which appellant brought in good faith, no prejudice

has been done into the intention of the testatrix. The disposition of her will can now be safely carried out.

'The most that can be said, if at all, is that Flora Blas' actuations were also impelled by some desire to gain. But who among the heirs can assume a posture of innocence and cast the first stone? None of them can safely claim that he is not thus similarly motivated.

"From the foregoing premises it cannot be said that Flora's actuations impaired the true intention of the testatrix in regard to the "no-contest and forfeiture" clause of the will. Flora's act of withdrawing her opposition before she had rested her case contributed to the speedy probation of the will. Since the withdrawal came before Flora bad rested her case, it precluded the defeat of the probate upon the strength of Flora's evidence. Through said withdrawal, Flora conformed to the testatrix's wish that her dispositions of her properties under the will be carried out. It follows that, taken as a whole, Flora's actuations subserved rather than violated the testatrix's intention.

There is, therefore, no further need to discuss the second issue in this jurisdiction, since, at any rate, said clause was not violated in this case.

"Wherefore, the appealed orders dated April 30, 1958 and March 7, 1959 are hereby reversed, and this case is remanded to the court a *quo* with the instruction that appellant's devise under the will be forthwith delivered to her. No costs. So ordered."

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.[14]

Absolute Conditions Not to Contract Marriage. — A condition which is frequently imposed by a testator upon an instituted

[14]Art. 793, Spanish Civil Code.

heir, or upon a devisee or legatee is the condition not to contract a first or a subsequent marriage. Undoubtedly, this condition is contrary to morals and public policy because it would deprive a person of one of his inherent or inalienable rights — the right to choose his own status. As a consequence, the Code in Art. 874 considers it as not imposed.

Idem; Condition not to contract first marriage. — According to the first paragraph of Art. 874, an absolute condition not to contract a first marriage shall be considered as not written. Subject to the rule provided for in the second paragraph, this rule is absolute in character. As in the case of impossible conditions, the validity of the institution of heirs or of the devise or legacy is not affected, although the condition is void. Thus, if a person institutes one of his daughters as heir to the free portion of his estate subject to the condition that she will never get married, the institution is valid, but the condition is void. In other words, the institution shall be considered as pure and not conditional.

Idem; Condition not to contract subsequent marriage. — In the case of an absolute condition not to contract a subsequent marriage, the rule is subject to several exceptions, besides the general exception provided for in the second paragraph of Art. 874. The exceptions are: (1) when it is imposed by the deceased spouse himself; (2) when it is imposed by the ascendants of the deceased spouse; and (3) when it is imposed by the descendants of the deceased spouse.[15] Thus, if the testator institutes his wife, as heir, or appoints her as a devisee or legatee, he may validly impose upon her the absolute condition not to contract a subsequent marriage. The same is true if a person institutes his daughter-in-law, who was formerly married to a deceased son, or his stepmother, who is the widow of his deceased father.

Evidently, the basis of these exceptions is love which transcends even death itself. Besides, according to Manresa to allow the property of the deceased spouse or of his or her ascendants or descendants to be enjoyed by the person who has taken his or her place in the survivor's heart would be an offense against his or her memory.[16]

[15]Art. 874, par, 1, Civil Code.
[16]6 Manresa, 7th Ed., p. 237.

According to Scaevola, the descendants referred to in Art. 874 are the descendants of the deceased spouse had by a prior marriage, not the common descendants of the deceased and the surviving spouse.[17] Dr. Tolentino, however, dissents from Scaevolas's opinion. He says:

> "We believe, however, that no distinction should be made because the law makes no such distinction. Whether the descendant is exclusively of the deceased spouse or begotten with the widow or widower is immaterial; the reason for upholding the prohibition is the same in either case. It is clear, however, that the ascendants or the descendants of the surviving spouse, had from a prior marriage, cannot impose the prohibition, because they are not ascendants or descendants of the deceased spouse."[18]

We believe that the above view of Dr. Tolentino is more logical.

Idem; Nature of condition when validly imposed. — The absolute condition not to contract marriage when validly imposed is resolutory in character. Art. 874 is concerned with heirs, devisees or legatees, who are entitled to the inheritance, devise or legacy upon the death of the testator, but lose their right thereto upon the fulfillment of the condition if validly imposed.[19] Consequently, if the testator institutes his wife as heir subject to the condition that she will never marry again, she immediately acquires a right to the inheritance upon the death of the testator, but if she violates the condition by contracting a second marriage, she loses her right to the said inheritance. Her legitime, however, is not affected.

Speaking of absolute conditions not to contract marriage when validly imposed, the following case is an interesting example:

Villaflor-Villanueva vs. Juico
4 SCRA 550

The testator, Nicolas Villaflor, died in 1908 with a will wherein he left most of his properties to his wife, Fausta Nepo-

[17]13 Scaevola, 622-624.
[18]3 Tolentino, Civil Code, 1956 Ed., pp. 206-207.
[19]6 Manresa, 7th Ed., p. 238.

muceno, and his brother Fausto Villaflor. In addition, he also left the "use and possession" of certain specified properties to his wife "while alive" subject to the condition that she does not remarry; otherwise, said properties shall pass to a grandniece, Leonor Villaflor. The widow, never remarried. She died in 1956. Who is now entitled to these properties — the estate of the widow or Leonor Villaflor?

Held: The plain intent of the testator was to invest his widow with only a usufruct or life tenure in the properties, subject to the further condition that if she remarried, her rights would thereupon cease, even during her lifetime. That the widow was meant to have no more than a life interest in the properties, even if she did not remarry at all, is evident from the expression used in the will, "use and possession while she lives". If the testator had intended to impose as sole condition the nonremarriage of his widow, the words "use and possession while she lives" would have been unnecessary, since the widow could only remarry during her lifetime. It follows, therefore, that the testator's grandniece, Leonor Villaflor, is entitled to these properties upon the widow's death, even if the widow never remarried in her lifetime.[20]

Relative Conditions Regarding Marriage. — It must be noted that the general rule stated in Art. 874 is applicable only when the prohibition to contract a first or subsequent marriage is absolute in character. Consequently, if the prohibition is relative with respect to persons, time or place, the rule does not apply; in other words, the prohibition or condition is valid. Thus, if the testator institutes A as his heir subject to the condition that she will not get married until she reaches the age of twenty-five, the condition not to marry is relative in character; hence, it is valid. The same is true if the testator bequeaths P10,000 to B subject to the condition that she will not get married to anybody belonging to a certain party or a certain sect. There are cases, however, when a

[20]Would it not be more logical to say that the testator's intention is that Leonor Villaflor shall be entitled to the properties only if the condition is violated? Would it not then necessary follow that since the condition had not been violated, the properties shall not be adjudicated to the legal heirs of the testator? After all, Leonor Villaflor was never designated as heir or devisee independently from the widow. She was designated, it is true, but subject to the *suspensive condition* that the widow should remarry. It is, therefore, submitted that No. 3 of Art. 960 of the Civil Code should have been applied. Thus, the properties should have been adjudicated to the legal heirs of the testator.

relative prohibition to marry becomes in effect absolute in character rendering it practically impossible for the heir, devisee or legatee to get married at all. In such cases, the rule stated in Art. 873 is applicable.

It must also be noted that the provisions of Art. 874 is not applicable to a condition to get married. Although such a condition will also have the effect of preventing a person from choosing his own status, nevertheless it must be considered valid since the law does not prohibit it. This is the accepted rule in Spanish Law.[21]

In synthesis, Art. 874, in an implicit manner, authorizes the following conditions: (1) A generic condition to contract marriage; (2) a specific condition to contract marriage with a determinate person; and (3) a specific condition not to contract marriage with a determinate person.[22]

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.[23]

Conditions Captatoria. — The condition that the heir shall make some provision in his will in favor of the testator or of any other person is what is known as a condition *captatoria*. Hence, if the testator makes a testamentary disposition in his will subject to such a condition, it is known as *disposicion captatoria*. Unlike the conditions contemplated by Arts. 873 and 874, the effect of a condition *captatoria* is according to Art. 875, to nullify the disposition itself. The reason for the precept is that testamentary succession is an act of liberality, not a contractual agreement. Besides, to permit it would impair the heir's freedom of testamentary disposition with respect to his own property as well as allow the testator to dispose of the property of another after the latter's death.[24]

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.

[21] 6 Manresa, 7th Ed., p. 238; 6 Sanchez Roman 608; 13 Scaevola 626.
[22] 6 Manresa, 7th Ed , p. 238.
[23] Art. 794, Spanish Civil Code.
[24] 6 Manresa, 7th Ed., p. 241.

This rule shall not apply when the condition, already complied with, cannot be fulfilled again.[25]

Art. 877. If the condition is casual or mixed, it shall be sufficient if it happens 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.[26]

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.[27]

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.[28]

Potestative, Casual, and Mixed Conditions. — As regards the cause upon which their fulfillment depends, conditions may be purely potestative, casual or mixed. A purely potestative condition is one whose fulfillment depends exclusively upon the will of the heir, devisee or legatee. Thus, if A is instituted as heir if he shall study law in a certain college, or if B is appointed as a devisee or legatee if she shall not get married before reaching the age of twenty-five, the condition in both cases is purely potestative. A casual condition is one whose fulfillment depends exclusively upon chance and/or upon the will of a third person. Thus, if a certain person is appointed as a devisee or legatee with respect to certain properties if the testator's race horse shall win the Senior Grand Derby, the

[25]Art. 795, Spanish Civil Code.
[26]Art. 796, Spanish Civil Code.
[27]Art. 799, Spanish Civil Code.
[28]Art. 800, Spanish Civil Code, in modified form.

condition is casual because its fulfillment depends upon chance. If the testator bequeaths his law library to a certain friend, provided his son does not become a lawyer within five years after his death, the condition is also casual, because its fulfillment depends upon the will of a third person. A mixed condition, on the other hand, is one whose fulfillment depends jointly upon the will of the heir, devisee or legatee and upon chance and/or the will of a third person. Thus, if the testator bequeaths P10,000 to A subject to the condition that A shall get married to B within five years after the testator's death, the condition is mixed because its fulfillment depends partly upon the will of the legatee, partly upon the will of a third person, and partly upon chance.

Idem; Time of fulfillment. — If the condition is purely potestative, the general rule is that the heir must fulfill it as soon as he learns of the testator's death. This rule, however, is not applicable when the condition already complied with, cannot be fulfilled again.[29] Evidently, these rules are applicable only when the potestative conditions is of a positive, not a negative, character.

On the other hand, if the condition is casual or mixed, the rule is that it shall be sufficient if it happens or be fulfilled at any time before or after the death of the testator, unless he has provided otherwise.[30] There are two secondary rules, however, which we must remember in relation to this rule. They are:

(1) If the condition had already been fulfilled at the time of the execution of the will and the testator was unaware thereof, it shall be deemed to have been complied with.[31] Thus, if the condition imposed upon the instituted heir A is that he must get married to B, and at the time of the execution of the will the two were already married without the testator's knowledge, the condition shall be deemed to have been complied with.

(2) If the condition has already been fulfilled at the time of the execution of the will and the testator had knowledge thereof, the condition shall, as a rule, still have to be complied with, unless it is of such a nature that it can no longer exist or be complied with

[29]Art. 876, Civil Code.
[30]Art. 877, par. 1, Civil Code.
[31]Art. 877, par. 2, Civil Code.

again.[32] This exception is illustrated by the case of an heir who is instituted subject to the condition that he must first get married when, as a matter of fact, the testator is well aware at the time of the execution of the will that he was already married. It is evident in this case that the condition is of such a nature that it cannot be complied with; consequently, it is considered fulfilled. However, if the heir becomes a widower before the death of the testator, then the general rule will still have to apply; in other words, in order to be entitled to the inheritance, he must get married again.

It will be observed that there is a fundamental difference between a potestative condition and a casual or mixed condition with respect to the time of fulfillment of the event which constitutes the condition. A potestative condition imposed upon an heir, devisee or legatee must be fulfilled by him as soon as he learns of the testator's death; a casual or mixed condition may be fulfilled before or after the testator's death. The reason for this difference lies in the special nature of both kinds of condition. By its very nature, a potestative condition should be complied with after the death of the testator, because until then the will on which it depends may be modified or even revoked. In other words, until the testator dies, there is really no condition with which the heir, devisee or legatee could comply, or as Sanchez Roman puts it, the conditional testamentary disposition is merely *in potentia*. It is different in the case of a casual or mixed condition. Since its fulfillment is independent of or only partly dependent upon the will of the heir, devisee or legatee, it is sufficient that it happens or be fulfilled at anytime before or after the death of the testator. It is, therefore, immaterial to the testator when the condition is fulfilled, unless knowing that said condition has already been complied with, he should again demand the fulfillment thereof.[33]

Idem; Rule in negative potestative conditions. — Art. 879 refers to potestative conditions which are negative in character. In other words, it refers to those potestative conditions which consist in not doing or not giving something, as distinguished from positive conditions which consist in doing or giving something. According to Manresa, if the potestative condition is negative in character, there

[32]Art. 877, par. 3, Civil Code.

[33]6 Manresa, 7th Ed., p. 247; 6 Sanchez Roman, 2nd Ed., p. 618.

is neither reason nor motive for delaying the delivery of the property to the heir, devisee or legatee since the effectivity of the right of such heir, devisee or legatee does not have to depend upon any act of the latter nor upon the fulfillment of any other requisite. In other words, the right of the heir, devisee or legatee does not have to be held in suspense as in the case of the heir, devisee or legatee whose right is subject to a positive condition; he acquires his right as a matter of course without any limitation other than that of not doing or not giving something.[34] For this reason, the Code authorizes the immediate delivery of the property to the heir, devisee or legatee. However, in order that such heir, devisee or legatee shall not perform or give that which is prohibited, he is required to give a security or bond, which in Roman law was known as *"caucion muciana."* In case the mandate or order of the testator is violated, the heir, devisee or legatee shall return whatever he may have received, together with its fruits and interests. In case he cannot, the security shall have to answer for the deficiency. Until the condition is violated he shall continue in the possession and enjoyment of the property.

Who can demand for the constitution of the bond or security? Even if the article does not say so, it is clear that this bond or security is constituted in favor of those to whom the property would pass in the event that the testator's mandate is not complied with. Hence, it is but logical that these same persons must have the right to demand for the constitution of the bond or security.[35] Consequently, they can compel the heir, devisee or legatee to file the required bond or security, and if such heir, devisee or legatee fails to do so, then he shall be placed in the same position as an heir, devisee or legatee instituted or appointed under a suspensive condition, in which case, according to the second paragraph of Art. 880, the estate shall be placed under administration until the security is given or until it is certain that it will be impossible to perform that which is prohibited by the testator.

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.

[34]6 Manresa, 7th Ed., p. 261.
[35]6 Manresa, 7th Ed., p. 262.

The same shall be done if the heir does not give the security required in the preceding article.[36]

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.[37]

Suspensive and Resolutory Conditions. — As regards their effects, a condition may be either suspensive or resolutory. A suspensive condition may be defined as a condition upon the fulfillment of which successional rights arising from an institution of heir or from a devise or legacy are acquired. A resolutory condition, on the other hand, may be defined as a condition upon the fulfillment of which rights already acquired by virtue of an institution of heir or of a devise or legacy are extinguished or lost. In the first, the effectivity of the institution of heir, devise or legacy depends upon the fulfillment of the condition, while in the second the testamentary disposition is already effective but subject to the threat of extinction. Thus, if A is instituted as heir if he gets married, and B is appointed as legatee with respect to certain properties if he passes the bar examination in his first attempt, the condition in both cases is suspensive in character. In order that A and B will be entitled to claim their rights arising from the institution of heir and from the legacy, it is essential that the condition shall be complied with. The effect of a resolutory condition, on the other hand, is diametrically opposed to that of a suspensive condition. Thus, if a widow had been designated as heir by the deceased spouse subject to the conditions that she will not get married again, the condition is resolutory in character. Upon the death of the testator, she acquires her rights as heir immediately. However, if the condition is fulfilled, *i.e.,* if she contracts a second marriage, her rights are extinguished.

It is, therefore, clear that when the institution of heir or the devise or legacy is subject to a suspensive condition, such condition has the effect of suspending not only the demandability of the right, but the right itself. Consequently, what is acquired by the heir, devisee or legatee is only a mere hope or expectancy. It is, however,

[36]Art. 801, Spanish Civil Code.
[37]Art. 804, Spanish Civil Code.

a hope or expectancy that is protected by the law. This is evident from the provisions of Arts. 880 and 881 of the Code.

Thus, if A is instituted as heir subject to the condition that he shall get married to B within a period of five years from the time of the death of the testator, the condition is suspensive in character. Pending its fulfillment, the estate, after the death of the testator, shall be placed under administration in accordance with the provision of Art. 880. Hence, an administrator who will take charge of the estate shall have to be appointed. This appointment of the administrator, as well as the manner of administration and the rights and obligations of the said administrator shall be governed by Rules 78 to 90 of the New Rules of Court. The administration shall last until the condition is fulfilled or it becomes certain that it cannot be fulfilled. If B gets married to some person other than A, it is logical that the administration shall be terminated. The estate shall, therefore, pass to those who are legally entitled to the same, such as the legal heirs.

As noted above, when the institution of heir or the devise or legacy is subject to a resolutory condition, the rights of the heir, devisee or legatee are acquired immediately upon the death of the testator. These rights, however, are subject to the threat of extinction. If the event which constitutes the resolutory condition happens or is fulfilled, such rights are extinguished or lost. The inheritance or the devise or legacy shall, therefore, pass to those who are legally entitled to the same, as for instance, the legal heirs.[38]

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.[39]

[38]See Art. 1179, *et seq.,* Civil Code.
[39]Art. 797, Spanish Civil Code, in modified form.

Institution Modal. — A mode may be defined as the statement of the object of the institution, or the application of the property left by the testator, or the charge imposed by him. Consequently, if the testator attaches to an institution of heir, or to a devise or legacy a statement of (1) the object of the institution of heir or of the devise or legacy, or (2) the application of the inheritance, devise or legacy, or (3) a charge upon the heir, devisee or legatee, the institution or the devise or legacy is modal, not conditional, in character.[40]

A mode, therefore, should not be confused with a condition. While a condition suspends, but does not obligate, a mode obligates, but does not suspend.[41] Thus, if A is instituted as heir if he passes the bar examination in his first attempt, it is evident that the institution in his first attempt, it is evident that the institution is conditional, since the right of the heir, as well as its demandability, is suspended until he passes the bar examination. If, on the other hand, B is given as legacy P10,000 with a charge of applying one-half of the amount for masses, prayers and other pious words, the legacy is not conditional; it is merely subject to a mode or obligation. There are cases, however, where it is difficult to distinguish one from the other. In case of doubt, the institution, devise or legacy must be considered as modal.[42]

Idem; Fulfillment or compliance. — The person or persons who are entitled to demand compliance with the mode or obligation are those who are directly interested in the obligation. If no person is directly interested in its fulfillment, or the identity of the person interested cannot be determined, the obligation is a mere advise or recommendation of the testator without any coercive force. In other words, it becomes a mere imperfect obligation of the heir, devisee or legatee.[43]

When may the inheritance or property be claimed by the heir, devisee or legatee? According to Art. 882, the delivery or payment of the inheritance, devise or legacy can be claimed immediately. However, it is a necessary condition before delivery or payment is

[40]Art. 882, Civil Code.

[41]6 Manresa, 7th Ed., p. 248. Another distinction given by the illustrious commentator is with regard to the expression used — "si" para expresar la condicion "ut" para el modo. (p. 224).

[42]6 Manresa, 7th Ed., p_ 224; see Chiang Joc-Soy vs. Vano, 8 Phil. 119.

[43]6 Sanchez Roman, 2nd Ed., pp. 620-621.

to be made that the instituted heir, or the devisee or legatee, or the heirs of such heir, devisee or legatee shall file a bond as security for the performance or fulfillment of the obligation. In case of failure to comply with the mode or obligation, the heir, devisee or legatee shall be compelled to return whatever he may have received by virtue of the institution or of the devise or legacy, together with its fruits or interests. In case he cannot, the bond or security can be made to answer for any deficiency.

Art. 883. When without the fault of the heir, an institution referred to in the preceding article cannot take effect in the exact mariner 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.[44]

Manner of Fulfillment or Compliance. — The provision of Art. 883 as arranged is defective. Apparently, the first paragraph is applicable only to *instituciones sub modo,* while the second paragraph is applicable only to conditional testamentary dispositions. It is, however, submitted that both paragraphs are applicable whether the institution of heirs, devise or legacy is modal or conditional in character.

A distinction must be made with respect to the application of the doctrine of constructive fulfillment as enunciated in the first paragraph when applied to conditional testamentary dispositions. If the condition is casual, the doctrine is evidently not applicable since the fulfillment of the event which constitutes the condition is independent of the will of the heir, devisee or legatee. However, if the condition is potestative or mixed, the doctrine is applicable.[45]

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.[46]

[44]Art. 798, Spanish Civil Code, in modified form.
[45]6 Sanchez Roman, 2nd Ed., pp. 618-619.
[46]Art. 791, Spanish Civil Code.

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.[47]

Testamentary Dispositions With a Term. — Testamentary dispositions with a term or period are those demandability or extinguishment are subject to the expiration of a term or period. Consequently, a term or period, as applied to testamentary dispositions, may be defined as an interval of time, which, exerting an influence upon a testamentary disposition as a consequence of a juridical act, either suspends its demandability or produces its extinguishment.

A term or period may be either suspensive *(ex die)* or resolutory *(in diem)*. It is suspensive when the rights of the instituted heir, devisee or legatee to the inheritance, devise or legacy are suspended until the arrival of the date or time designated by the testator; it is resolutory when such rights are immediately demandable, although they are extinguished upon the arrival of the date or time designated by the testator.[48]

Idem; Rule if term is suspensive. — If the institution of heir or the devise or legacy is subject to a suspensive term, the term shall suspend the effects of the institution or of the devise or legacy. In other words, the heir, devisee or legatee can demand for the delivery of the inheritance, devise or legacy only upon the expiration of the term or period. Stated in another way, the right of the heir, devisee or legatee is acquired at the time of the death of the testator, but the demandability of the right itself is suspended until the arrival of the date or time designated by the testator. Thus, if a parcel of land is devised to A, but it is stated in the will that the said land shall be delivered to him only after the expiration of a term or period of five years to be counted from the time of the death of the testator, there is no question that A shall acquire a right to the land immediately

[47]Art. 805, Spanish Civil Code.
[48]Arts. 885, 1193, Civil Code.

upon the death of the testator; however, he can demand for its delivery only upon the expiration of the designated term or period.

Pending the arrival of the date or time designated by the testator, the inheritance, devise or legacy shall be given to the legal or intestate heirs of the said testator in conformity with the rule stated in the first sentence of the second paragraph of Art. 885. However, these legal heirs shall not enter into the possession of the property without giving sufficient security, with the intervention of the instituted heir or of the devisee or legatee. It must be noted that this provision directly conflicts with the provision of Art. 880. As Mr. Justice J.B.L. Reyes has so succinctly stated:

> "Art. 880 conflicts with Art. 885. Under Art. 880, if the heir be instituted under a suspensive condition 'or term' the estate is placed under administration; under Art. 885, par. 2, the legal (*i.e.*, intestate) heir is considered called 'until the arrival of the period.' Now, who will it be? The administrator or the legal heir?
>
> 'In its prototype, Art. 805 of the Code of 1889 *(now Art. 880),* the rule was limited to suspensive conditions only, because suspensive periods were governed by Art. 805 *(now Art. 885).* Some unknown genius in the Code Commission inserted 'or term' in Art. 880, and created a contradiction where there was none. Consequently, the words 'or term' in line 2, and 'or until the arrival of the term' in lines 4 and 5 *(at the end of the first paragraph),* of Art. 880 must be eliminated."[49]

There is, however, one instance where it is possible to apply the provision of Art. 880. If the legal heirs cannot file the required bond or security, then the inheritance or property shall have to be placed under administration.

Idem; Id. — Transmissibility of rights. — If the instituted heir or the devisee or legatee should die before the expiration of the suspensive term or period, his right to the inheritance, devise or legacy shall be transmitted to his own heirs. This principle is now enshrined in Art. 878. It must be noted, however, that in order that this rule shall be applicable, the heir, devisee or legatee should

[49]49 Observations on the New Civil Code, Lawyer's Journal, pp. 555-558, Nov. 30, 1950.

have died after the death of the testator, but before the expiration of the term or period. This rule is of course in conformity with the principle that if the institution of heir or the devise or legacy is with a suspensive term, what is suspended by the term or period is not the acquisition of the right to the inheritance, devise or legacy, but merely the demandability of the right itself.

Idem; Rule if term is resolutory. — If the institution of heir or the devise or legacy is subject to a resolutory term, the heir, devisee or legatee can demand immediately for the delivery of the inheritance, devise or legacy. However, after the expiration of the designated term or period, his rights thereto are terminated. As a consequence, the inheritance, devise or legacy shall pass to the legal heirs of the testator. Thus, if a parcel of land is devised to X, but it is stated in the will that he shall enjoy the land only for a period of five years after the death of the testator, the devise is subject to a resolutory term. Upon the expiration of the term of five years after the death of the testator, the property shall pass to the legal heirs of the said testator in accordance with the rules of intestate succession.

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.[1]

Concept of Legitime. — Under the Spanish Civil Code as well as under our Code, the legitime is defined as 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.[2] From this definition, it is clear that a part or portion of the hereditary estate is to a certain extent withdrawn from the patrimony of the testator so that he can no longer dispose of it by any gratuitous title, although he can still enjoy it. According to Manresa, this is the distinctive nature or characteristic of the system of legitime.[3] This

[1]Art. 806, Spanish Civil Code.
[2]Art. 886, Civil Code.
[3]6 Manresa, 7th Ed., pp. 291-292.

limited withdrawal from the testator's patrimony is due to the fact that the legitime is already reserved by operation of law for certain heirs who are, therefore called compulsory heirs. Thus, the Supreme Court, describing the interest which a son has in the estate of his father, once stated:

> "It is undeniable that a necessary or forced heir, according to the system of legitimes, has, by provision of law, from the time of his birth, a vested right to acquire the inheritance from his ascendants after their death and such a vested right is inherent with his legitimate filiation to which belong the obligations and rights of the author of his being. The son and the father are in some respects co-owners of the property of the latter."[4]

The avowed purpose of the system of legitime is of course to protect compulsory heirs. It is always possible that a man or a woman may forget his or her parental, filial or conjugal obligations. The law, by reserving a part or portion of the testator's estate for the benefit of compulsory heirs, is thus able to protect such heirs from his or her anger or neglect.

As it is, the system of legitime, as adopted in the New Civil Code, is still fundamentally the same as that found in the Spanish Code. There are, however, certain changes. Among the most important changes are the following: (1) The legitime of the surviving spouse has been converted from usufruct into full ownership; (2) illegitimate children other than acknowledged natural have been given a regular legitime. Children of void marriages are considered natural children by legal fiction 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 Family Code, however, all illegitimate children are simply referred to as illegitimate children. Furthermore, the legitime of each illegitimate child is one-half the legitime of a legitimate child); and (3) the *"mejora"* or betterment has been abolished, but the free portion has *been* increased to one-half, so that the testator may give part or all of it to his legitimate children or descendants, or to his spouse, or to third persons.[5]

[4]Rocha vs. Tuason, 39 Phil. 976.
[5]Report of the Code Commission, p. 54.

Kinds of Legitime. — Under our system of compulsory succession, the legitime of compulsory heirs may be either fixed or variable. It is fixed if the aliquot part of the testator's estate to which a certain class of compulsory heirs is entitled by operation of law is always the same whether they survive alone or with other classes of compulsory heirs; it is variable if the aliquot part changes depending upon whether they survive alone or with other classes of compulsory heirs. Thus, the legitime of legitimate children or descendants and legitimate parents or ascendants is always one-half of the testator's estate, while that of the other classes of compulsory heirs depends upon whether they survive as a class or they concur with other classes of compulsory heirs.

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.[6]

Compulsory Heirs. — In general, compulsory heirs are those heirs for whom the law has reserved that part of the testator's estate

[6]Art. 867, Spanish Civil Code, in modified form.

known as the legitime.[7] As such, testator cannot disregard them. These heirs are enumerated in Art. 887 of the Code.

Thus, if the testator is a legitimate person, his compulsory heirs under Art. 887 of the Civil Code are the following:

(1) Legitimate children and descendants;

(2) In default of the foregoing, legitimate parents and ascendants;

(3) The widow or widower;

(4) Acknowledged natural children and natural children by legal fiction; and

(5) Acknowledged illegitimate children who are not natural.

(Please see comments on illegitimate children for nos. 4 and 5 of this enumeration.)

On the other hand, if the testator is an illegitimate person, his compulsory heirs are the following:

(1) Legitimate children and descendants;

(2) Acknowledged natural children and natural children by legal fiction;

(3) Acknowledged illegitimate children who are not natural;

(4) In default of all the foregoing, parents by nature; and

(5) The widow or widower.

(Please see comments on illegitimate children for nos. 2 and 3 of this enumeration.)

Kinds of Compulsory Heirs. — The compulsory heirs as enumerated in Art. 887 may be classified into primary compulsory heirs and secondary compulsory heirs. Primary compulsory heirs are those who are always entitled to their legitime as provided by law regardless of the class of compulsory heirs with which they may concur, while secondary compulsory heirs are those who may be excluded by other compulsory heirs. The first includes all kinds of

[7]See Art. 886, Civil Code.

compulsory heirs with the exception of parents or ascendants, while the second embraces only parents or ascendants.

Idem; Legitimate children or descendants. — This class includes legitimate children or descendants proper,[8] legitimated children or descendants,[9] and adopted children.[10] As a rule, adopted children are entitled to the same successional rights as legitimate children.[11] There are, however, two well-known exceptions. Thus, if the adopter is survived by his legitimate parents or ascendants and by his adopted child, the latter shall not have more successional rights than an acknowledged natural child.[12] Furthermore, if the adopter dies before his legitimate parent or ascendant, or is incapacitated to inherit from such parent or ascendant, or is disinherited by such parent or ascendant, unlike a legitimate child, the adopted child cannot inherit by right of representation from the parent or ascendant. The basis of this exception is evident. Adoption merely creates a relationship similar to that of legitimate paternity and filiation between adopter and adopted child. It does not create any relationship between the adopted child and the legitimate relatives of the adopter.

Idem; Widow or widower. — Under the old law, the widow or widower was entitled merely to a usufructuary right; under the present law, she or he is now entitled to all of the rights of a primary compulsory heir. However, if there is a decree of legal separation, the guilty spouse can no longer be considered as a compulsory heir of the innocent spouse, since one of the effects of the decree is to disqualify the former from inheriting from the latter.[13]

The surviving spouse cannot claim to be a compulsory heir of her or his parent-in-law under Art. 887(3). The aforesaid provision 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.

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[8]Art. 264, Civil Code.
[9]Art. 272, Civil Code.
[10]See Art. 39, Child and Youth Welfare Code (P.D. No. 603).
[11]Ibid.
[12]Ibid.
[13]Arts.106, 892, Civil Code.

Idem; illegitimate children. — Under the New Civil Code there are three kinds of illegitimate children who are classified as primary compulsory heirs. They are: (1) acknowledged natural children; (2) natural children by legal fiction; and (3) acknowledged illegitimate children who are not natural.[14]

The first includes all natural children who may have been acknowledged either voluntarily[15] or by a final judgment of a competent court.[16] Consequently, a natural child who has not been acknowledged is not a compulsory heir. In other words, in relation to his presumed parent, he has no successional right whatsoever. This is the settled rule in this jurisdiction.[17] It is, however, possible that even when the testator is already dead, a natural child not acknowledged may still participate in the inheritance by maintaining a complex action to compel recognition and at the same time to obtain relief in the character of heir.[18] But such an action would be possible only in those exceptional cases provided by law.[19]

The second includes all of those children born or conceived of void marriage as well as those conceived of voidable marriages after the decree of annulment. By express provision of law, such children shall have the same status, rights and obligations as acknowledged natural children.[20] Consequently, they are also primary compulsory heirs. Since their status is conferred upon them by operation of law, recognition by the testator is not necessary. However, according to Art. 887 of the Code, proof of filiation is still required.[21]

The third includes all illegitimate children other than natural children in accordance with Art. 269 and other than natural children

[14]Prior to the effectivity of the Family Code, the term 'spurious children' is still used, although it is not exactly accurate because the other kinds of spurious children recognised under the old Code are no longer recognized under the new. That is why the law calls such children "other illegitimate children referred to in Art. 287" (Art. 887) and the Supreme Court, in recent cases, calls them illegitimate children not natural."

[15]Art. 278, Civil Code.

[16]Arts. 283, 284, Civil Code.

[17]Canales vs. Arrogante, 91 Phil 6.

[18]Briz vs. Briz, 43 Phil. 763; Lopez vs. Lopez, 68 Phil. 227; Escoval vs. Escoval, 48 Off. Gaz. 615; Coquia vs. Coquia, (CA), 50 Off. Gaz. 3701.

[19]Art. 285, Civil Code.

[20]Art. 89, Civil Code.

[21]Art. 887, Civil Code.

by legal fiction. In other words, they are those children born outside of wedlock of parents who, at the time the conception of the former, were disqualified by some impediment to marry each other. Under the law, this class of illegitimate children shall be entitled to support and such successional rights as are granted in the Civil Code. These rights, however, are predicated on the fact that there must be either voluntary or compulsory recognition by the putative parent. This now is well-settled in this jurisdiction.[22]

Contrary to the provisions of the New Civil Code, the Family Code provisions limit the classification of children to only the legitimate and the illegitimate children. Thus, the further classification of illegitimate children to (1) acknowledged natural children; (2) natural children by legal fiction; and (3) acknowledged illegitimate children who are not natural; was thereby eliminated. Now, all illegitimate children are simply referred to as illegitimate children.

Under the Family Code, illegitimate children, like legitimate children, are given their status as such from the moment of birth. Hence, there is no need for illegitimate children to file the action for recognition if they have been recognized by their parents by any of the evidences enumerated in Art. 172 of the Family Code. Where the illegitimate children are required to establish their illegitimate filiation, they can do so in the same way and by the said evidences. As stated in the case of *Edna Padilla Mangulabnan as guardian ad litem for minor Alfie Angelo Acero vs. the Honorable Intermediate Appellate Court and Ambrosio Tan Chen Acerto* (G.R. No. 71994, May 31, 1990) and the case of *Victoria U. Baluyut, Ma. Theresa U. Baluyut and Ma. Flordeliza U. Baluyut, all minors, represented by their mother and guardian ad litem, Norma Urbano vs. Felicidad S. Baluyut and Hon. Court of Appeals* (G.R. No. L-33659, June 14, 1990), filiation may be proved by the voluntary or compulsory recognition of the illegitimate child. Recognition is voluntary when made by the putative parent in the record of birth, a will, a statement before a court of record or in any authentic writing (Art. 278, Civil Code). (Under the Family Code, however, private instruments signed by the putative parent is acceptable to establish the child's filiation.

[22]Paulino vs. Paulino, 3 SCRA 730; Rep. of the Philippines vs. Workmen's Compensation Commission, 13 SCRA 272; Noble vs. Noble, 18 SCRA 1104; Divinagracia vs. Rovira, 72 SCRA 307. See also Vda. de Clemena vs. Clemena, 24 SCRA 720.

Such documents need not be limited to authentic public document as required by Art. 265 of the New Civil Code) Filiation may be proved by compulsory recognition under Art. 283 of the Civil Code or when by court action, the child brings out his recognition.

The following children are illegitimate under Art. 165 of the Family Code:

(1) Children born of couples who are not legally married, or of common-law marriages;

(2) Children born of bigamous or polygamous marriages;

(3) Children born of adulterous relations between the parents;

(4) Children born of couples below 18 years old, whether they are married (but which marriage is void) or not;

(5) Children born of other void marriages under Art. 35 of the Family Code. This excludes marriages solemnized by any person not legally authorized to perform marriages but such marriages were contracted with either or both parties believing in good faith that the solemnizing officer had the legal authority to do so;

(6) Children born of incestuous marriages under Art. 37 of the Family Code;

(7) Children born of marriages void for reasons of public policy under Art. 38 of the Family Code.

However, children of marriages void under (i) Art. 36 of the Family Code (because either of the parties to the marriage was psychologically incapacitated to comply with the essential marital obligations of marriage); and (ii) Art. 53 of the Family Code (because either of the former spouses who marries again fails to comply with such requirements as recording in the appropriate civil registry and registry of property the judgment of annulment of marriage, the partition and distribution of the properties of the spouses, and the delivery of the children's presumptive legitime), are legitimate.

Ideas; Parents or ascendants. — Legitimate parents or ascendants are classified as secondary compulsory heirs because of the fact that under our law, they cannot inherit from their child or descendant if they concur with legitimate children or descendants of the latter. It must be noted, however, that while they can be excluded

by the presence of legitimate children or descendants, they cannot be excluded by the presence of adopted children. This is so, because of the provision of No. 4 of Art 39 of the Child and Youth Welfare Code (P.D. No. 603), which has superseded Art. 343 of the New Civil Code, and which states that if the adopter is survived by legitimate parents or ascendants and by the adopted child, the latter shall not have more successional rights than an acknowledged natural child.

Illegitimate parents are also classified as secondary, compulsory heirs because of the fact that under our law, they cannot inherit from their illegitimate child if they concur with children or descendants of the latter, whether legitimate or illegitimate. Thus, if the testator, who is an illegitimate child, is survived by his children and his illegitimate parents, the latter are excluded altogether from the succession by the presence of the former regardless of their legitimacy or illegitimacy.[23]

If the testator happens to be an adopted person, may the adopter also be classified as a secondary compulsory heir? So long as the adopted person is survived by his parents by nature, whether legitimate or illegitimate, the adopter cannot be classified as a secondary compulsory heir. There is, however, an instance where he may be classified as such. According to the last paragraph of No. 4 of Art. 39 of the Child and Youth Welfare Code (P.D. No. 603):

> "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."

Although the law uses the term "legal heir," nevertheless, because of the qualifying phrase "whether testate or intestate" at the end of the provision, it is evident that it also refers to compulsory heirs.

> *(Note:* The abovequoted provision of the Child and Youth Welfare Code is an example of very bad codification. Suppose that the testator is an adopted person, and he is survived by his legitimate grandparents and the adopter, what will happen then? Shall the grandparents be excluded? Unfortunately, the law is explicit, too explicit as a matter of fact. The adopter shall

[23]Art. 903, Civil Code.

take the place of the deceased parents of the testator in the line of succession. That means that the grandparents shall be excluded. Only the adopter shall be classified as a compulsory heir of the adopted. He shall, therefore, be entitled to a legitime of one-half (1/2) of the entire estate of the adopted. This is clearly unjust.)

Under Art. 190 of the Family Code, when parents (legitimate or illegitimate), or the legitimate ascendants of the adopted concur with the adopters, they shall divide the entire estate, that is, one-half to be inherited by the parents or ascendants and the other half by the adopters.

Problem — Don died after executing a Last Will and Testament leaving his estate valued at P12 Million to his common-law wife Roshelle. He is survived by his brother, Ronnie and his half-sister Michelle.

1. Was Don's testamentary disposition of his estate in accordance with the law on succession? Explain your answer.

2. Assuming further that he died intestate, survived by his father Juan, his brother Ronie, his half-sister Michelle and his legitimate son Jayson. How will you distribute his estate? Explain.

Answer – 1. Yes. Don's testamentary disposition of his estate is in accordance with the law on succession. Don has no compulsory heirs not having ascendants, descendants nor a spouse (Art. 887, NCC). Brothers and sisters are not compulsory heirs. Thus, he can bequeath his entire estate to anyone who is not otherwise incapacitated to inherit from him. A common-law wife is not incapacitated under the law as Don is not married to anyone.

2. Jayson will still be entitled to the entire P12 Million as the father, brother and sister will be exluded by a legitimate son of the decedent (Art. 887, NCC). This follows the principle that the descendants exclude the ascendants from inheritance. *(Suggested Answers to the 2006 Bar Examination Questions, PALS)*

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.[24]

Legitime of Legitimate Descendants. — Under our present Code, the legitime of legitimate children and descendants consists of one-half of the hereditary estate of their legitimate parents or ascendants, while the other half is at the latter's free disposal. This half for free disposal may be given by the testator to his legitimate children or descendants or to any other person not disqualified by law to inherit from him, and subject to the rights of the surviving spouse and illegitimate children.[25] This arrangement of the testator's hereditary estate is very different from that found in the old Code. Under the Spanish Code, the legitime of legitimate children and descendants consists of two-thirds of the hereditary estate of their legitimate parents or ascendants, the latter being allowed to dispose of one of the two-thirds parts in order to give it as a mejora or betterment to one or more of their children or descendants.[26] Hence, the legitime of legitimate children and descendants is divided into two parts — the strict legitime and the *mejora* or betterment. The strict legitime is one-third of the estate of the testator, while the *mejora* is likewise one-third. Taken together, they comprise what is known as the long legitime. The remaining one-third is at the testator's free disposal. Under this arrangement the testator has no control over one-third of his estate, limited control over another third, and absolute control over the remainder. It will thus be seen that this arrangement has been completely revamped in the New Civil Code. The *mejora* or betterment, which is a distinctive feature of the law of succession under the Spanish Code, has been eliminated entirely, although the equivalents of the strict legitime and the free portion have been increased correspondingly. This elimination of the mejora, according to the Code Commission, is due to the following reasons:

[24]Art. 808, Spanish Civil Code, in modified form.

[25]Art. 888, Civil Code. As it is, the one-half free portion is not really free because it is subject to the rights of the surviving spouse and illegitimate children. A distinction, therefore, must be made between the free portion and the disposable (free) portion. The latter is that which remains after satisfying the legitimes of the surviving spouse and the illegitimate children.

[26]Arts. 808, 823, Spanish Civil Code.

(1) The supposed equalization of natural inequalities among children through the system of the "mejora" is in many cases but imaginary, because parents often act upon other bases, such as rewarding the better qualities of character of one of the children.

(2) Such reward may be effected by the father or mother by disposing of part or all of the free half.

(3) The testator should have greater freedom to dispose of his estate by will. Under the Spanish Code, the free portion is 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 to persons other than his children and descendants.[27]

Idem; Rules of division. — Although Art. 888 does not provide any rule by which legitimate children and descendants may divide the legitime in case there are several of them of different degrees concurring in the succession, it is clear that the *rule of proximity* enunciated in Art. 962 of the Code is the rule that shall apply. According to this article, in every inheritance, the relative nearest in degree excludes the more distant ones, saving the right of representation when it properly takes place. Thus, if the testator is survived by (1) his children, A and B, and (2) his grandchildren, C and D, children of B, it is evident that C and D are excluded by the presence of their father, B, since they are more remote from the testator. But if he is survived by (1) his children, A and B, (2) his grandchildren, D and E, children of B, and (3) his grandchildren, F and G, children of C, who died before him, the result is different. Although, D and E are excluded by the presence of their father. B, F and G are not excluded, because they shall represent their deceased father, C, with regard to the legitime to which C would have been entitled had he been living at the time of the death of the testator.[28]

Art. 889. The legitime of legitimate parents or descendants consists of one-half of the hereditary estate 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.[29]

[27]Report of the Code Commission, pp. 114-115.
[28]Art. 962, Civil Code.
[29]Art. 859, Spanish Civil Code, in modified form.

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 lines.[30]

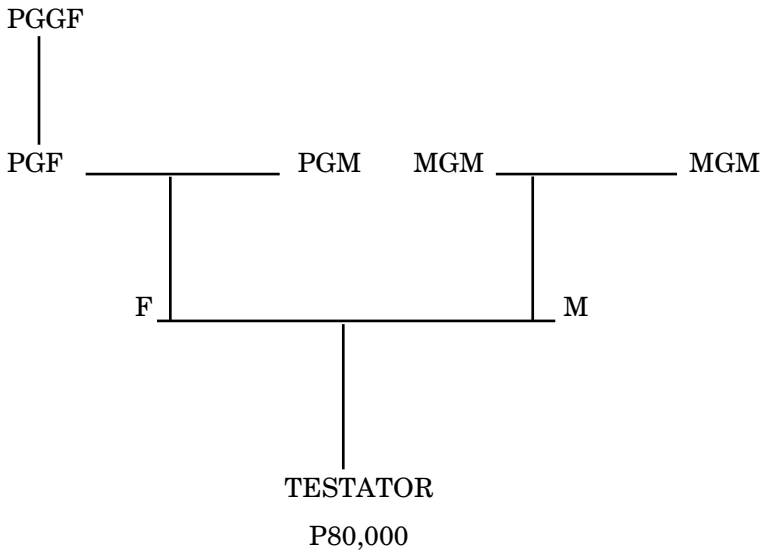
Legitime of Legitimate Ascendants. — In default of legitimate children or descendants, the legitime of legitimate parents or ascendants consists of one-half of the hereditary estate of their children or descendants, while the other half is for free disposal. This half for free disposal may be given by testator to his legitimate parents or ascendants or, if he so desires, to any other person not disqualified by law to inherit from him, but subject to the rights of the surviving spouse and illegitimate children.[31]

Again, it must be noted that legitimate parents or ascendants are excluded from the succession if they concur with legitimate or legitimated children or descendants. This is, however, not true if they concur with an adopted child of the testator because of the rule stated in Art. 343 of the Code to the effect that if the adopter is survived by legitimate parents or ascendants and by an adopted child, the latter shall not have more successional rights than an acknowledged natural child. This constitutes an exception to the general rule that an adopted child shall have the same successional rights as a legitimate child.[32] The reason for this, according to the Code Commission, is that it would be unjust to exclude the adopter's parents or ascendants from the inheritance in favor of the adopted child.[33] Consequently, applying the rule stated in Art. 343, if the testator is survived by his legitimate parents and an adopted child, the legitime of the former shall consist of one-half of the hereditary estate,[34] while the legitime of the latter shall consist of one-fourth to

[30]Art. 810, Spanish Civil Code.
[31]Art. 889, Civil Code.
[32]Art. 341, Civil Code.
[33]Report of the Code Commission, p. 92.
[34]Art. 889, Civil Code.

be taken from the free portion thus leaving one-fourth of the entire estate at the testator's free disposal.[35]

Idem; Rules of Division. — The different rules of division of the hereditary estate among legitimate parents or ascendants, if several concur in the succession, may be restated as follows, using as illustration the diagram below:



(1) If the testator is survived by both parents, the legitime shall be divided between them equally.[36] Thus, if the testator is survived by his parents, F and M, and the net remainder of his estate is P80,000, their legitime consists of one-half of such net remainder, or P40,000, which shall be divided between them equally.

(2) If one of the parents should have died before the testator, the entire legitime shall pass to the survivor.[37] Thus, if F died before the testator, the entire legitime of P40,000 shall pass to M to the exclusion of all the other ascendants.

[35]Art. 896, Civil Code.
[36]Art. 890, Civil Code.
[37]Ibid.

(3) If both parents should have died before the testator and the survivors are ascendants of the same degree, one-half of the legitime shall pass to the ascendants of the maternal line.[38] Thus, if F and M, died before the testator and the only survivors are the paternal grandparents, PGF and PGM, and the maternal grandparents, MGF and MGM, the legitime of P40,000 shall be divided in such a way that 1/2, or P20,000, shall pass to PGF and PGM which they shall divide equally, while the other 1/2, or P20,000, shall pass to MGF and MGM which they shall also divide equally. If the only survivors are PGM, MGF, and MGM, the legitime shall be divided in such a way that 1/2, or P20,000, shall pass to PGM alone, while the other 1/2, or P20,000, shall pass to MGF and MGM which they shall divide equally.

(4) If both of the parents should have died before the testator and the survivors are ascendants of different degrees, the legitime shall pertain entirely to those nearest in degree of either line.[39] Thus, if F and M died before the testator and the only survivors are the maternal grandmother, MGM, and the paternal great grandfather, PGGF, the former shall be entitled to the entire legitime to the exclusion of the latter.

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.[40]

Reserva Troncal; Concept. — *Reserva troncal* or lineal may be defined as the reservation by virtue of which an 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

[38]Ibid.
[39]Ibid.
[40]Art. 811, Spanish Civil Code.

came.[41] By its very nature, this *reserva* constitutes an exception to the system of legitime as well as to the order of intestate succession as recognized and regulated in our Code. Hence, commentators have aptly described it as a *reserva extraordinaria*.

Historical Background. — *Reserva troncal* is the only *reserva* which is recognized in the New Civil Code. However, in the original project of the Code as drafted by the Code Commission the provision of what is now Art. 891 was not included. As a matter of fact, under the original plan all of the different kinds of *reservas,* such as the *reserva troncal* under Art. 811 of the Spanish Code, the *reversion legal* under Art. 812[42] and the *reserva viudal* under Art. 986,[43] had been eliminated altogether in conformity with one of the underlying objectives of the law on succession, which is to prevent property from being entailed.[44] Nevertheless, during the discussion of the project the provision of what is now Art. 891 was inserted by congressional action. What is unfortunate, however, is the fact that the supplementary provisions of Arts. 977 and 978 of the Spanish Civil Code which regulate the rights and obligations of the *reservista* and *reservatario* were not also inserted.

Purpose. — From the very name of the *reserva* itself, it is apparent that the purpose of *reserva troncal* or lineal is to prevent persons who are strangers to the family from acquiring, by some chance or accident, property which otherwise would have remained with the said family.[45] This explains why the law requires that the ascendant who is obliged to make the reservation should reserve the

[41]Art. 891, Civil Code.

[42]Ascendants succeed, to the exclusion of all other persons, to things given by them to such if their children or descendants as have died without issue, when the same things donated form part of the estate. Should they have been alienated, they shall succeed to any right of action which the donee may have had with respect to them, and to the price obtained therefor should they have been sold, or to the property by which they were substituted, if they were bartered or exchanged. *(Art. 842, Spanish Civil Code).*

[43]Beside the reservation imposed by Article 811, any widower or widow who contracts a second marriage shall be obliged to reserve for the children and descendants of the former marriage the ownership of all the property he or she may have acquired from the deceased spouse by will, intestate succession, gift, or by any other gratuitous title, but not his or her half of the profits of the conjugal partnership. *(Art. 968, Spanish Civil Code).*

[44]Report of the Code Commission, pp. 116-117.

[45]6 Manresa, 7th Ed., p. 319.

property for the benefit of relatives who are within the third degree and who belong to the line from which the said property came.[46]

Requisites. — In order that there will be a reservation of the property in accordance with the provision of Art. 891, the following requisites must concur:

(1) The property should have been acquired by operation of law by an ascendant from his descendant upon the death of the latter;

(2) The property should have been previously acquired by gratuitous title by the descendant from another ascendant or from a brother or sister; and

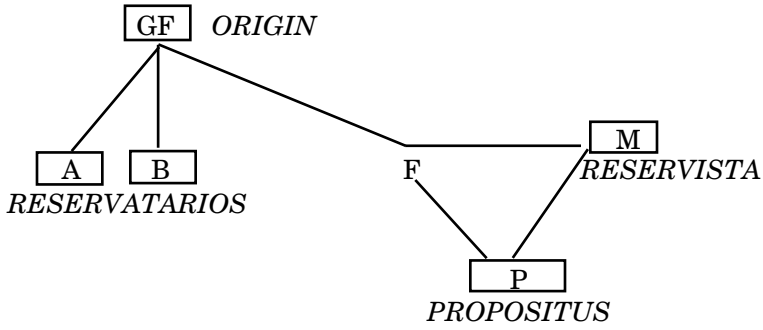
(3) The descendant should have died without any legitimate issue in the direct descending line who could inherit from him.

A fourth requisite is sometimes added — that there must be relatives of the descendant who are within the third degree and who belong to the line from which the property came. As a matter of fact, it was so held by the Supreme Court, citing Dr. Padilla, in *Chua vs. CFI of Negros, Occidental* (78 SCRA 412). It is submitted, however, that this is not a requisite, but merely a resolutory condition to which the *reserva* is subject. As stated by Morell, "the ascendant acquires the property with a condition subsequent, to wit: whether or not there exist at the time of his death relatives within the third degree of the descendant in the line from whence the property proceeds. If such relatives exist, they acquire ownership of the property at the death of the ascendant. If they do not exist the ascendant can freely dispose thereof."[47]

[46]Art. 891, Civil Code.

[47]Morell, Estudios Sobre Bienes Reservables, pp. 304-305, quoted in Edroso vs. Sablan, 25 Phil. 295, and in Nono vs. Nequia, 93 Ma 120.

The above requisites may be illustrated by the following example:



Before his death in 1950, GF donated a parcel of land to his grandson, P, the only child of his deceased son, F. P died intestate in 1960 without any heir in the direct descending line, as a consequence of which the land passed to his mother, M, in accordance with the laws of intestate succession. Is the property reservable? It is evident that the property in this particular case is reservable, because all of the requisites for reservation are present. In the first place, M, who is the ascendant *reservista,* had acquired the property by operation of law from her descendant, P; in the second place, P, who is the descendant-*propositus*, had previously acquired the property by gratuitous title from another ascendant, his grandfather, GF, who is the origin of the said property; and in the third place, the descendant had died without any legitimate issue in the direct descending line who could inherit from him. Consequently, from the time of the death of the descendant-*propositus*, P, in 1960, the ascendant, M, who acquired the property, is obliged to reserve it for the benefit of relatives of the *propositus* who are within the third degree and who belong to the line from which the said property came. This reservable character of the property will, as a rule, terminate upon the death of the ascendant-*reservista*. Thus, if we extend the example by presupposing that M died in 1977, A and B, uncles of the *propositus,* P, in the paternal line, can claim the property as their own in accordance with the provision of Art. 891 of the Code.

Nature. — Although some commentators hold that the right of the ascendant-*reservista* in the reservable property during the pendency or lifetime of the reserves is similar to that of the fiduciary in

fideicommissary substitutions[48] and others maintain that it is exactly the same as that of a usufructuary, the ultimate or naked title being vested in the person in whose favor the *reserva* is established,[49] the weight of authority, and this has been adopted in this jurisdiction, is to the effect that the ascendant-*reservista* acquires the ownership of the property subject to the resolutory condition that there must exist relatives of the descendant-*propositus* who are within the third degree and who belong to the line from which the said property came. If the condition is fulfilled, that is, if such relatives exist after his death, the property passes, in accordance with this special order of succession, to such relatives. But if the condition is not fulfilled, the property is released and will be adjudicated in accordance with the regular order of succession.[50] On the other hand, during the whole period between the constitution of the *reserva* and the extinction thereof, the *reservatarios* or relatives of the descendant-*propositus* within the third degree have only an expectation to the property, an expectation which cannot be transmitted to their own heirs, unless these heirs are also within the third degree.[51] However, upon the fulfillment of the condition to which the *reserva* is subject this expectation is converted automatically and by operation of law into an absolute right of ownership so that the property ceases altogether to be a part of the estate of the ascendant-*reservista*.[52] Consequently, it cannot be held liable for the payment of debts of the ascendant which are chargeable against his estate.

Edroso vs. Sablan
25 Phil. 255

> The two parcels of land, which constitute the subject matter of this appeal, were inherited by Marcelina Edroso from her son, Pedro Sablan, who died unmarried and without issue in 1902. The records show that these lands had been inherited by Pedro from his father, Victorian Sablan, who died in 1882. After the death of Pedro, Marcelina Edroso applied for registration of

[48]14 Scaevola, 259-260; 6 Manresa, 7th Ed., pp. 321-324.

[49]Alcubilla, cited in 6 Sanchez Roman 977; 6 Manresa, 7th Ed., pp. 321-324.

[50]6 Manresa, 7th Ed., pp. 321-324; 6 Sanchez Roman 1934; Edroso vs. Sablan, 25 Phil. 295; Lunsod vs. Ortega, 46 Phil. 664; Director of Lands vs. Aguas, 63 Phil. 279; Nono vs. Nequia, 93 Phil. 120.

[51]52 Edroso vs. Sablan, 25 Phil. 295; 6 Manresa, 7th Ed., pp. 323-324; Morell, Estudios Sobre Bienes Reservables, pp. 304-305.

[52]Cobardo vs. Villanueva, 44 Phil. 190; Cano vs. Director of Lands, 105 Phil. 1.

these disputed lands, but the application was opposed by two paternal uncles of Pedro Sablan on the ground that said lands are reservable in accordance with the provision of Art. 811 *(now Art. 891)* of the Civil Code and, therefore, cannot be registered in the applicant's name, since she is merely a usufructuary. The Supreme Court, however, held:

"The ascendant who inherits from a descendant, whether by the latter's wish or by operation of law, acquires the inheritance by virtue of a title perfectly transferring absolute ownership. All the attributes of the right of ownership belong to him exclusively — use, enjoyment, disposal and recovery. This absolute ownership, which is inherent in the hereditary title, is not altered, in the least, if there be no relatives within the third degree in the line whence the property proceeds or they die before the ascendant heir who is the possessor and absolute owner of the property. If there should be relatives within the third degree who belong to the line whence the property proceed, then a limitation to that absolute ownership would arise. The nature and scope of this limitation must be determined with exactness in order not to vitiate rights that the law wishes to be effective. The opinion which makes this limitation consist in reducing the ascendant heir to the condition of a mere usufructuary, depriving him of the right of disposal and recovery, does not seem to have any support in the law. There is marked difference between the case where a man's wish institutes two persons as his heirs, one as usufructuary and the other as owner of his property, and the case of the ascendant in Article 811 *(now Art. 891)*. In the first case there is not the slightest doubt that the title to the hereditary property resides in the hereditary owner and only he can dispose of and recover it, while the usufructuary can in no way perform any act of disposal of the hereditary property except that he may dispose of the right of usufruct in accordance with the provision of Article 489 *(now Art. 572)* of the Civil Code, because he totally lacks the fee simple. But the ascendant who holds the property required by Article 811 *(now Art. 891)* to be reserved, can dispose of the property itself, and recover it from anyone who may unjustly detain it, while the person in whose favor the right is required to be reserved in either case cannot perform any act whatsoever of disposal or of recovery.

"The ascendant acquires the property with a condition subsequent, to wit: whether or not there exist at the time of his death relatives within the third degree of the descendant in the line whence the property proceeds. If such relatives exist, they acquire ownership of the property at the death of the ascendant. If they do not exist, the ascendant can freely dispose thereof. If

this is true, since the possessor of property subject to conditions subsequent can alienate and encumber it, the ascendant may alienate the property required by law to be reserved, but he will alienate what he has and nothing more because no one can give what does not belong to him, and the acquirer will therefore receive a limited and revocable title. The relatives within the third degree will in turn have an expectation to the property while the ascendant lives, an expectation that cannot be transmitted to their heirs, unless these are also within the third degree. After the person who is required by law to reserve the right has died, the relatives may rescind the alienation of the realty required by law to be reserved and they will acquire it and all the rest that has the same character in complete ownership in fee simple, because the condition and the usufruct have been terminated by the death of the usufructuary." *(Morell, Estudios Sobre Bienes Reservables, 304, 305).*

"The conclusion is that the person required by Article 811 *(now Art. 891)* to reserve the right has, beyond any doubt at all, the rights of use and usufruct. He has, moreover, for the reasons set forth, the legal title and dominion, although under a condition subsequent. Clearly he has, under an express provision of the law, the right to dispose of the property reserved, and to dispose of is to alienate, although under a condition. He has the right to recover it, because he is the one who possesses or should possess it and have title to it, although a limited and revocable one. In a word, the legal title and dominion, even though under a condition, reside in him while he lives. After the right required by law to be reserved has been assured, he can do anything that a genuine owner can do.

"Therefore, we reverse the judgment appealed from and in lieu thereof decide and declare that the applicant is entitled to register in her own name the two parcels of land which are the subject matter of the application, recording in the registration the right required by Article 811 *(now Art. 891)* to be reserved to either or both of the opponents, Pablo Sablan and Basilio Sablan, should they survive her, without special finding as to costs."

Personal Element. — *Reserva troncal* presupposes a great complexity of personal elements. They are as follows:

(1) The ascendant, brother or sister, otherwise known as the origin of the property, from whom the descendant-*propositus* had acquired the property by gratuitous title;

(2) The descendant-*propositus* from whom the ascendant-*reservista* in turn had acquired the property by operation of law;

(3) The ascendant-*reservista* who is obliged to reserve the property; and

(4) The relatives of the *propositus,* otherwise known as the *reservatarios,* who are within the third degree and who belong to the line from which the property came and for whose benefit the reservation is constituted.[53]

It is, however, an indispensable requirement that all of these personal elements must be joined by the bonds of legitimate relationship. In other words, *reserva troncal* is possible only in the legitimate family.[54]

Nieva vs. Alcala
4 Phil. 915

The property here in question was inherited by operation of law by Francisco de Ocampo from his son Alfeo de Ocampo, who, in turn, had inherited it, in the same manner, from his mother Juliana Nieva, the natural mother of the plaintiff. The plaintiff is the natural sister of Alfeo de Ocampo, and she belongs to the same line from which the property in question came. Was Francisco de Ocampo obliged by law to reserve said property for the benefit all the plaintiff, and illegitimate relatives within the third degree of Alfeo de Ocampo? If he was, then, upon his death, the plaintiff and not his son the defendant Jose de Ocampo, was entitled to the said property; if he was not, the plaintiffs' action must fail. Answering the question in the negative, the Supreme Court, held:

"This question, so far as our investigation shows, has not been decided before by any court or tribunal. However, eminent commentators of the Spanish Civil Code, who have devoted their lives to the study and solution of the intricate and difficult problems that may arise under the provisions of the Code, have dealt with the very question now before us and are unanimous in the opinion that the provisions of Article 811 *(now Art. 891)*

[53]De Buen, Encyclopedia Juridica Española, Vol. 17, p. 349, quoted in Director of Lands vs. Aguas, 63 Phil. 279; See Aglibot vs. Manalac, G.R. No. L-14530, April 25, 1962, 4 SCRA 1030.

[54]Nieva vs. Alcala, 41 Phil. 915; Director of Lands vs. Aguas, 63 Phil. 279.

apply only to legitimate relatives. One of such commentators, undoubtedly the best known of them all, is Manresa. We believe we can do not better than to adopt his reasons and conclusions, in deciding the question before us. In determining the persons who are obliged to reserve under Article 811 *(now Art. 891),* he says:

"'Is every ascendant, whether legitimate or not, obliged to reserve? Should the natural father or grandfather reserve the properties proceeding from the mother or other natural ascendant? Article 811 *(now Art. 891)* does not distinguish. Nevertheless, the article in referring to the ascendant in an indeterminate manner shows that it imposes the obligation to reserve only upon the legitimate ascendants.

"'Let us not overlook for the moment the question whether the Code recognizes or does not recognize the existence of the natural family, or whether it admits only the bond established by the acknowledgment between the father or mother who acknowledged and the acknowledged children. However it may be, it may be stated as an indisputable truth that in said Code, the legitimate relationship forms the general rule and natural relationship the exception; which is the reason why, as may be easily seen, the law in many articles speaks only of children or parents, of ascendants or descendants, and in them reference is of course made to those who are legitimate; and when it desires to make a provision applicable only to natural relationship, it does not say father or mother, but natural father or natural mother; it does not say child, but natural child; it does not speak of ascendants, brothers or parents in the abstract, but of natural ascendants, natural brothers or natural parents.

"'Articles 809 *(now Art. 889)* and 810 *(now Art. 890)* themselves speak only of ascendants. Can it in any way be maintained that they refer to legitimate as well as to natural ascendants? They evidently establish the legitime of the legitimate ascendants included as forced heirs in number 2 of Article 807 *(now Art. 887).* And Article 811 *(now Art. 891)* continues to treat of this same legitime. Therefore, the place which Article 811 *(now Art. 891)* occupies in the Code is proof that it refers to legitimate ascendants."[55]

[55]To the same effect; Centeno vs. Centeno, 52 Phil. 322; Director of Lands vs. Aguas, 63 Phil. 279.

Idem; Origin of property. — The law requires that the person from whom the descendant-*propositus* acquired the property should be an ascendant, brother or sister. Thus, in the case of *Celedonia Solivio vs. The Honorable Court of Appeals and Concordia Javellana Villanueva (G.R. No. 83484, February 12, 1990),* the Court held that the property of the deceased, Esteban Javellana, Jr., is not reservable property, for Esteban, Jr. was not an ascendant, but the descendant of his mother, Salustia Solivio, from whom he inherited the properties in question. Therefore, he did not hold his inheritance subject to a reservation in favor of his aunt, Celedonia Solivio, who is his relative within the third degree on his mother's side. The *reserva troncal* applies to properties inherited by an ascendant from a descendant who inherited it from another ascendant or a brother or a sister. It does not apply to property inherited by a descendant from his ascendant, the reverse of the situation covered by Art. 891.

Consequently, it is not necessary to investigate the ultimate source or origin of the property beyond such ascendant brother or sister in order to determine its lineal character. It does not, therefore, matter if such ascendant, brother or sister may have acquired it from a stranger or from some other relative. What is material is that the *propositus* should have acquired it from anyone of them by gratuitous title.

From what had been stated, it necessarily follows that at the time of its acquisition by the *propositus*, the property should have belonged to the ascendant, brother or sister as the case may be. The significance of this principle may be illustrated by the following examples:

(1) A father insured his life with a certain insurance company with his daughter as beneficiary. After his death, the value of the insurance policy was collected by the daughter, who died shortly afterwards. The amount collected passed to her mother by operation of law. Is this amount reservable? This question should be resolved in the negative, since the amount collected did not belong to an ascendant, brother or sister, but to the insurance company.[56]

(2) A father bought a whole unit of sweepstakes ticket which he gave to one of his children. The ticket won one of the top prizes.

[56]2 Ramos 59, citing Alcubilla.

Subsequently, the child died and the amount collected passed by operation of law to his mother. Is the amount reservable? Again, this question must be resolved in the negative, since the amount collected was not acquired from an ascendant, brother or sister, but from the society or office in charge of the sweepstakes.

Idem; Descendant-propositus. — The second person involved in the *reserva* is the descendant-*propositus* from whom the property is directly acquired by the ascendant-*reservista*.

It is of course essential in order that the property shall be reservable that the *propositus* should have acquired it by gratuitous title from an ascendant or from a brother or sister. "Acquisition by gratuitous title" merely means that the recipient should not have given anything in return for the property; in other words, the transmission by the ascendant, brother or sister should have been an act of pure liberality, without imposing any obligation whatsoever upon the beneficiary. This is possible only in donations and in testate and intestate succession.[57]

Chua vs. CFI of Negros Occidental
78 SCBA 412

Jose Frias Chua died intestate in 1929, survived by his widow Consolacion de la Torre and three legitimate children Lorenzo, Ignacio and Juanito. The records show that Lorenzo and Ignacio are children of Jose by a first marriage, while Juanito is his child by his second marriage to Consolacion. In the intestate proceeding for the settlement of Jose's estate, one-half (1/2) of a valuable lot was adjudicated to Consolacion, while the other one-half (1/2) was adjudicated to Juanito. In 1952, Juanito died intestate without any issue, survived by his mother Consolacion. In 1966, the latter also died intestate. Subsequently, Ignacio and two children of Lorenzo, who predeceased Consolacion, filed a complaint against the estate of Consolacion praying that the one-half (1/2) portion of the lot under question which formerly belonged to Juanito but which passed to Consolacion upon the latter's death, be declared as a reservable property under Art. 891 of the Civil Code. Private respondents (defendants), however, contend that the property is not reservable and that even assuming that it is, petitioners' (plaintiffs') right of action

[57]6 Manresa, 7th Ed., p. 360; Cobardo vs. Villanueva, 44 Phil. 189-190. Chua vs. CFI, 78 SCRA 412.

has already prescribed. Speaking through Justice Martin, the Supreme Court held:

"The pertinent provision on *reserva troncal* under the New Civil Code provides:

> "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 belong to the line from which said property came."

Pursuant to the foregoing provision, in order that a property may be impressed with a reservable character the following requisites must exist, to wit: (1) that the property was acquired by a descendant from an ascendant or from a brother or sister by gratuitous title; (2) that said descendant died without an issue; (3) that the property is inherited by another ascendant by operation of law; and (4) that there are relatives within the third degree belonging to the line from which said property came. In the case before Us, all of the foregoing requisites are present. Thus, as borne out by the records, Juanito Frias Chua of the second marriage died intestate in 1952; he died without leaving any issue; his *pro-indiviso* of 1/2 share of Lot No. 399 was acquired by his mother, Consolacion de la Torre, by operation of law. When Consolacion de la Torre died, Juanito Frias Chua who died intestate had relatives within the third degree. These relatives are Ignacio Frias Chua and Dominador Chua and Remedios Chua, the supposed legitimate children of the deceased Lorenzo Frias Chua, who are the petitioners herein.

"The crux of the problem in the instant petition is focused on the first requisite of *reserva troncal* — whether the property in question was acquired by Juanito Frias Chua from his father, Jose Frias Chua, gratuitously or not. In resolving this point, the respondent Court said:

> "It appears from Exh. "3", which is part of Exh. "D", that the property in question was not acquired by Consolacion de la Torre and Juanito Frias Chua gratuitously but for a consideration, namely, that the legatees were to pay the interest and cost and other fees resulting from Civil Case No. 5300 of this Court. As such it is undeniable that the lot in ques-

> tion is not subject to a *reserva troncal,* under Art. 891 of the New Civil Code, and as such the plaintiffs complaint must fail."

We are not prepared to sustain the respondent Court's conclusion that the lot in question is not subject to a *reserva troncal* under Art. 891 of the New Civil Code. As explained by Manresa, which this Court quoted with approval in *Cabardo v. Villanueva*, 44 Phil. 186, "The transmission is gratuitous or by gratuitous title when the recipient does not give anything in return." It matters not whether the property transmitted be or be not subject to any prior charges; what is essential is that the transmission must be made gratuitously, or by an act of mere liberality of the person making it, without imposing any obligation on the part of the recipient; and that the person receiving the property gives or does nothing in return; or, as ably put by an eminent Filipino commentator, "the essential thing is that the person who transmits it does so gratuitously, from pure generosity, without requiring from the transferee any prestation." It is evident from the record that the transmission of the property in question to Juanito Frias Chua of the second marriage upon the death of his father Jose Frias Chua was by means of a hereditary succession and therefore gratuitous. It is true that there is the other (Exh. "D") of the probate Court in Intestate Proceeding No. 4816 which states in express terms:

> "2. — Se adjudicada por el presente a favor de Consolacion de la Torre, viuda, mayor de edad, *y* de de su hijo, Juanito Frias Chua, menor de edad, todos residentes de San Enrique, Negros Occidental, I.F., como herederos del finado Jose Frias Chua Choo, estas propiedades:
>
> La parcela de terreno conocida por Lote No. 399 del Catastro de la Carlota, Negros Occidental, de 191.954 metros cuadrados y cubierto por el Certificado de Titulo No. 11759, en partes equales proindivisor; por con la obligacion de pagar a las Standard Oil Co. of New York la deuda de P3,971.20, sus intereses, costas y demas gastos resultantes del asunto civil No. 5300 de este Jusgado."

But the obligation of paying the Standard Oil Co. of New York the amount of P3,971.20 is imposed upon Consolacion de la Torre and Juanito Frias Chua not personally by the deceased Jose Frias Chua in his last will and testament but by an order of the court in the Intestate Proceeding No. 4816 dated January

15, 1931. As long as the transmission of the property to the heirs is free from any condition imposed by the deceased himself and the property is given out of pure generosity, it is gratuitous. It does not matter if later the court orders one of the heirs, in this case Juanito Frias Chua, to pay the Standard Oil Co. of New York the amount of P3,971.20. This does not change the gratuitous nature of the transmission of the property to him. As far as the deceased Jose Frias Chua is concerned the transmission of the property to his heirs is gratuitous. This being the case the lot in question is subject to *reserva troncal* under Art. 891 of the New Civil Code.

"It is contended that the distribution of the shares of the estate of Jose Frias Chua to the respondent heirs or legatees was agreed upon by the heirs in their project of partition based on the last will and testament of Jose Frias Chua. But petitioners claim that the supposed Last Will and Testament of Jose Frias Chua was never probated. The fact that the will was not probated was admitted in paragraph 6 of the respondents' answer. There is nothing mentioned in the decision of the trial court in Civil Case No. 7839 A which is the subject of the present appeal nor in the order of January 15, 1931 of the trial court in the Testate Estate Proceeding No. 4816 nor in the private respondents' brief, that the Last Will and Testament of Jose Frias Chua has ever been probated. With the foregoing, it is easy to deduce that if the Last Will and Testament has in fact been probated there would have been no need for the testamentary heirs to prepare a project of partition among themselves. The very will itself could be made the basis for the adjudication of the estate as in fact they did in their project of partition with Juanito Frias Chua getting one-half of Lot 399 by inheritance as a son of the deceased Jose Frias Chua by the latter's second marriage.

"According to the records, Juanito Frias Chua died on February 27, 1952 without any issue. After the death his mother Consolacion de la Torre succeeded to his one-half pro indiviso share of Lot 399. This was, however, subject to the condition that the property was reservable in character under Art. 891 of the Civil Code in favor of relatives within the third degree of Jose Frias Chua from whom the property came.

These relatives are the petitioners herein.

"It is claimed that the complaint of petitioners to recover the one-half portion of Lot 399 which originally belonged to Juanito Frias Chua has already prescribed when it was filed on May 11, 1966. We do not believe so. It must be remembered

> that the petitioners herein are claiming as reservees of the property in question and their cause of action as reservees did not arise until the time the reservor, Consolacion de la Torre, died in March 1966. When the petitioners therefore filed their complaint to recover the one-half (1/2) portion of Lot 399, they were very much in time to do so.
>
> "IN VIEW OF THE FOREGOING, the decision appealed from is hereby set aside. The petitioners Ignacio Frias Chua, Dominador Chua and Remedios Chua are declared owners of 1/2 undivided portion of Lot 399; and the Register of Deeds of Negros Occidental is hereby ordered to cancel Transfer Certificate of Title No. 31796 covering Lot No. 399 issued in the name of Consolacion de la Torre and to issue a new Certificate of Title in the names of Consolacion de la Torre, 1/2 undivided portion; Ignacio Frias Chua, 1/4 undivided portion, of said lot. Without pronouncement as to costs.
>
> "SO ORDERED".

It is also essential that the *propositus* should have died without any legitimate issue in the direct descending line who could inherit from him. This is so, because, evidently, if there are legitimate descendants of the *propositus* who can inherit from him, it would not be possible for the property to pass by operation of law to an ascendant who shall be obliged to make the reservation in accordance with the provision of Art. 891.

Idem; Ascendant-reservista. — The third person involved in the reserva is the ascendant-*reservista* who is obliged to reserve the property for the benefit of relatives of the descendant-*propositus* who are within the third degree and who belong to the line from which the said property came.

It is, however, an indispensable requisite before the property is considered reservable that such ascendant should have acquired it by operation of law from the descendant-*propositus*. The question now is — when can the property be considered as having been acquired by operation of law?

In intestate succession, the whole estate of the descendant, in default of legitimate children or descendants, passes to the ascendant by operation of law. If there are properties in the estate which the descendant had previously acquired by gratuitous title from another

ascendant or from a brother or sister, then under Art. 891 of the Code such properties are reservable.[58]

In testamentary succession, the expression "operation of law" can be applied only to the transmission of the legitime, but not to the transmission of the entirety or of a part of the free portion, since it is an undisputed fact that when an ascendant inherits by will from a descendant, in default of legitimate children or descendants of the latter, the legitime passes to him by force of law, while the free portion, if he is instituted to it, passes to him by force of the testator's will. Thus, if the ascendant is instituted as sole heir by the descendant in his will and the hereditary state consists of properties which the latter had previously acquired by gratuitous title from another ascendant or from a brother or sister, the legitime of the ascendant, which is one-half of the estate, shall pass to him by operation of law, while the free portion, which is also one-half of the estate, shall pass to him by force of the descendant's will. Consequently, only one-half of the entire estate is reservable, while the other half is free property.[59]

The problem regarding the extent of the reservation in testamentary succession becomes complicated, however, if some of the properties in the hereditary estate of the descendant had been acquired by gratuitous title from an ascendant or from a brother or sister, while others had been acquired by some other title from the same source or by any title from some other source. The problem may be illustrated by a hypothetical case. Let us say that the descendant-*propositus* died with a will wherein his mother is instituted as universal heir. The net value of his hereditary estate is P40,000. One-half of this estate had been acquired gratuitously from his deceased father, while the other half had been acquired through his own efforts or industry. From an examination of the facts of this case it is clear that a reservation is established in accordance with the provision of Art. 891 of the Civil Code, but what shall be the extent of such reservation? In other words, to what portion of the hereditary estate shall the reservation attach? There are two divergent views which had been advanced to resolve this question. According to one view, known as *reserva maxima,* all of the properties which the descendant had previously acquired by gratuitous title from

[58]6 Manresa, 7th Ed., p. 367.
[59]Ibid.

another ascendant or from a brother or sister must be included in the ascendant's legitime insofar as such legitime can contain them.[60] Thus, in the above problem, since one-half of the hereditary estate of the descendant had been previously acquired by gratuitous title from his father, all of the properties so acquired are reservable because they can be contained within the ascendant's legitime. According to another view, known as *reserva minima* or proportional *reserva,* which is supported by all Filipino commentators and by the great majority of Spanish commentators, all of the properties which the descendant had previously acquired by gratuitous title from another ascendant or from a brother or sister must be considered as passing to the ascendant-*reservista* partly by operation of law and partly by force of the descendant's will.[61] Therefore, in the above problem, since one-half of the hereditary estate of the descendant had been previously acquired by gratuitous title from his father, one-half of the properties so acquired shall be included in the legitime of the mother, while the other half shall be included in the free portion. Consequently, only the half which is included in the legitime is reservable, while the other half is free property.

Idem; Reservatarios. — The fourth person or persons involved in the *reserva* are the *reservatarios* or relatives of the descendant-*propositus* for whose benefit the reservation is established. However, in order that such relatives may be benefited by the reservation, it is indispensable that the following conditions must concur: *first,* such relatives must be legitimate relatives of the descendant-*propositus* within the third degree: *second,* they must belong to the line from which the reservable property came; and *third,* they must survive the ascendant-*reservista*.

With regard to the first condition, the Supreme Court in several cases, notably the cases of *Florentino vs. Florentino, 40 Phil. 480, Cobardo vs. Villanueva, 44 Phil. 186,* and *Lunsod vs. Ortega, 46 Phil. 664,* has constantly held that the degree of relationship must be counted from the descendant-*propositus*, because it is only upon his death that the property becomes reservable. This doctrine is in conformity with the opinion of the great majority of Spanish

[60] 6 Manresa, 7th Ed., p. 368; 6 Sanchez Roman 1026; 14 Scaevola, 236.
[61] 6 Manresa, 7th Ed., pp. 368-374; 6 Sanchez Roman 1027-1028.

commentators.[62] Consequently, the only persons who can qualify as *reservatarios* are the following:

(1) First degree relatives — This can only refer to the legitimate father or mother of the descendant-*propositus,* since it is evident that when an ascendant inherits from a descendant either as a compulsory heir or as an intestate heir, it is because the descendant has no legitimate descendants of his own, or, if he has, they cannot inherit from him because of disinheritance, incapacity or repudiation.

(2) Second degree relatives — This can only refer to the grandparents as well as to the brothers and sisters of the full or half blood of the descendant-*propositus* belonging to the line from which the reservable property came.

(3) Third degree relatives – This can only refer to the great-grandparents, uncles or aunts (brothers and sisters of the full or half blood of the *propositus*' father or mother), and nephews or nieces (children of the *propositus*' brothers or sisters of the full or half blood) belonging to the line from which the reservable property came.[63]

With regard to the second condition, the expression "line from which the property came" has always been understood as referring to the paternal line as opposed to the maternal line, or vice versa and not to that which is constituted by a series of degrees which may be either direct or collateral. This interpretation is of course logical in view of the fact that *reserva troncal* or lineal aims at maintaining as much as possible absolute separation between the paternal and maternal lines in order to prevent property which belongs to one line from passing to a stranger through the agency or instrumentality of the other line.[64] There is, however, a conflict of opinion among commentators on the question of whether the paternal line or maternal line as contemplated by the Code should be broadly construed to refer to the paternal or maternal line of the descendant-*propositus* from which the reservable property came without any qualification whatsoever so that anyone who belongs to such line is qualified to be a *reservatario* or should be strictly construed to refer specifically to the sub-line or branch within such

[62]6 Manresa, 7th Ed., 282, p. 330; 6 Sanchez Roman 1002; 14 Scaevola 282.
[63]6 Manresa, 7th Ed., p. 335.
[64]6 Sanchez Roman 1015.

paternal or maternal line so that only one who belongs to such branch is qualified to be a *reservatario*. Thus, if the descendant-*propositus* had acquired the property by gratuitous title from his deceased paternal grandfather, and upon his death the property passed to his mother by operation of law, for whose benefit should the property be reserved? Is it reserved for every relative of the descendant-*propositus* within the third degree in the paternal line, although the relative may not be related by consanguinity to the source or origin of the property, or is it necessary that we shall also have to consider the branch from which the property came so that the relative must not only be related by consanguinity to the descendant-*propositus,* but also to the source or origin of the property? Suppose that when the ascendant-*reservista* dies, the only survivor among the relatives of the descendant-*propositus* who are within the third degree and who belong to the paternal line is the paternal grandmother, shall she be entitled to the reservable property? According to one view as advocated by Manresa, since the law merely states that the *reservatario* should belong to the line from which the reservable property came without any qualification whatsoever, it is clear that she would be entitled to the property.[65] According to another view as advocated by Sanchez Roman, which we believe is more in conformity with the nature and purpose of the *reserva,* since she is not related by consanguinity to the origin of the property, but only by affinity, she cannot be considered as belonging to the line from which the said property came. Otherwise, if she had remarried and, subsequently, she had children out of such marriage, such children would also be qualified as *reservatario* thus frustrating altogether the very purpose of the reservation. Consequently, the applicable rule may be stated as follows: The *reservatario* or person for whose benefit the property is reserved must not only be a relative by consanguinity of the descendant-*propositus* within the third degree, but he must also be a relative by consanguinity of the source or origin of the property.[66]

If the origin of the property is a brother or sister of the full-blood, the question of line is unimportant. This is so because in such case there is no way by which we would be able to determine

[65]6 Manresa, 7th Ed., pp. 332-333.
[66]6 Sanchez Roman 1015.

the "line from which the property came." However, if the origin is a brother or sister of the half-blood, the common parent or ascendant must always be considered. If the common ascendant is the father, the property is reserved only for the relatives on the father's side; if the common ascendant is the mother, the property is reserved only for the relatives on the mother's side.[67]

Problem No. 1 — In 1970, O, a son of A by his first wife, B, donated a valuable lot located in Metro Manila to his half-brother, P, a son of A by his second wife, C. In 1975, both A and O were killed in a vehicular accident. In 1978, P died intestate. The lot passed to his mother, C, who was the only intestate heir. In 1980, C also died intestate. The lot is now claimed by: (1) X, a brother of A; (2) Y, a sister of B; and (3) Z, a sister of C. Who is entitled to the property? Why?

Answer — X alone is entitled to the property. Undoubtedly, the lot is reservable within the meaning of Art. 891 of the Civil Code. All of the requisites of *reserva troncal* are present. In the first place, the property had been acquired by operation of law by an ascendant (C) from his descendant (P) upon the death of the latter; in the second place, the property had been previously acquired by gratuitous title by the descendant (P) from a brother (O); and in the third place, such descendant (P) died without any legitimate issue in the direct descending line who can inherit from him. Consequently, when the property passed by operation of law to C, the latter was obliged to reserve it for the benefit of relatives of P who are within the third degree and who belong to the line from which the reservable property came.

The real question, therefore, is — who, among the three claimants can qualify as *reservatorio* or reservee? In order to answer this question, two tests should be applied. They are: *first,* is the claimant a relative of the descendant-*propositus* (P) within the third degree; and second, does he belong to the line (line of O) from which the reservable came? Applying these tests to the case at bar, it is clear that Y cannot qualify because she is not even a relative of the descendant-*propositus,* P. Neither can Z qualify because she does not belong to the line from which the property came. She is not related by consanguinity to O. But X can qualify. He is not only a relative of P (being a paternal

[67]6 Manresa, 7th Ed., p. 334.

uncle) within the third degree; he also belongs to the line from which the reservable property came. Therefore, he alone shall be entitled to the property.

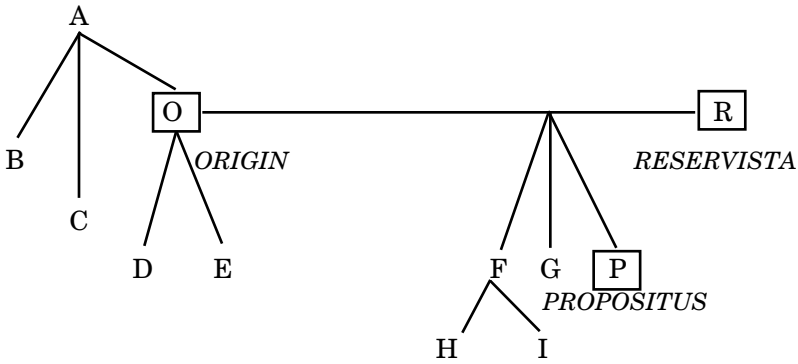
Problem No. 2 — O and P are the legitimate children of H and W. H died in 1970. In 1972, O donated to his brother, P, a valuable lot located in Metro Manila. In 1975, O was killed in a vehicular accident. In 1978, P died intestate. The lot passed to his mother, W, who was the only intestate heir. In 1980, W also died intestate. The lot is now claimed by S, a sister of W, and by B, a brother of H. Who is entitled to the property? Why?

Answer — Both S and B are entitled to the property in equal shares. Undoubtedly, the lot is reservable within the meaning of Art. 891 of the Civil Code. All of the requisites of reserva troncal are present. In the first place, the property had been acquired by operation of law by an ascendant (W) from a descendant (P) upon the death of the latter; in the second place, the property had been previously acquired by gratuitous title by the descendant (P) from a brother (O); and in the third place, such descendant (P) died without any legitimate issue in the direct descending line who can inherit from him. Consequently, when the property passed by operation of law to W, the latter was obliged to reserve it for the benefit or relatives of P who are within the third degree and who belong to the line from which the reservable property came. Since both S and B are third degree relatives of P and both belong to the line from whence the reservable property came, the property should now be given to them automatically and by operation of law.

(*Note:* We are, of course, aware of the view of Justice Paras that the origin of the property must be a half-brother or half-sister, thus implying that if the origin is a brother or sister of the full blood, the property is not reservable within the meaning of Art. 891 of the Civil Code (3 Paras 232). It is respectfully submitted, however, that the law does not make such a distinction. As far as the origin of the property is concerned, it speaks only of "another brother or sister". Consequently, even if the origin is a brother or sister of the full-blood, the property is still reservable although the question of line becomes unimportant. (See 6 Manresa, 7th Ed., 334). Of course, if in the above problem, W was survived also by, let us say, a son or daughter, who is a brother or sister of O and P, the question of whether or not the property is reservable will become moot and academic. Whether under instestate succession or under Art. 891 of the Civil Code, the property shall pass to such brother or sister.)

With regard to the third condition, it must be observed that the title of the ascendant-*reservista* is by its very nature subject to the resolutory condition that if upon his or her death there are relatives of the descendant-*propositus* who are within the third degree and who belong to the line from, which the property came, then such property shall pass by operation of law to such relatives. In order that the purpose for which the reservation is established may be attained, it is, therefore, indispensable that the ascendant-*reservista* must be survived by such relatives of the descendant-*propositus*.

If the ascendant-*reservista* is survived by several relatives of the descendant-*propositus* and all of them are within the third degree belonging to the line from which the reservable property came, who shall be entitled to such property? According to a well-settled doctrine in this jurisdiction, in such case the rules of legal or intestate succession shall apply.[68] Consequently, if some of the survivors are in the direct ascending line, while others are in the collateral line, the rule of preference between line, by virtue of which those in the direct ascending line shall exclude those in the collateral line, is applicable. Within each line, however, the rule which is applicable is that of proximity by virtue of which the nearest in degree shall exclude the more remote ones.



Problem — Before his death in 1945, O donated to his son, P, a parcel of land. Upon the death of P in 1960 without any legitimate issue in the direct descending line, the land passed

[68]Florentino vs. Florentino, 40 Phil. 480; Padura vs. Baldovino, 104 Phil. 1065. See also 6 Manresa, 7th Ed., pp. 336-359; 6 Sanchez Roman 100, 1010.

to his mother, R in accordance with the laws of intestate succession. The latter died in 1970 without a will.

(1) Granting that the property is reservable in accordance with Art. 891 of the Civil Code, who shall be entitled to it if the *reservista,* R, is survived by the following relatives of the descendant-*propositus*, P: (a) A, grandfather in the paternal line; (b) B and C, uncles in the paternal line; (c) F and G, children of D by a prior marriage, and, therefore, brothers of the half blood, of P; (d) F and G, children of O and R, and, therefore brothers of the full blood of P; and (e) H and I, children of F, and, therefore, nephews of P?

Answer — While it is true that all of the survivors in this particular case can qualify as *reservatarios,* since all of them are relatives of the descendant-*propositus,* P, within the third degree and they all belong to the line from which the reservable property came, yet the property cannot be given to all of them. This is so because the rules of intestate succession shall have to be applied. The reason for this is that in *reserva troncal,* in reality, the *reservatario* or *reservatarios* inherit from the descendant-*propositus*, not from the ascendant-*reservista*. Since, in intestate succession, those in the direct ascending line shall exclude those in the collateral line, and since A is the only member of the direct ascending line among the survivors, therefore, the entire reservable property shall pass to him automatically and by operation of law upon the death of R.

(2) Suppose that we eliminate A from the list of survivors, who shall be entitled to the reservable property?

Answer – D, E, F and G shall be entitled to the reservable property. Since all of the survivors are collateral relatives, therefore, the rule of proximity, by virtue of which those nearest in degree to the descendant-*propositus* shall exclude the more remote ones, shall apply. D, E, F and G are relatives of the second degree, while H and I are relatives of the third degree. Consequently, the former shall exclude the latter. With regard to the division of the property itself, since F and G are brothers of the full blood of P, while D and E are brothers of the half-blood, following the doctrine enunciated by the Supreme Court in *Padura vs. Baldovino,*[69] the rule of intestate succession stated in Art. 1006 of the Civil Code, by virtue of which brothers and sisters of the full blood shall be entitled to a share double that of those of the half blood, is applicable. Consequently, the property

[69]104 Phil. 1065.

must be partitioned among D, E, F, and G in the proportion of 1:1:2:2. D and E shall, therefore, be entitled to 1/6 each of the property, while F and G shall be entitled to 2/6 or 1/3 each.

(3) Suppose that F died before the *reservista,* R, so that the only survivors are B, C, D, E, G, H and I, who shall be entitled to the reservable property?

Answer — Only D, E, G, H and I shall be entitled to the reservable property. B and C are of course excluded because they are merely relatives of the third degree, while D, E and G are relatives of the second degree. While it is true that H and I, who are nephews of P, should also be excluded because they are also relatives of the third degree, yet following the doctrine enunciated by the Supreme Court in *Florentino vs. Florentino,*[70] they cannot be excluded because they shall represent their deceased father, F, in the reservable property. Even in *reserva troncal,* the right of representation is recognized, provided that the representative is a relative of the descendant-*propositus* within the third degree, and provided further, that he belongs to the line from which the reservable property came.

Florentino vs. Florentino
40 Phil. 480

In 1908, Severina Foz de Leon died leaving by will her entire estate including the property, which is the subject matter of this litigation, to her only daughter and compulsory heir, Mercedes Fiorentino. The records show that she inherited the property in question from her deceased son Apolinio Florentino III, who, in turn, had inherited it from his deceased father Apolinio Florentino II. The right of the instituted heir, Mercedes Florentino, to the property is now contested by the children and grandchildren of Apolonio Florentino II by a previous marriage on the ground that the said property is reservable in accordance with the provision of Art. 811 *(now Art. 891)* of the Civil Code and that they, together with Mercedes Florentino, are entitled to the property as *reservatarios*. Declaring that the property is reservable, and that the right of representation is applicable so long as the representatives are relatives of the descendant-*propositus* within the third degree, the Supreme Court held:

"Following the order prescribed by law in legitimate succession, when there are relatives of the descendant within the

[70]40 Phil. 480.

third degree, the right of the nearest relative over the property which the reservista should return to him, excludes that of the ones more remote. The right of representation cannot be alleged when the one claiming the same as a *reservatario* of the 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 Article 811 *(now 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. Nevertheless, there is right of representation on the part of *reservatarios* who are within the third degree, as the case of nephews of the deceased person from whom the reservable property came. These *reservatarios* have the right to represent their ascendants who are the brothers of the said deceased person and relatives within the third degree in accordance with Article 811 of the Civil Code *(now Art. 891)."*

Padura vs. Baldovino
104 Phil. 1065

Agustin Padura contracted two marriages during his lifetime. With his first wife, he had one child, Manuel, and with his second wife, Benita, he had two children, Fortunato and Candelaria. Agustin died in 1908, leaving all of his properties to Benita and the three children. Four parcels of land were adjudicated to Fortunato. Shortly thereafter, Fortunato died without a will. Not having any issue, the four parcels of land passed to his mother, Benita. In 1934, Candelaria also died, leaving as her only heirs four legitimate children, petitioners herein. In 1940, Manuel also died, leaving as his only heirs seven legitimate children, oppositors herein. In 1952, Benita died. The children of Manuel and Candelaria were declared to be the rightful *reservatarios*. Subsequently, the children of Candelaria filed the instant petition seeking to have the reservable properties partitioned, such that 1/2 of the same be adjudicated to them on the basis that they inherit by right of representation. The children of Manuel filed their opposition, maintaning that they (the 11 *reservatarios)* should all be deemed as inheriting in their own right, as a consequence of which, they should all inherit in equal shares. The question, therefore, is how shall the reservable properties be divided among the eleven *reservatarios?* Speaking through Justice J.B.L. Reyes, the Supreme Court held:

"The *reservatarios* nephews of the full blood are entitled to a share twice as large as that of the others in conformity with Arts. 1006 and 1008 of the Civil Code of the Philippines. The *reserva troncal* is a special rule designed primarily to assure the return of the reservable property to the third degree relatives belonging to the line from which the property originally came, and avoid its being dissipated by the relatives of the inheriting ascendant *(reservista).* The stated purpose of the *reserva* 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. In the relations between one *reservatario* and another of the same degree, there is no call for applying Art. 891 any longer; wherefore, the respective shares of each in the reversionary property should be governed by the ordinary rules of intestate succession. In this spirit the jurisprudence of this Court and that of Spain has resolved that upon the death of the ascendant *reservista,* the reservable property should pass, not to all the *reservatarios* as a class, but only to those nearest in degree to the descendant *(propositus),* excluding those *reservatarios* of more remote degree *(Florentino vs. Florentino, 40 Phil. 489-490; T. S. 8 Nov. 1894; Dir. Gen. de los Registros, Resol. 20 March 1905).* And within the third degree of relationship from the descendant *(propositus),* the right of representation operates in favor of nephews *(Florentino vs. Florentino, supra).*

"Proximity of degree and right of representation are basic principles of ordinary intestate succession; so is the rule that whole blood brothers and nephews are entitled to a share double that of brothers and nephews of half-blood. If in determining the rights of the *reservatarios inter se,* proximity of degree and the right of representation of nephews are made to apply, the rule of double share for immediate collaterals of the whole blood should be likewise operative. In other words, the *reserva troncal* merely determines the group of relatives *(reservatarios)* to whom the property should be returned; but within that group, the individual right to the property should be decided by the applicable rules of ordinary intestate succession, since Art. 891 does not specify otherwise. This conclusion is strengthened by the circumstances that the reserva being an exceptional case, its application should be limited to what is strictly needed to accomplish the purpose of the law. The restrictive interpretation is the more imperative in view of the new Civil Code's hostility to successional *reservas* and reversions, as exemplified by the suppression of the *reserva viudal* and the *reversion legal* of the Code of 1889 *(Arts. 812 and 968-980.)*

> "Even during the *reservista's* lifetime, the *reservatarios,* who are the ultimate acquirers of the property, can already assert the right to prevent the *reservista* from doing anything that might frustrate their reversionary right; and for this purpose they can compel the annotation of their right in the Registry of Property even while the *reservista* is alive *(Ley Hipotecaria de Ultramar, Arts. 168, 199; Edroso vs. Sablan, 25 Phil. 295).* This right is incompatible with the mere expectancy that corresponds to the natural heirs of the *reservista.* It is likewise clear that the reservable property is no part of the estate of the *reservista,* who may not dispose of them by will, so long as there are *reservatarios* existing *(Arroyo vs. Gerona, 38 Phil. 237).* The latter, therefore, do not inherit from the *reservista,* but from the descendant-*propositus,* of whom the *reservatarios* are the heirs *mortis causa,* subject to the condition that they must survive the *reservista.* Had the nephews of whole and half blood succeeded the *propositus* directly, those of full blood would undoubtedly receive a double share compared to those of the half-blood. Why then should the latter receive equal shares simply because the transmission of the property was delayed by the interrugnum of the *reserva?* The decedent *(causante),* the heirs and their relationship being the same, there is no cogent reason why the hereditary portions should vary."

Property Subject to Reservation. — It is clear from what had already been stated that the property which is subject to the reservation established in Art. 891 must be the same property which the ascendant-*reservista* had acquired by operation of law from the descendant-*propositus* upon the death of the latter and which the latter, in turn, had acquired by gratuitous title during his lifetime from another ascendant or from a brother or sister. Consequently, the ascendant-*reservista* cannot substitute another property for that which he is obliged by law to reserve. This consequence is deducible not only from the object and purpose of the *reserva,* but also from the obligations imposed upon the *reservista,* such as the obligation to make an inventory of all reservable property and the obligation to annotate in the Registry of Property the reservable character of all reservable immovable property.[71]

There are, however, certain cases, and these are by no means rare, where there would have to be substitution of the reservable

[71] 6 Manresa, 7th Ed., pp. 363-364.

property through unavoidable necessity, such as when the property is consumable, or when it is lost or destroyed through the fault of the *reservista,* or when it has deteriorated through the same cause, or when it has been alienated. In such cases, the remedy of the *reservatarios* or persons entitled to the reservable property would be to recover the value of the property or to seek the ownership and return thereof depending upon the circumstances of each particular case. These remedies are available regardless of whether or not the required inventory has been made and the mortgage has been constituted, although undoubtedly, restitution or recovery would be rendered much more difficult or even impossible if these requirements are not complied with.[72]

If the reservable property consists of a sum of money and there is no ready cash in the estate of the *reservista* when he dies, what is the remedy available to the *reservatarios?* It is believed that in this particular case the ordinary rules for the collection of a judgment credit in accordance with our laws of procedure shall have to be applied. Consequently, the *reservatarios* entitled to the sum of money can ask for the sale of property belonging to the estate of the *reservista* in order to raise the necessary amount.[73]

Rights of Reservista. — Since the ascendant-*reservista* actually acquires the ownership of the reservable property upon the death of the descendant-*propositus* subject to the resolutory condition that there must exist at the time of his death relatives of the descendant who are within the third degree and who belong to the line from which the property came, it is clear that all of the attributes of the right of ownership, such as enjoyment, disposal and recovery, belong to him exclusively, although conditional and revocable.[74] He can, therefore, alienate or encumber the property if he so desires, but he will only alienate or encumber what he had and nothing more because no one can give what does not belong to him. As a consequence, the acquirer will only receive a limited and revocable title. Therefore, after the death of the ascendant, the *reservatarios* may then rescind the alienation or encumbrance, because the condition to which it is subject has already been fulfilled.[75]

[72]Ibid., pp. 364-365.
[73]Ibid., p. 365.
[74]See Edroso vs. Sablan, 25 Phil. 295.
[75]Edroso vs. Sablan, Ibid., Lunsod vs. Ortega, 46 Phil. 664.

Obligations of Reservista. — The obligations of the ascendant-*reservista are:*

(1) To make an inventory of all reservable property;

(2) To appraise the value of all reservable movable property;

(3) To annotate in the Registry of Property the reservable character of all reservable immovable property; and

(4) To secure by mortgage (a) the restitution of movable property not alienated, (b) the payment of damages caused or which may be caused by his fault or negligence, (c) the return of the price which he has received for movable property alienated, or the payment of its value at the time of its alienation, if such alienation was made by gratuitous title, and (d) the payment of the value of immovable property validly alienated.[76]

Rights of Reservatarios. — During the whole period between the constitution in legal form of the *reserva* and the extinction thereof, an expectation that cannot be transmitted to their own heirs, unless these heirs are also within the third degree.[77] In spite of this, it is undeniable that they are entitled to certain rights which are necessary, not only for the recognition of the existence of their expectation or eventual right to the property, but also for the preservation of such expectation. These rights, which are correlative to the obligations of the *reservista,* are to ask for the inventory of all reservable property, the appraisal of all reservable movable property, the annotation in the Registry of Property of the reservable character of all reservable immovable property, and the constitution of the necessary mortgage.[78]

Can a *reservatorio* alienate his expectation to the property during the pendency or lifetime of the *reserva?* According to the Supreme Court in the case of *Edroso vs. Sablan, 25 Phil. 295,* which was decided on September 13, 1913, he cannot because of the following reasons: *first,* the property is in no way, either actually, constructively or formally, in his possession; *second,* he has no title of ownership or of fee simple to the property which he can transmit to another; and *third,* it is impossible to determine the part of the property that might pertain to him at the time he exercises the

[76]Arts. 977, 978, Spanish Civil Code; Dizon vs. Galang, 48 Phil. 601.
[77]6 Sanchez Roman 1035; Riosa vs. Rocha, 48 Phil. 737.
[78]6 Manresa, 7th Ed., pp. 385-388.

right, because, in view of the nature and scope of the right required by law to be reserved, the extent of his right cannot be foreseen, for it may disappear by his dying before the ascendant-*reservista*. It must be observed, however, that this doctrine was to a certain extent based on a decision rendered by the *Supremo Tribunal* of Spain on December 3, 1897, a decision which is now practically obsolete due to its reversal by the same tribunal on April 1, 1941. As it now stands, the accepted rule in Spain is to the effect that a *reservatario* may dispose of his expectancy to the reservable property during the pendency of the *reserva* in its uncertain and conditional form. If he dies before the *reservista,* he has not transmitted anything, but if he survives such *reservista,* the transmission shall become effective. On March 24, 1961 in *Sieves vs. Esparcia,* 1 SCRA 750, our Supreme Court finally adopted this view.

The following problem essentially based upon *Sienes* is interesting:

> *Problem* — The lot in question originally belonged to A. With his first wife, B, A had four children, D, E, F, and G, while with his second wife, C, he had only one child, H. Upon his death in 1956, said lot was left to H. When H died in 1952, single and without any descendant, his mother, C, sold the property to X. Subsequently, D, E, F and G sold the same property to Y. Several years later, C died.
>
> (a) Is the property reservable?
>
> (b) How about the two sales which were executed — are they valid or not?
>
> (c) Who is now entitled to the property?
>
> *Answer* — (a) In order that the property shall be considered as reservable under Art. 891 of the Civil Code, it is necessary that the following requisites must concur: (1) The property should have been inherited by operation of law by an ascendant from his descendant upon the death of the latter; (2) the property should have been previously acquired by gratuitous title by the descendant from another ascendant or from a brother or sister; and (3) the descendant should have died without any legitimate issue in the direct descending line who could inherit from him. It is clear that all of these requisites are present in the instant case. Consequently, when H died in 1952, and the property passed by operation of law to his mother, C, it became reservable. In order words, C, who is the *reservista,* must re-

serve the property for the benefit of the relatives of H who are within the third degree and who belong to the line from which the property came. This reservation, however, is subject to two resolutory conditions, namely: (1) the death of the ascendant *reservista,* and (2) the survival, at the time of his death, of relatives of the descendant-*propositus* who are within the third degree and who belong to the line from which the reservable property came. *(6 Manresa, 268-269; 2 Sanchez Roman 1934; Sienes vs. Esparcia, 1 SCRA 750.)*

(b) As far as the first sale is concerned, undoubtedly, it is valid, but the *reservista* can only alienate that which he has and nothing more — a limited and revocable title to the reservable property. Hence, the alienation transmits only the conditional and revocable title of the *reservista,* the rights acquired by the transferee being revoked or resolved by the survival of *reservatarios* at the time of the death of the *reservista (Edroso vs. Sablan, 25 Phil. 295; Lunsod vs. Ortega, 46 Phil. 664; Florentino vs. Florentino, 40 Phil. 279; Sieves vs. Espacio, supra.)* Consequently, in the instant case, inasmuch as the *reservatarios,* D, E, F, and G, were still alive at the time of the death of the *reservista,* C, the conclusion becomes inescapable that the previous sale made by such *reservista* in favor of X became of no legal effect, and as a consequence, the reservable property passed automatically and by operation of law to the *reservatarios*. But then, the *reservatarios* had also alienated their right or expectancy over the reservable property during the pendency of the *reserva.* Was this sale valid? This question was answered in the affirmative by the Supreme Court in *Sienes vs. Esparcia, (supra).* But, of course, it is subject to the same conditions to which the previous sale is subject.

(c) Premises considered, it is clear that Y is now entitled to the subject property.

Idem; When reservatario acquires right; effect. — Assuming that the *reservatario* has all of the necessary qualifications, his hope or expectancy over the reservable property is finally converted into a perfected right upon the concurrence of two requisites — death of the *reservista* and survival. Upon the death of the *reservista,* the *reservatario* nearest the descendant-*propositus* becomes, automatically and by operation of law, the absolute owner of the reservable property.[79] Consequently, the property is withdrawn automatically

[79]Cano vs. Director of Lands, 105 Phil. 1.

from the estate of the *reservista*. Hence, even the creditors of such *reservista* cannot touch it. Furthermore, if in the decree of registration there is an express recognition of the rights of the *reservatario,* the acquisition of the property by such *reservatario* upon the death of the *reservista* may be entered immediately in the property records without the necessity of opening any state proceedings.[80]

Extinction of Reserva. — The following are the different causes for the extinguishment of the *reserva:*

(1) Death of the ascendant-*reservista*.[81]

(2) Death of all relatives of the descendant-*propositus* within the third degree who belong to the line from which the property came. In such case, the active subject of the *reserva* disappears, as a consequence of which the resolutory condition which limits the title of the *reservista* also disappears.[82]

(3) Loss of the reservable property for causes not due to the fault or negligence of the *reservista*.[83]

(4) Waiver or renunciation by the *reservatarios*.[84] The renunciation may be before or after the death of the *reservista*. If the renunciation is made before the death of the *reservista,* such renunciation cannot affect other third degree relatives who may be born subsequently and who survive the *reservista;* if it is made after the death of the *reservista,* the reservation is extinguished but only insofar as the share of the renouncer is concerned. In either case, the renunciation may be either express or implied.[85]

(5) Prescription of the right of the *reservatarios,* when the ascendant-*reservista* holds the property adversely against them in the concept of an absolute owner.[86] The possibility of the *reservatarios* losing their right in the reservable property by extraordinary

[80]Ibid.
[81]6 Manresa, 7th Ed., p. 390.
[82]Ibid., pp. 390-391.
[83]Ibid., p. 391.
[84]Ibid., pp. 391-392.
[85]6 Sanchez Roman 1040-1041.
[86]6 Manresa, 7th Ed., p. 393.

prescription has been explicitly recognized by the Supreme Court in *Maghirang vs. Balcita*[87] and in *Carillo vs. De Paz*.[88]

In the first case *(Maghirang vs. Balcita),* the subject property was inherited by a minor, Gertrudis Balcita, in 1902 directly from her maternal grandfather, Bonifacio Gutierrez, in representation of her predeceased mother. In 1906, Atilano Bautista, father of Gertrudis, representing himself to be the absolute owner of the land, sold it to Esteban Reyes with right or repurchase within ten years. Upon buying the property, Reyes immediately took possession thereof. In 1912, Gertrudis died survived by her father, Atilano Bautista, and a maternal aunt, the plaintiff Sergia Gutierrez. In 1918, the latter brought an action for registration of the land in her capacity as *reservatario* or reservee under Art. 911 *(now 891)* of the Civil Code. The lower court ruled that Reyes had already acquired absolute ownership over the property by acquisitive prescription because he had been in continuous and adverse possession thereof for more than ten years. The Supreme Court, however, held:

> "We are of the opinion that the conclusion thus reached is erroneous. We may accept the legal proposition that occupancy by Esteban Reyes, pursuant to the contract of sale with *pacto de retro* by which he acquired the property, and prior to the expiration of the period for redemption, may be considered an adverse possession as against everybody having a prescriptive interest, notwithstanding the existence of the stipulation for repurchase. As was said by this court in *Santos vs. Heirs of Crisostomo and Tiongson* (41 Phil. 342, 352), the insertion of a stipulation for repurchase by the vendor in a contract of sale does not necessarily create a right inconsistent with the right of ownership in the purchaser. Such a stipulation is in the nature of an option, and the possible exercise of it rests upon contingency. It creates no subsisting right whatever in the property, and so far from being inconsistent with the idea of full ownership in the purchase, it really rests upon the assumption of ownership in him.
>
> "But it must be borne in mind that the true owner of this property was Gertrudis Balcita, a minor, and the period of limi-

[87]48 Phil. 551.

[88]18 SCRA 467. See also prior case of Carillo vs. De Paz, 91 Phil. 265. As a matter of fact, the Supreme Court has even held that estoppel and laches may also bar the *reservatarios* from claiming the reservable property (Arroyo vs. Gerona, 58 Phil. 226, 237).

tation did not begin to run against her or any person claiming in her right until the date of her death, which was December 9, 1912. It must furthermore be remembered that the plaintiff does not claim in the character of an ordinary successor to the rights of Gertrudis Balcita; her claim is based upon a positive provision of law, which could not operate in any wise until the death of Gertrudis Balcita, when the reservable character first attached to the property in question. From this it is obvious that the right of the plaintiff — which even yet is of a purely contingent nature — could not be affected by anything that had occurred prior to the death of Gertrudis Balcita; and as this action was begun in May, 1918 the ten-year period necessary to confer a complete prescriptive title had not then elapsed.

"What has been said makes it unnecessary to express any opinion upon the more recondite question whether Sergia Gutierrez really has a prescriptible interest in the parcel B, but we may observe that the position of the reservee under the Spanish law is very much like that of the ordinary remainderman at common law, who is entitled to take after the termination of a particular life estate; and it is generally accepted doctrine in common-law jurisdictions that if the life tenant loses his life estate by adverse possession the interest of the remainderman is not thereby destroyed. (17 R.C.L. 982; 21 C.J., 972, 975, 1013.) The reason for the rule is said to be that, during the existence of the life estate, the remainderman has no right to possession and consequently cannot bring an action to recover it. (21 C.J., 974.) As was said by the Supreme Court of Ohio in Webster vs. Pittsburg, etc., Railroad Co. (15 L.RA. (N.S.), 1154), "No possession can be deemed adverse to a party who has not at the time the right of entry and possession."

The case of *Carillo* is even more interesting. Without deviating substantially from the actual facts and decision, we have formulated the following problem and the corresponding answer based on the decision:

Problem — In 1943, Severino Salak sold 1/2 of a parcel of land (the subject property) to Honoria Salak. He died in 1944 survived by a daughter, Francisco Salak de Paz. In January, 1945, Honoria, together with her mother, Isabel Carillo Salak, and her brother, Adolfo Salak, were massacred by the Japanese. At the time of their death, Honoria was 25 years old, Adolfo, 32 years old, and Isabel, 52 years old. They were survived by Agustina de Guzman Vda. de Carrillo, mother of Isabel. In 1946,

in the intestate proceeding for the settlement of the estate of Severino Salak, the entire subject property was adjudicated to the decedent's daughter, Francisca. On April 24, 1950, Agustina died. In 1963, Prima Carillo, a daughter of Agustina and sister of Isabel, brought an action against Francisca for recovery of 1/2 of the subject property in her capacity as *reservatario* or reservee under Art. 891 of the Civil Code. Defendant interposed the defense of prescription. Decide.

Answer — The defense of prescription should be sustained.

It is of course, very true that the subject property is reservable under Art. 891 of the Civil Code. All of the requisites are present. Since at the time they were massacred by the Japanese, Honoria was 25 years old, Adolfo, 32 years old, and Isabel, 52 years old, under the presumptions on survivorship enunciated in Rule 123, Sec. 69 (ii) (now Rule 131, Sec. 5, ii), of the Rules of Court, Honoria was the first to die, followed by Isabel, and then Adolfo, it is obvious that 1/2 of the subject property, which Honoria had bought from Severino Salak in 1943, passed by intestate succession to her mother, Isabel. When Isabel died, the said 1/2 of the property also passed by intestate succession to her son, Adolfo. When Adolfo died, it passed again by intestate succession, this time, to his maternal grandmother, Agustina. Hence, all of the requisites of reserva troncal under Art. 891 of the Civil Code are present with: (1) Isabel as the origin of the property; (2) Adolfo as the descendant-*propositus;* (3) Agustina as the ascendant-*reservista;* and (4) Prima as the *reservatario* or reservee. Thus, Agustina had inherited the property by operation of law from her descendant Adolfo; Adolfo, in turn, had acquired said property by gratuitous title from another ascendant, his mother, Isabel; and finally, Adolfo, the *propositus*, died without issue. From the moment Agustina inherited the property from Adolfo in 1945, it became reservable. In other words, she was obliged to reserve the property for the benefit of relatives of Adolfo who are within the third degree and who belong to the line from which the said property came.

Agustina finally died on April 24, 1950. From that very moment, the *reserva* was extinguished. Prima, maternal aunt, and therefore, a third degree relative of Adolfo, became automatically and by operation of law the absolute owner of the reservable property. From that very moment she had a perfect right to bring an action against Francisca for the recovery *(accion reinvindicatoria)* of 1/2 of the subject property. Such right or cause of action accrued on April 24, 1950. The law (Section 40

of the Code of Civil Procedure) fixes 10 years as the period for actions to recover real property, counted from the time the cause of action accrued. This is the applicable law (Art. 1116, Civil Code). Plaintiffs suit herein, having been filed only in 1963, or more than 10 years from April 24, 1950, has already prescribed. (*Carillo vs. De Paz*, 18 SCRA 467.) (Note: It must be noted that had the massacre of Honoria, Isabel and Adolfo taken place after the effectivity of the New Civil Code (Aug. 31, 1950), there would have been no *reserva troncal*. The presumptions on survivorship would not then apply. What would have been applicable would be the presumption stated in Art. 43 of the New Civil Code. All of the three would be presumed to have died at the same time. Hence, there would have been no transmission of successional rights from one to the other.)

The above doctrine was again recognized in *Chua vs. Court of First Instance of Negros Occidental (supra.)*. In this case, one of the incidental issues that had to be resolved was the contention of private respondents (the legal heirs of the ascendant-*reservista* Consolacion de la Torre that the complaint of petitioner (the *reservatarios* or reservees) for recovery of one-half (1/2) of the subject property had already prescribed. The Supreme Court ruled:

"It is claimed that the complaint x x x had already prescribed when it was filed on May 11, 1966. We do not believe so. It must be remembered that the petitioners herein are claiming as reservees of the property in question and their cause of action as reservees did not arise until the time the reservor, Consolacion de la Torre, died in March, 1966. When, the petitioners therefore filed their complaint to recover the one-half (1/2) portion of Lot 399, they were very much in time to do so."

It is interesting to note that in the 1979 Bar Examinations, a problem was asked based on the three cases that we have just discussed. The problem (and corresponding answer) are as follows:

Problem — A married B in 1950 bringing into the marriage a 10-hectare piece of unregistered land in Antipolo which he inherited from his father. Of the marriage two daughters were born. On February 10, 1955, A and his two daughters went to Baguio. On the way they met an accident and A died instantly on the spot while the two daughters died two days later in the hospital where they were brought. In 1960, B sold the land to C. In 1977, B died so D, the only brother of A, asked C to reconvey the land to him. Upon C's refusal, D filed a complaint for recov-

ery of the land. C raised the defense of prescription. Should the defense be sustained? Why?

Answer — The defense should be sustained but only with respect to one-third of the subject property; however, with respect to the other two thirds, it should not be sustained.

It must be observed that when A died, the subject property passed by intestate succession to his wife B and his two daughters in the proportion of one-third for each. When the two daughters died two hours later, their one-third shares passed by intestate succession to their mother B. These shares which B acquired by operation of law from her two daughters become reservable. In other words, by mandate of the law, upon acquiring the two-thirds share of her daughters she was obliged to reserve such share for the benefit of relatives of her two deceased daughters who are within the third degree and who belong to the line from whence the reservable property came: All of the requisites of *reserva troncal* are, therefore, present. In the first place, the property was acquired by a descendant from an ascendant or from a brother or sister by gratuitous title; in the second place, said descendant died without any legitimate issue in the direct descending line who can inherit from him; in the third place, the property is inherited by another ascendant by operation of law; and in the fourth place, there are relatives of the descendant who are within the third degree and who belong to the line from which said property came. Consequently, when C bought the subject property from B in 1960, he acquired only that which B had and nothing more. In other words, when B, the ascendant-*reservista,* sold the property to C in 1960, the latter acquired the one-third share which B had inherited from A without any condition whatsoever. However, with respect to the other two-thirds share which is reservable, C acquired a limited and revocable title only. Therefore, when B, the ascendant-*reservista* vendor finally died in 1977, automatically, by operation of law, the two-thirds share which is reservable passed to D, who is the *reservee* or *reservatario*.

Premises considered, the defense of prescription can only be sustained with respect to the one-third share of B which she had inherited from A in 1955. The computation of the 10-year period of prescription must commence from 1960. In the case of the two-thirds share which is reservable, the computation must commence from 1977 when B, the ascendant-*reservista,* died. When D, the *reservatario,* therefore, filed his action after the death of B, he was very much in time to do so.

(6) Registration by the *reservista* of the property as free property under the Land Registration Act *(Act No. 496)*[89]

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The records show that the reservista registered the property in question as free property under the Land Registration Act without any opposition on the part of the *reservatarios.* After this death, six years later, the plaintiff, commenced this action for the recovery of the property on the ground that he is entitled to the ownership and possession thereof in accordance with the provision of Art. 811 *(now Art. 891)* of the Civil Code. On appeal, the Supreme Court held that his failure to present any opposition to the registration within a period of one year after the decree of registration had been entered has the effect of extinguishing his right to the property. Subsequently, his counsel presented a motion for rehearing wherein he invoked the doctrine in the case of *Edroso vs. Sablan, 25 Phil. 295.* The Supreme Court, however, held:

"It is true that in the case of *Edroso vs. Sablan,* we held that the owners of 'el derecho reservable' were entitled to have their right noted in the certificate of registration as a valid lien against the property. In that case *(Edroso vs. Sablan),* the persons holding the reservable rights presented their opposition to the registration of the land in question during the pendency of the action in the Court of Land Registration. In the present case, the land in question was registered in the month of September, 1909. No objection was presented to the registration of the property. No question is now raised that the proceedings for the registration of the land in question were not regular and in accordance with the provisions of the Land Registration Act. Moreover, the plaintiff presented no claim whatever for a period of six years. In the case of *Edroso vs. Sablan,* the parties interested went to the Court of Land Registration during the pendency of the action there and fully protected their rights. In the present case, the plaintiff did not, thereby losing his right given him under the law to the land in question. Whether he has any other remedy for the purpose of recovering damages to cover his loss is a question which we do not now discuss or decide. The appellee apparently had the idea that the decision in the present case destroys *'el derecho reservable.'* That was not the purpose

[89]De los Reyes vs. Paterno, 34 Phil. 420.

> of the decision. The effect of the decision simply is that unless such right is protected during the pendency of the action for the registration of the land within a period of one year, thereafter, such right is lost forever. We are of the opinion that there is no conflict between the decision in the present case and in the case of *Edroso vs. Sablan*."

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.[90]

Art. 893. If the testator leaves no legitimate descendants, but leaves legitimate ascendants, the surviving spouse will have a right to one-fourth of the hereditary estate.

This fourth shall be taken from the free portion of the estate.[91]

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.[92]

Legitime of Surviving Spouse. — One of the major changes effected in the New Civil Code is to give to the surviving spouse absolute dominion over a certain portion of the decedent's estate rather than a mere interest in the form of a usufruct which is often difficult to satisfy and which prevents the property from being freely alienated to third persons.[93] Thus, under the present Code

[90]Art. 834, Spanish Civil Code, in amended form.
[91]Art. 836, Spanish Civil Code, in amended form.
[92]New provision.
[93]Report of the Code Commission, p. 112.

the surviving spouse is entitled to a legitime the amount of which is variable depending upon whether he or she survives alone or concurrently with other compulsory heirs. It must be noted, however, that in case of legal separation, if the survivor happens to be the guilty spouse, he or she is incapacitated to inherit from the deceased spouse.[94]

The successional rights of the surviving spouse with respect to his or her legitime may be summarized as follows:

(1) Surviving alone — 1/2 of the estate, unless 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 such marriage, in which case the legitime of the surviving spouse is 1/3 of the estate, except when they have been living as husband and wife for more than five years, in which case the legitime of such surviving spouse is again 1/2 of the estate.

(2) Surviving with legitimate descendants — 1/4 of the estate, if there is only one child; the same as that of each child, if there are two or more children.

(3) Surviving with ascendants — 1/4 of the estate.

(4) Surviving with illegitimate children — 1/3 of the estate.

(5) Surviving with legitimate descendants and illegitimate children — 1/4 of the estate, if there is only one legitimate child; the same as that of each legitimate child, if there are two more legitimate children.

(6) Surviving with legitimate ascendants and illegitimate children — 1/8 of the estate.

Idem; Alone as a class. — As a general rule, if the only surviving compulsory heir of the testator is the widow or widower, the legitime of such widow or widower consists of one-half (1/2) of the hereditary estate. There is, however, an exception to this rule. 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 such marriage, the legitime of the surviving spouse as the sole heir shall be one-third (1/3) of the hereditary

[94]Arts. 106, 892, Civil Code.

estate, while the remaining two-thirds shall be at the testator's free disposal. Nevertheless, this exception shall not apply, if they had been living together as husband and wife for more than five years before the celebration of the marriage.[95]

Idem; With legitimate descendants. — If the surviving spouse concurs with only one legitimate child or descendant, his or her legitime consists of one-fourth (1/4) of the hereditary estate which shall be taken from the free portion.[96] Consequently, the division of the estate shall be as follows:

Legitimate of the child or descendant	1/2
Legitime of the surviving spouse	1/2
For free disposal	1/4

If he or she concurs with two or more legitimate children or descendants, his or her legitime shall be equal to that of each legitimate child or descendant which shall be taken from the free portion.[97] Thus, if the testator is survived by his widow, W, two legitimate children, A and B, and two grandchildren, D and E, children of a deceased legitimate child, C, and the net value of the estate is P60,000, the legitime of the legitimate children and descendants shall consists of 1/2 of P60,000, or P30,000. The legitime of the legitimate children and descendants of P30,000, however, shall be divided *per stirpes* and not *per capita*. This is so, because D and E are entitled by right of representation to the legitime which would have pertained to their deceased father, C.[98] Consequently, the division of the estate shall be as follows:

Legitime of A	P10,000
Legitime of B	10,000
Legitime of D by right of representation	5,000
Legitime of E by right of representation	5,000

[95]Art. 900, Civil Code.
[96]Art. 892, par. 1, Civil Code.
[97]Art. 892, par. 2, Civil Code.
[98]Arts. 970, 972, 974, Civil Code.

Legitime of W	10,000
For free disposal	20,000
	P60,000

Idem; With legitimate ascendant. — If the surviving spouse concurs only with legitimate parents or ascendants, the legitime of the former consists of one-fourth (1/4) of the hereditary estate to be taken from the free portion,[99] while that of the latter consists of one-half (1/2).[100] Thus, if the testator is survived by his widow, W, and his legitimate parents, F and M, and the net value of the estate is P40,000, the division shall be as follows:

Legitime of F	P10,000
Legitime of M	10,000
Legitime of W	5,000
For Free disposal	5,000
	P40,000

Idem; With illegitimate children. — If the surviving spouse concurs only with illegitimate children, he or she shall be entitled to a legitime of one-third (1/3) of the hereditary estate, while the latter shall also be entitled to one-third (1/3). The remaining one-third (1/3) shall be at the free disposal of the testator.[101]

Problem — The testator is survived by: (1) W, his widow; (2) N, an acknowledged natural child; and (3) S, an acknowledged illegitimate child who is not natural. The net value of the estate is P54,000. How shall such estate be divided?

Answer — By virtue of the provision of Art. 894 of the Civil Code, the legitime of the surviving spouse, W, shall consist of 1/3 of P54,000, or P18,000, the legitime of the illegitimate children, N and S, shall also consist of 1/3 of P54,000, or P18,000, while the remaining 1/3 of P54,000, or P18,000, shall be at the testator's free disposal. It must be observed, however, that N is

[99]Art. 893, Civil Code.
[100]Art. 889, Civil Code.
[101]Art. 894, Civil Code.

an acknowledged natural child, while S is an acknowledged illegitimate child who is not natural. Therefore, the rule stated in the second paragraph of Art. 895 of the Civil Code is applicable. According to this rule, "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." From this rule, it is evident that the proportion between the legitime of an acknowledged natural child and that of an acknowledged illegitimate child who is not natural is five to four (5:4). Applying this proportion to the problem, N shall be entitled to 5/9 of the legitime of P18,000, while S shall be entitled to 4/9. Therefore, the entire estate shall be divided as follows:

Legitime of W	P18,000
Legitime of N	10,000
Legitime of S	8,000
For free disposal	18,000
	P54,000

Note: This rule was repealed by the Family Code. Since the various classifications of illegitimate children was eliminated such that they are now all classified as illegitimate children, their legitime shall be the same, that is, one-half of the legitime of a legitimate child. The 5:4 proportion is, thus, inapplicable. The entire estate shall be divided as follows:

Legitime of W	P18,000
Legitime of N	9,000
Legitime of S	9,000
For free disposal	18,000
	P54,000

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.[102]

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.[103]

Art. 897. When the widow or widower survives with legitimate children or descendants, and acknowledged 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.[104]

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.[105]

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.[106]

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.

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[102]Art. 840, Spanish Civil Code, in amended form.
[103]Art. 841, Spanish Civil Code, in amended form.
[104]New Provision.
[105]New Provision.
[106]New Provision.

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 paragraph.[107]

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.[108]

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.[109]

Legitime of Illegitimate Descendants. — Another major change that is introduced in the new Civil Code is the improvement of the successional rights of illegitimate children. Under the law, only acknowledged natural children were entitled to succeed as compulsory heirs; under the present law, all classes of illegitimate children are entitled to succeed as compulsory heirs.[110] The amount of their legitime, however, is variable depending upon whether they inherit alone or as a class or concurrently with other classes of compulsory heirs.

Idem; Alone as a class. — When the only survivors are illegitimate children, the legitime of such illegitimate children consists of one-half (1/2) of the hereditary estate, while the other half is at the testator's free disposal.[111] This rule which is contained in Art. 901 of the Code must, however, be supplemented by the rule contained in the second paragraph of Art. 895 if some of the survivors are acknowledged natural or natural children by legal fiction, while others are acknowledged illegitimate children who are not natural. This rule, however, was repealed by the Family Code, more particularly by the second sentence of Art. 176 which states

[107]Art. 837, Spanish Civil Code, in amended form.
[108]Art. 842, Spanish Civil Code, in amended form.
[109]Art. 843, Spanish Civil Code, in amended form.
[110]See Report of the Code Commission, pp. 112-114.
[111]Art. 901, Civil Code.

that the legitime of each illegitimate child shall consist of one — half of the legitime of a legitimate child. Since the various classifications of illegitimate children was eliminated such that they are now all simply classified as illegitimate children, their legitime shall be the same, that is, one-half of the legitime of a legitimate child.

Problem No. 1 — The testator is survived by an acknowledged natural child, A, and an acknowledged illegitimate child who is not natural, X. The net value of the estate is P36,000. How shall such estate be divided?

Answer — Since the only surviving compulsory heirs are illegitimate children, their legitime shall consist of 1/2 of the estate of P36,000, or P18,000 *(Art. 901, Civil Code)*. It must, however, be noted that A is an acknowledged natural child, while X is an acknowledged illegitimate child who is not natural. Hence, as far as the division of the legitime of P18,000 is concerned, the rule stated in the second paragraph of Art. 895 of the Code shall apply. In other words, the legitime of an acknowledged illegitimate who is not natural shall be 4/ 5 of that of an acknowledged natural child. It is, therefore, evident that the proportion between the share of an acknowledged natural child and that of an acknowledged illegitimate who is not natural is five to four (5:4). This merely means that for every five shares or parts that each acknowledged natural child shall receive, an acknowledged illegitimate who is not natural shall be entitled to four parts. Applying this proportion to the problem, A shall be entitled to 5/9 of P18,000, or P10,000, while X shall be entitled to 4/9 of P18,000, or P8,000. Consequently, the entire estate shall be divided as follows:

Legitime of A	P10,000
Legitime of X	8,000
For free disposal	18,000
	P36,000

In view of the provisions of the Family Code, the 5:4 proportion is inapplicable. The entire estate shall, therefore, be divided as follows:

Legitime of A	P 9,000
Legitime of X	9,000
For free disposal	18,000
	P36,000

Problem No. 2 — The testator is survived by two acknowledged natural children, A and B, and three acknowledged illegitimate children who are not natural, X, Y, and Z. The net value of the estate is P88,000. How shall such estate be divided?

Answer — Since all of the survivors are illegitimate children, their legitime shall consist of 1/2 of the entire estate of P88,000, or P44,000. Two of the survivors, however, are acknowledged natural children, while three are acknowledged illegitimate children who are not natural. Therefore, the legitime of P44,000 shall be divided among them in accordance with the proportion of 5:5:4:4:4. In other words, each of the acknowledged natural children shall be entitled to 5/22 of the legitime of P44,000, or P10,000, while each of the acknowledged illegitimate children who are not natural shall be entitled to 4/22 of the legitime of P44,000, or P8,000. Consequently, the entire estate shall be divided as follows:

Legitime of A	P10,000
Legitime of B	10,000
Legitime of X	8,000
Legitime of Y	8,000
Legitime of Z	8,000
For free disposal	44,000
	P88,000

With the new provisions of the Family Code, the 5:5:4:4:4 proportion is inapplicable. As there is now no distinction between acknowledged natural children and acknowledged illegitimate children not natural since they are both simply classified as illegitimate children, the entire estate shall be divided as:

Legitime of A	P 8,800
Legitime of B	8,800
Legitime of X	8,800
Legitime of Y	8,800
Legitime of Z	8,800
For free disposal	44,000
	P88,000

Idem; With legitimate descendants. — If illegitimate children concur with legitimate children or descendants, 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, while the legitime of each of the acknowledged illegitimate children who are not natural shall be equal in every case to four-fifths of the legitime of each of the acknowledged natural children.[112] In other words, the legitimes of illegitimate children shall be computed in such a way that the legitime of an acknowledged natural child or a natural child by legal fiction shall consist of one-half (1/2), and that of an acknowledged illegitimate child who is not natural, two-fifths (2/5), of the legitime of a legitimate child or descendant. But this computation was repealed by the provisions of the Family Code as (i) the acknowledged natural child; (ii) the natural child by legal fiction; and (iii) the acknowledged illegitimate child are now all classified simply as illegitimate children.

Since the law has already reserved one-half of the hereditary estate for this legitime of legitimate children or descendants,[113] these legitimes of illegitimate children shall be taken from the free portion of the estate, provided that in no case shall the total exceed such free portion.[114]

Problem No. 1 — The testator is survived by two legitimate children, A and B, two acknowledged natural children, C and D, and two acknowledged illegitimate children who are not natural, E and F. What are the legitimes of these survivors if the net value of the hereditary estate is P80,000?

Answer — A and B, who are legitimate children, shall be entitled to one-half of the entire estate which they shall divide in equal shares. They shall, therefore, receive P20,000 each. C and D, who are acknowledged natural children, shall each be entitled to one-half of the legitime of A or B. They shall, therefore, receive P10,000 each. E and F, who are acknowledged illegitimate children who are not natural, shall each be entitled to two-fifths of the legitime of A or B. They shall, therefore, receive

[112]Art. 895, pars. 1, 2, Civil Code.
[113]Art. 888, Civil Code.
[114]Art. 895, Civil Code.

P8,000 each. Consequently, the entire estate shall be divided as follows:

Legitime of A	P20,000
Legitime of B	20,000
Legitime of C	10,000
Legitime of D	10,000
Legitime of E	8,000
Legitime of F	8,000
For free disposal	4,000
	P80,000

Since C, D, E and F are all classified as illegitimate children under the Family Code, they shall receive P10,000 each. Consequently, the division of the entire estate shall be as follows:

Legitime of A	P20,000
Legitime of B	20,000
Legitime of C	20,000
Legitime of D	20,000
Legitime of E	20,000
Legitime of F	20,000
For free disposal	none
	P80,000

Problem No. 2 — The testator is survived by two legitimate children, A and B, four acknowledged children, C, D, E, and F, and one acknowledged illegitimate child, G. What are the legitimes of these survivors if the net value of the hereditary estate is P96,000?

Answer — A and B shall be entitled to a legitime of one-half of P96,000, or P48,000, which they shall divide in equal shares. The free portion, from which the legitimes of the illegitimate children shall be taken, is, therefore, P48,000. Now, if we are going to satisfy the legitimes of the illegitimate children in such a way that each of the four acknowledged natural children shall receive 1/2, and the acknowledged illegitimate child who is not natural, 2/5 of the legitime of each of the legitimate chil-

dren, the free portion of P48,000 shall not be sufficient to satisfy such legitimes. Since the law says that in no case shall the total legitimes of illegitimate children exceed the free portion, we shall, therefore, have to apply the proportion of 5:5:5:5:4 in order to divide the free portion of P48,000 among the five illegitimate children. Hence, each of the four acknowledged natural children shall be entitled to 5/24 of P48,000, or P10,000, while the acknowledged illegitimate child who is not natural shall be entitled to 4/24 of P48,000, or P8,000. Consequently, the entire estate shall be divided as follows:

Legitime of A	P24,000
Legitime of B	24,000
Legitime of C	10,000
Legitime of D	24,000
Legitime of E	24,000
Legitime of F	10,000
Legitime of G	24,000
	P96,000

There is nothing left at the testator's free disposal.

Under the Family Code, C, D, E, F and G are all classified as simply illegitimate children. Since the law provides that the total legitime of the illegitimate children shall not exceed the free portion, the legitime of each illegitimate child cannot be computed at one-half the legitime of the legitimate child. Hence, the free portion of P40,000 shall equally be divided among the five illegitimate children. Consequently, the entire estate shall be divided as follows:

Legitime of A	P24,000
Legitime of B	24,000
Legitime of C	9,600
Legitime of D	9,600
Legitime of E	9,600
Legitime of F	9,600
Legitime of G	9,600
	P96,000

There will be nothing left at the testator's free disposal.

Idem; With ascendants. — If the testator is a legitimate person and he is survived by his legitimate parents or ascendants and illegitimate children, the legitime of the legitimate parents or ascendants shall consist of one-half (1/2) of the hereditary estate,[115] while that of the illegitimate children shall consist of one-fourth (1/4) to be taken from the free portion.[116] If the testator, however, is an illegitimate person and he is survived by his illegitimate parents and illegitimate children, the former are not entitled to any legitime, because they are excluded by the presence of the latter.[117] In such case, the legitime of the illegitimate children shall consist of one-half (1/2) of the hereditary estate.[118]

> *Problem* — The testator is survived by his legitimate parents, F and M, his adopted child, A, and an acknowledged natural child, N. The net value of the hereditary estate is P40,000. What is the legitime of the survivors?
>
> *Answer* — In order to solve the problem, we must take into consideration the provision of Art. 39, No. 4, of the Child and Youth Welfare Code (P.D. No. 603). Under this article, 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. Applying this rule to the above problem, it is evident that A's legitime shall be equal to N's legitime. Thus, the legitime of the parents is P20,000 which they shall divide in equal shares; the legitime of A and N is P10,000 which they shall divide in equal shares; and the remaining P10,000 shall be at the testator's free disposal.

Idem; With spouse. — If illegitimate children concur with the widow or widower of the testator, the legitime of the illegitimate children shall consist of one-third (1/3) of the hereditary estate and that of the surviving spouse shall also consist of another third (1/3), with the remaining third (1/3) available for free disposal.[119]

Idem; With legitimate descendants and spouse. — If illegitimate children concur with legitimate chidren or descendants

[115]Art. 899, Civil Code.
[116]Art. 896, Civil Code.
[117]Art. 903, Civil Code.
[118]Art. 901, Civil Code.
[119]Art. 894, Civil Code.

and the widow or widower of the testator, the rules prescribed by the New Civil Code in Arts. 888, 892, 897, and 898 and by the Family Code in Art. 176, second sentence which repealed Art. 895 of the New Civil Code. These rules may be restated as follows:

(1) The legitime of legitimate children or descendants shall consist of one-half of the hereditary estate.[120]

(2) The legitime of the surviving spouse shall be equal to the legitime of the legitimate children,[121] unless there is only one legitimate child or descendant, in which case the legitime of such surviving spouse shall consist of one-fourth of the hereditary estate.[122]

(3) The legitime of each illegitimate child shall consist of one-half of the legitime of a legitimate child. It is to be recalled that all three types of illegitimate children under the New Civil Code are simply classified in the Family Code as illegitimate children. Hence, the rules that: (i) the legitime of each of the acknowledged natural children and natural children by legal fiction shall consist of one-half of the legitime of the legitimate children or descendants;[123] and (ii) the legitime of each of the acknowledged illegitimate children who are not natural shall consist of four-fifths of the legitime of each of the legitimate of four-fifths of the legitime of each of the legitimate children or descendants[124] are now both repealed.

(4) The legitimes of the surviving spouse and the illegitimate children shall be taken from the free portion, provided that in no case shall the total legitime of such illegitimate children exceed such free portion, and provided further that the legitime of the surviving spouse must first be fully satisfied.[125]

> *Problem No. 1* — The testator is survived by two legitimate children, A and B, one acknowledged natural child, C, one, acknowledged illegitimate child who is not natural, D, and his

[120]Art. 888, Civil Code.
[121]Arts. 897, 898, Civil Code.
[122]Art. 292, par. 1, Civil Code.
[123]Art. 895, par. 1, Civil Code (repealed by Art. 176, 2nd sentence, Family Code).
[124]Art. 895, par. 2, Civil Code (repealed by Art. 176, 2nd sentence, Family Code).
[125]Art. 895, par. 3, Civil Code (repealed by the Family Code).

widow, W. What are the legitimes of these survivors if the net of the hereditary estate is P72,000?

Answer — The legitime of A and B consists of one-half of the entire estate *(Art. 888)*. They are, therefore, entitled to P18,000 each. The legitime of the widow, W, consists of a portion equal to the legitime of each of the legitimate children *(Arts. 897 and 898)*. She is, therefore, entitled to P18,000 which must be taken from the free portion. The legitime of the acknowledged natural child, C, consists of one-half of the legitime of each of the legitimate children or descendants *(Art. 895, par. 1)*. He is, therefore, entitled to P9,000 which must be taken from the free portion. The legitime of the acknowledged illegitimate child who is not natural, D, consists of two-fifths of the legitime of each of the legitimate children or descendants (Art. 895, par. 2). He is, therefore, entitled to P7,200 which must be taken from the free portion. Consequently, the estate shall be divided as follows:

Legitime of A	P18,000
Legitime of B	18,000
Legitime of W	18,000
Legitime of C	9,000
Legitime of D	7,200
For free disposal	1,800
	P72,000

Under the provisions of the Family Code, the legitime of either C or D, both of whom are simply classified as illegitimate children, shall consist of one-half of the legitime of either A or B. C and D are, therefore, entitled to P9,000 each, which amounts must be taken from the free portion. Thus, the estate shall be divided as:

Legitime of A	P18,000
Legitime of B	18,000
Legitime of W	18,000
Legitime of C	9,000
Legitime of D	9,000
For free disposal	none
	P72,000

Problem No. 2 — The testator is survived by two legitimate children, A and B, two acknowledged natural children, C and D, two acknowledged illegitimate children who are not natural, E and F, and his widow, W. What are the legitimes of these survivors if the net value of the estate is P72,000?

Answer — Since the legitime of legitimate children or descendants consists of one-half of the hereditary estate *(Art. 888),* A and B shall, therefore, be entitled to P36,000, or P18,000 each. Hence, the free portion from which the legitimes of the other survivors shall be satisfied is P36,000. It is evident, however, that if we are going to satisfy such legitimes in accordance with the shares prescribed for the survivors in the Civil Code, the amount of P36,000 will not be sufficient. How then can the legitimes of the survivors be satisfied? The solution is found in the last paragraph of Art. 895 of the Code. In a case like this, two limitations or conditions must always have to be considered. In the first place, in no case shall the total legitime of the illegitimate children ever exceed the free portion; and in the second place, the legitime of the surviving spouse must first be fully satisfied. *(Art. 895, par. 3).* Hence, since the legitime of the surviving spouse is equal to that of each of the legitimate children *(Arts. 897 and 898),* W shall be entitled to P18,000. There will, therefore, be P18,000 left in the free portion which will be available for distribution to the illegitimate children. Since the legitime of an acknowledged illegitimate child who is not natural shall be equal in every case to four-fifths of the legitime of an acknowledged natural child, this remainder of P18,000 shall be divided among the illegitimate children in the proportion of 5:5:4:4. Therefore, C and D shall be entitled to 5/18 of P18,000 each, while E and F shall be entitled to 4/18 of P18,000 each. Consequently, the estate shall be divided as follows:

Legitime of A	P18,000
Legitime of B	18,000
Legitime of W	18,000
Legitime of C	5,000
Legitime of D	5,000
Legitime of E	4,000
Legitime of F	4,000
	P72,000

There will be nothing left at the testator's free disposal.

In view of the changes brought about by the provisions of the Family Code, the proportion of 5:5:4:4 is inapplicable. Consequently, the estate shall be divided as:

Legitime of A	P18,000
Legitime of B	18,000
Legitime of W	18,000
Legitime of C	4,500
Legitime of D	4,500
Legitime of E	4,500
Legitime of F	4,500
	P72,000

There will be nothing left at the testator's free disposal.

Idem; With legitimate ascendants and spouse. — If illegitimate children concur with legitimate parents or ascendants and the surviving spouse, the hereditary estate shall be divided as follows:

(1) Legitime of the legitimate parents or ascendants — 1/2 of the estate.[126]

(2) Legitime of the surviving spouse — 1/8 of the estate to be taken from the free portion;

(3) Legitime of the illegitimate children — 1/4 of the estate to be taken from the free portion;

(4) Disposable portion — 1/8 of the estate.[127]

Problem — The testator died with a will in 1978, survived by his legitimate mother, M, his widow, W, one acknowledged natural child, A, and one acknowledged illegitimate child who is not natural, B. Although he instituted all of these survivors as heirs in his will, he also disposed of the entire disposable portion of his estate to a stranger, X. Granting that the net value of his entire estate is P72,000, how shall it be divided?

[126]Art. 899, Civil Code.
[127]Art. 899, Civil Code.

Answer — The estate shall be divided as follows:

(1)	Legitime of M, consisting of 1/2 of estate...	P36,000
(2)	Legitime of W, consisting of 1/8 of estate...	9,000
(3)	Legitime of A and B, consisting of 1/4 of estate.....	18,000
(4)	Disposable portion in favor of X	9,000
		P72,000

Applying the provisions of the second paragraph of Art. 895 of the Civil Code, the P18,000 to which A and B are entitled shall be divided between them in the proportion of 5 is to 4. In other words, A shall be entitled to 5/9 of P18,000, or P10,000, while B shall be entitled to 4/9 of P18,000, or P8,000. Said 5:4 proportion is, however no longer applicable considering that there is no distinction between A and B under the Family Code. Hence, both shall be entitled to P9,000 each.

Idem; Transmissibility of rights. — If an illegitimate child dies before the testator, can his right to the legitime which had been reserved for him by law be transmitted to his own heirs? This question is answered by the provision of Art. 902 of the Code, which states that the rights of illegitimate children set forth in the preceding articles are transmitted upon their death to their descendants, whether legitimate or illegitimate. In reality, this provision is merely a recognition of the principle of representation.[128] Consequently, the precept can be extended to cases of disinheritance or incapacity.[129]

It must be observed, however, that unlike the case of legitimate children or descendants, where the person or persons to whom the right is transmitted must be legitimate descendants, here the representatives may be either legitimate or illegitimate descendants.

Problem No. 1 — Two years ago, X executed a will instituting as universal heirs his wife, W, and his two legitimate children, A and B, in the proportion of one-half (1/2) for W, one-fourth (1/4) for A and one-fourth (1/4) for B. Several days ago, in a vehicular accident, both X and B were killed. B was killed

[128]Arts. 970, *et seq.,* Civil Code.
[129]Arts. 923, 1035, Civil Code.

instantly; X died two hours afterwards. B is survived by two legitimate children, C and D, and two acknowledged natural children, E and F. The net value of X's estate is P240,000. The only survivors are W, A, C, D, E and F. Distribute the estate.

Answer — Had B survived X, the distribution of the estate would have been as follows:

W.....	P60,000,	as compulsory heir
	60,000,	as voluntary heir
A.....	60,000,	as compulsory heir
B.....	60,000,	as compulsory heir
	P280,000	

Because of predecease, B's share, which is in reality his legitime, is rendered vacant. Under the law, this vacant share shall now pass to B's legitimate children, C and D, by right of representation. His acknowledged natural children, E and F, cannot participate as co-representatives because of the doctrine of absolute separation between members of the legitimate family and members of the illegitimate family *(Art. 992, Civil Code)*. Consequently, the estate shall be distributed as follows:

W	P60,000,	as compulsory heir
	60,000,	as voluntary heir
A	60,000,	as compulsory heir
C	30,000,	by right of representation
D	30,000,	by right of representation
	P240,000	

Problem No. 2 — Suppose that in the above problem, both A and B, instead of being legitimate children of X, are acknowledged natural children, how shall you distribute the estate?

Answer — In such case, E and F, acknowledged natural children of B, can then participate in the succession as co-representatives. In other words, the legitime of B, which has been rendered vacant because of predecease, shall now pass to his children, C, D, E and F in the proportion of 2:2:1:1. C shall receive 2/6 or 1/3 of P60,000; D, the same; E shall receive 1/6 of P60,000; and F, the same.

Consequently, the estate shall be distributed as follows:

W	P60,000,	as compulsory heir
	60,000,	as voluntary heir
A	60,000,	as compulsory heir
C	20,000,	by right of representation
G.....	20,000,	by right of representation
E.....	10,000,	by right of representation
F	10,000,	by right of representation
	P240,000	

In view, however, of the new provisions of the Family Code, C, D, E and F shall all simply be classified as illegitimate children. Hence, the proportion of 2:2:1:1 is inapplicable. The estate shall, thus, be distributed as:

W	P60,000,	as compulsory heir
	60,000,	as voluntary heir
A	60,000,	as compulsory heir
C	15,000,	by right of representation
D	15,000,	by right of representation
E	15,000,	by right of representation
F	15,000,	by right of representation
	P240,000	

(Note: In subsection 2, under Section 1 of Chapter 3 (Legal or Intestate Succession), the subject of representation, Arts. 970, *et seq.,* will be discussed. Although it is a concept of intestate succession, nevertheless, representation may also take place in testamentary succession in case of predecease, incapacity and disinheritance. It must be noted, however, that in testamentary succession, only a compulsory heir may be represented and only with respect to his legitime.

Anent the subject of representation by illegitimates which will also be discussed under Arts. 970, *et seq.,* and under Art. 992, it must be noted that the following rules will apply: *first,* if the person to be represented is legitimate, it is essential that the representative must also be legitimate; and *second,* if the person to be represented is illegitimate, then it is immaterial whether

the representative is legitimate or illegitimate. This is so because of the doctrine of absolute separation between members of the legitimate family and members of the illegitimate family enunciated in Art. 992 of the Civil Code.)

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.[130]

Legitime of illegitimate Parents. — Under the present Code, illegitimate parents are classified as compulsory heirs of their illegitimate children, but only in default of children or descendants, whether legitimate or illegitimate. If the testator leaves neither legitimate descendants, nor a surviving spouse, nor illegitimate children, and the only survivors are illegitimate parents, such parents shall be entitled to a legitime of one-half (1/2) of the hereditary estate. If the widow or widower of the testator, however concurs with illegitimate parents, the legitime of the parents shall consist of one-fourth (1/4) of the hereditary estate, while that of the surviving spouse shall also consist of one-fourth (1/4) of the estate, leaving one-half (1/2) for the testator's free disposal.[131]

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.[132]

Preservation of Legitime. — The principle of the untouchability of the legitime of compulsory heirs in enunciated in the above article. The same principle is also encunciated either expressly or impliedly in Arts. 842, 864 and 872 of the Code.

[130]New provision.
[131]Art. 903, Civil Code.
[132]Art. 813, Spanish Civil Code.

There are two aspects of the principle. In the first place, the testator cannot deprive his compulsory heirs of their legitime. The only exception is when the testator disinherits a compulsory heir for a cause expressly stated by law.[133] In the second place, he cannot impose upon the same any burden, encumbrance, condition, or substitution of any kind whatsoever. The only exception is when he expressly prohibits the partition of the hereditary estate for a period which shall not exceed twenty years.[134] This power of the testator to prohibit division applies even to the legitime of compulsory heirs.[135] Of course, there are other instances when a charge or burden is imposed upon the legitime of compulsory heirs, such as in the case of *reserva troncal*[136] or when the estate consists of a family home,[137] but in these cases, the charge is imposed by the law and not by the testator.

Idem; Effect of impairment. — If the testator deprives a compulsory heir of his legitime in violation of the principle declared in Art. 904, the effect of such deprivation must be distinguished or qualified. There are four possible ways by which the testator may attempt to deprive a compulsory heir of his legitime. They are as follows:

(1) By valid disinheritance[138] in such a case, the disinheritance shall take effect, provided that the requisite formalities prescribed by law are complied with. As heretofore stated, this is the only exceptional case under our Code where the testator may, by his own act, deprive a compulsory heir of the legitime to which he is entitled by law.

(2) By imperfect disinheritance.[139] By imperfect disinheritance, we refer to the expressed attempt of the testator to deprive a compulsory heir of his legitime without the requisite formalities prescribed by law. The effect of such attempt would be the partial annulment of the institution of heirs to the extent that the legitime

[133]Art. 915, Civil Code.
[134]Art. 1083, Civil Code.
[135]Ibid.
[136]Art. 891, Civil Code.
[137]Art. 238, Civil Code.
[138]Arts. 915, *et seq.,* Civil Code.
[139]Art. 918, Civil Code.

of the heir disinherited is prejudiced, but legacies and devises which are not inofficious shall be respected.

(3) By preterition of a compulsory heir in the direct line.[140] In this case, the attempt of the testator to deprive the compulsory heir of his legitime is implied. The effect of such attempt would be the annulment of the institution of heirs, but legacies and devises which are not inofficious shall be respected.

(4) By leaving to the compulsory heir by any title any property or amount which is not sufficient to satisfy the legitime to which such heir is entitled by law.[141] In such a case, the heir can ask for the completion of his legitime.

Art. 905. Every renunciation or compromise as regards a future legitime between the person owing it and his compulsory heir 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.[142]

Effect of Renunciation or Compromise. — According to the above article, every renunciation or compromise as regards a future legitime between the testator and his compulsory heirs is void. The reasons for this precept are evident. In the first place, the rights of the heirs with respect to their legitime are merely inchoate or prospective, because such rights are perfected only at the moment of the death of the testator.[143] Hence, before the death of the latter, there can be nothing to renounce or compromise. In the second place, no contract may be entered into with respect to future inheritance except in the cases expressly authorized by law.[144] The only exceptional cases where a contract may be entered with respect to future inheritance would be those contemplated in Arts. 130 and 1080 of the Code. It is, therefore, clear that all agreements between the testator and a compulsory heir which partake of the nature of a renunciation or compromise with regard to the future legitime of the heir would be void under this article. As a matter

[140]Art. 854, Civil Code.
[141]Art. 906, Civil Code.
[142]Art. 816, Spanish Civil Code.
[143]Art. 777, Civil Code.
[144]Art. 1347, Civil Code.

of fact, the rule can be extended to any contract with regard to the future legitime entered into, not only between the testator and the heir, but also among the heirs themselves, or between the heirs and third persons.[145] This is so by virtue of the provision of Art. 1347 of the Code. It must be noted, however, that the prohibition cannot be applied to donations *inter vivos* made by the testator to a compulsory heir. Such donations, which are presumed to be advances of the legitime, are allowed by the law but subject to collation.[146]

Who can claim the nullity of the renunciation or compromise? It is clear that such nullity may be claimed either by the compulsory heir who made it or by any other compulsory heir who is prejudiced by such renunciation or compromise.[147] It must be observed, however, that if the nullity is claimed after the death of the testator, it is required that the heir who is filing the claim must bring to collation whatever he might have received by virtue of the renunciation or compromise. This requirement is logical because it would be unjust if such heir is allowed to claim his legitime and still retain what he had received.[148]

> *Problem* — MN, a wealthy *hacendero* died leaving to his four legitimate children and his widow an estate worth about P2,000,000. When the proceedings for the settlement of his estate were pending, Rosie, a child he begot with his *lavandera,* filed a claim for a share in the estate. The widow and four children contested the claim on the ground that in a previous action for support filed by the *lavandera* when Rosie was still a minor, the *lavandera* agreed to dismiss the case and signed an agreement acknowledging that the sum of P50,000 paid thereunder included payment for whatever inheritance Rosie was to have. Should Rosie's claim be granted? Why? (1979 Bar Problem)
>
> *Answer* — Rosie's claim should be granted but subject to the condition that the portion of the P50,000 paid to her mother as her inheritance shall be brought to collation. It must observed that the agreement is actually a renunciation or compromise as regards a future legitime or inheritance between the person owing it and a compulsory heir. According to the Civil Code, such

[145]6 Manresa, 7th Ed., pp. 443-444; 6 Sanchez Roman 940-941. See Art. 2035, Civil Code.

[146]6 Manresa, 7th Ed., p. 444.

[147]Ibid., p. 445.

[148]Ibid.

a renunciation or compromise is void, and the latter may claim the same upon the death of the former, but he must bring to collation whatever he may have received by virtue of the renunciation or compromise. *(Art. 905, Civil Code)*

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.[149]

Effect of Incomplete Legitime. — The case contemplated in this Article must be distinguished from the preterition of a compulsory heir in the direct line as contemplated in Art. 854 of the Code. In preterition, there is a total omission of the compulsory heir in the institution, and consequently, a total deprivation of his legitime; in this article, the testator has not entirely forgotten the heir, but making a wrong estimate of the portion which he could freely dispose of, he has left to such heir something less than the portion to which he is entitled by operation of law. In preterition, the effect is the total annulment of the institution of heirs; in this article, the only effect is to give a remedy or a right of action to the compulsory heir who is prejudiced to demand for the completion of his legitime. However, it must be noted that under the latter case, if the heir cannot lose his legitime, neither can he demand more than what it amounts to. At most, he can only ask for the balance of what he is legally entitled to.[150]

It must also be noted that the law uses the phrase "by any title" in describing the disposition of the property given by the testator to the compulsory heir who is prejudiced. There is, therefore, a clear implication that the property which the testator had given to the compulsory heir, and which is not sufficient to cover the legitime of such heir, might not have been disposed of by the will itself, but by some other gratuitous title, such as by way of donation, during the lifetime of the testator. The reason for this is evident. In the computation of the legitime of compulsory heirs during the proceedings for the settlement of the estate of the testator, the value of the property donated to the heir at the time when the donation was

[149]Art. 815, Spanish Civil Code.

[150]6 Manresa, 7th Ed., pp. 437-438. *See* Aznar vs. Duncan, G.R. No. L24365, June 30, 1966, 17 SCRA 590.

made shall be collated to the net value of the estate and subsequently imputed against his legitime.[151] Consequently, whether the property had been disposed of by will or by way of donation, the same rule applies; the remedy of the heir who is prejudiced is to demand for the completion of his legitime.

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.[152]

Effect of Inofficious Testamentary Dispositions. — The testamentary dispositions alluded to in the above article refer not only to those dispositions in favor of voluntary heirs, but also to all legacies, devises, and other charges which are chargeable against the disposable free portion of the hereditary estate. Such testamentary dispositions are considered inofficious if they are in excess of the disposable free portion of the hereditary estate thus resulting in the impairment of the legitime of compulsory heirs. What is the effect of inofficious testamentary dispositions? According to the above article, they shall be reduced on petition of the compulsory heirs who are prejudiced. The procedure for such reduction is regulated by Arts. 911 and 912 of the Code.

There is a very clear analogy between inofficious testamentary dispositions and inofficous donations *inter vivos*. This is evident from an examination of the provisions of Arts. 771 and 907 of the Code. According to the first article, donations *inter vivos* which are inofficious, bearing in mind the estimated net value of the donor's estate at the time of his death, shall be reduced with regard to the excess. The reduction shall be made on petition of the compulsory heirs who are prejudiced. The procedure for such reduction shall be regulated by Arts. 911 and 912 of the Code. The basis of the rule in either case is the very concept of the legitime itself. Under our system of compulsory succession, the testator's freedom of disposition is limited by the fact that he cannot make any gratuitous disposition of his property, whether by an act *inter vivos* or by an act *mortis causa,* which would impair the legitime of his compulsory heirs. This principle, crystallized in Art. 904 of the Code, is complemented by

[151]Arts. 908-910, Civil Code.
[152]Art. 817, Spanish Civil Code.

Art. 752, which declares that no person can give by way of donation more than he can dispose of by will. Violation of the principle in cases of donations *inter vivos* shall pave the way for the remedy provided for in Art. 771; violation of the principle in cases of donations *mortis causa* or testamentary dispositions shall pave the way for the remedy provided for in Art. 907.[153]

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.[154]

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.[155]

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 reduced in the manner prescribed by this Code.[156]

Steps in Distribution of Estate If There are Donations. — There are five distinct steps in the determination of the legitime of compulsory heirs. They are:

(1) Determination of the gross value of the estate at the time of the death of the testator.

[153]See 64 Manresa, 7th Ed., pp. 448-449.
[154]Art. 818, Spanish Civil Code, in modified form.
[155]Art. 819, Spanish Civil Code, in modified form.
[156]Art. 847, Spanish Civil Code, in modified form.

(2) Determination of all debts and charges which are chargeable against the estate.

(3) Determination of the net value of the estate by deducting all of the debts and charges from the gross value of the estate.

(4) Collation or addition of the value of all donations *inter vivos* to the net value of the estate.

(5) Determination of the amount of the legitime from the total thus found in accordance with the rules (Arts. 888-903) established in the Civil Code.

In order to distribute the hereditary estate in accordance with the will of the testator, two more steps are added to the above steps. They are:

(6) Imputation of the value of all donations *inter vivos* made to compulsory heirs against their legitime and of the value of all donations *inter vivos* made to strangers against the disposable free portion and restoration to the hereditary estate if the donation is inofficious.

(7) Distribution of the residue of the estate in accordance with the will of the testator.

The steps in the determination of the legitime of compulsory heirs may be illustrated by the following case:

Mateo vs. Lagua
29 SCRA 864

Sometime in 1917, Cipriano Lagua and his wife, in a public instrument, donated two lots to their son Alejandro Lagua, in consideration of the latter's marriage to Bonifacia Mateo. Alejandro took possession of the properties, but the Certificate of Title remained in the name of Cipriano. In 1923, Alejandro died, survived by his wife Bonifacia, and a daughter, Anatalia. Cipriano then undertook the farming of the donated lots giving to Bonifacia and her daughter the owner's share of the harvest. On July 31, 1941, Cipriano executed a deed of sale of the two lots in favor of his younger son, Gervacio. This sale notwithstanding, Bonifacia was given the owner's share of the harvest until 1956 when it was altogether stopped. It was only then that Bonifacia learned of the sale of the lots to her brother-in-law, who had the sale in his favor registered only on September 22, 1955. As

a consequence, two Transfer Certificates of Title were issued to Gervacio. Bonifacia and her daughter then brought an action against Cipriano and Gervacio seeking the annulment of the deed of sale and recovery of the possession of the properties. On January 3, 1957, judgment was rendered in favor of Bonifacia and her daughter. Subsequently, Gervacio and his wife commenced an action against Bonifacia and Anatalia for reimbursement of the improvements allegedly made on the two lots plus damages. At about the same time, Gervacio and his father, Cipriano, filed an action for the annulment of the donation of the two lots insofar as one-half portion thereof was concerned. It was their claim that in donating the two lots, which allegedly were all that Cipriano owned, said plaintiff not only neglected leaving something for his own support but also prejudiced the legitime of his forced heir, plaintiff Gervacio. Being intimately related, the two cases were heard jointly. The trial court rendered a decision dismissing the first case, plaintiffs being possessors in bad faith, and, therefore not entitled to reimbursement of expenses for improvements put up by them on the land. The other suit was likewise dismissed on the ground of prescription. Plaintiffs appealed to the Court of Appeals. Said tribunal affirmed the ruling of the trial court in the first case. In regard to the annulment case, the Court held that the donation was inofficious to the extent of about 500 square meters, and, therefore, defendants must reconvey a portion of the donated lots equivalent to about 500 square meters. From this decision, Bonifacia and Anatalia resorted to the Supreme Court. Speaking through Justice J. B. L. Reyes, the Court held:

"In reality, the only question this case presents is whether or not the Court of Appeals acted correctly in ordering the reduction of the donation for being inofficious, and in ordering herein petitioners to reconvey to respondent Gervacio Lagua an unidentified 494.75-square-meter portion of the donated lots.

"We are in accord with the Court of Appeals that Civil Case No. 442 is not one exclusively for annulment or revocation of the entire donation, but of merely that portion thereof allegedly trenching on the legitime of respondent Gervacio Lagua; that the cause of action to enforce Gervacio's legitime, having accrued only upon the death of his father on 12 November 1958, the dispute has to be governed by the pertinent provisions of the new Civil Code; and that a donation propter nuptias may be reduced for being inofficious. Contrary to the views of appellants (petitioner's), donations *propter nuptias* (by reason of marriage) are without onerous consideration, the marriage being merely

the occasion or motive for the donation, not its *causa*. Being liberalities, they remain subject to reduction for inofficiousness upon the donor's death, if they should infringe the legitime of a forced heir.

"It is to be noted, however, that in rendering the judgment under review the Court of Appeals acted on several unsupported assumption: that the lot mentioned in the decision (Nos. 998, 5106 and 6541) were the only properties composing the net hereditary estate of the deceased Cipriano Lagua; that Alejandro Lagua and Gervacio Lagua were his only legal heirs; that the deceased left no unpaid debts, charges, taxes, etc., for which the estate would be answerable. In the computation of the heirs' legitime, the Court of Appeals also considered only the area, not the value, of the properties.

"The infirmity in the above course of action lies in the fact that in its Article 908, the new Civil Code specifically provides as follows:

> "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."

"In other words, before any conclusion about the legal share due to a compulsory heir may be reached, it is necessary that certain steps be taken first. The net estate of the decedent must be ascertained, by deducting all payable obligations and charges from the value of the property owned by the deceased at the time of his death; then all donations subject to collation would be added to it. With the partible estate thus determined, the legitimes of the compulsory heir or heirs can be established; and only thereafter can it be ascentained whether or not a donation had prejudiced the legitimes. Certainly, in order that a donation may be reduced from being inofficous, there must be proof that the value of the donated property exceeds that of the disposable free portion plus the donee's share as legitime in the properties of the donor. In the present case, it can hardly be said that, with the evidence then before the court, it was in any position to rule on the inofficiousness of the donation involved here, and to order its reduction and reconveyance of the deducted portion to the respondents.

> "For the foregoing consideration, the decision of the Court of Appeals, insofar as Civil Case No. 442 of the court *a quo* is concerned, is hereby set aside and the trial court's order of dismissal sustained, without prejudiced to the parties' litigating the issue of inofficiousness in a proper proceeding, giving due notice to all persons interested in the estate of the late Cipriano Lagua. Without costs."

Idem; Gross value of estate. — The procedure for the determination of the gross value of the estate at the time of the death of the testator shall depend upon whether there is a judicial proceeding for the settlement of the estate or not. In case there is a judicial proceeding, the procedure shall depend upon the nature of the proceeding itself. Thus, in case of administration proceedings, the executor or administrator, within three months after his appointment, shall return to the court a true inventory or appraisal of all the real and personal estate of the deceased which have come to his possession or knowledge.[157] If there is no administration proceeding, it is the actual value of the estate which should be taken into consideration, and not the sentimental value. The valuation or appraisal may even be made by common agreement.[158]

Idem; Debts and charges. — Deductible debts and charges refer to pre-existing obligations of the testator which he had incurred during his lifetime, and not to the charges or burdens which are created by testamentary dispositions found in the will. According to the law, charges or burdens arising from or based upon testamentary dispositions are chargeable or imputable against the portion at the testator's free disposal. Since it would be impossible to determine such disposable portion without first determining the legitime of compulsory heirs, it is clear that such charges or burdens cannot be placed in the same category as pre-existing obligations of the testator.[159]

Idem; Collation of donations. — Upon the determination of the net value of the estate by the settlement or liquidation of all deductible debts and charges, the next step in the determination of the legitime of compulsory heirs is the collation or addition of

[157]Secs. 1-3, New Rules of Court.
[158]6 Manresa, 7th Ed., p. 452.
[159]6 Manresa, 7th Ed., p. 453; 14 Scaevola 390.

the value of all donations which the testator had made during his lifetime to the net value of the estate. The value to be collated or added is the value of the thing donated at the time when the donation was made.[160] Consequently, any loss, deterioration, or improvement of the thing donated from the time when the donation was made up to the time of the settlement of the donor's estate shall be for the account or for the benefit of the donee.[161]

Idem; Id. — Meaning of collation. — Collation, as it is used in the Civil Code, has three different but interrelated acceptations. In one sense, it is understood as a fictitious mathematical process of adding the value of the thing donated to the net value of the hereditary estate. This is the sense in which it is used in Art. 908 of the Code. The immediate purpose is to compute the legitime of compulsory heirs. In another sense, it includes not only the process of adding the value of the thing donated to the net value of the hereditary estate but also the subsequent act of charging or imputing such value against the legitime of the compulsory heir to whom the thing was donated. This is the sense in which it is used in Art. 1061 of the Code. The immediate purpose is to take the donations "in the account of the partition" in order to equalize the shares of the compulsory heirs as much as possible. In still another sense, it refers to the actual act of restoring to the hereditary estate that part of the donation which is inofficious in order not to impair the legitime of compulsory heirs. The immediate purpose is to protect the legitime of compulsory heirs.

Idem; Id.; Id. — Donations to be collated. — Whether the donation was made to a compulsory heir or to a stranger, the value thereof at the time when it was made shall be added to the net value of the hereditary estate for the purpose of determining the legitime of compulsory heirs and the portion at the testator's free disposal. That donations *inter vivos* made to compulsory heirs shall be collated is evident from the provision of Art. 1061 of the Code. In case of donations *inter vivos* to strangers, the basis of the rule is found in the prohibition of inofficious donations, or those which impair the legitime of compulsory heirs *(Arts. 752, 771, Civil Code).* Besides, under the second paragraph of Art. 909, such

[160]Arts. 908, 1071, Civil Code.
[161]Art. 1071, Civil Code.

donations are imputable against the portion at the testator's free disposal in order to determine whether they are inofficious or not. It is clear that before they can be so imputed and before they can be considered inofficious, it is essential that their value must be added to the net remainder of the estate in order to determine the legitime of compulsory heirs and the portion at the testator's free disposal against which they are imputable. This has been the consistent doctrine enunciated by the Supreme Tribunal of Spain and by the majority of Spanish commentators.[162] This is also the view upheld by practically all Filipino commentators and by an *obiter dictum* of the Supreme Court in the case of *Liguez vs. Court of Appeals*.[163]

How about the proceeds of a life insurance policy, where the beneficiary is a third person or even a compulsory heir, shall such proceeds be collated or not? In the case of *Del Val vs. Del Val*,[164] where the beneficiary was a third person, it was held that the proceeds of an insurance policy belong exclusively to the beneficiary and not to the estate of the insured; consequently, the provisions of the Civil Code with regard to collation cannot apply. It is believed that the same principle can be applied where the beneficiary is a compulsory heir: As far as the premiums are concerned, although they partake of the nature of donations, commentators sustain the view that so long as they are paid from the income of the insured and are not excessive, they are not subject to collation.[165]

Idem; Imputation. — After the value of all donations *inter vivos* have already been added to the net value of the hereditary estate, the next step is the determination of the legitime of compulsory heirs in accordance with the rules prescribed in Arts. 888 to 903 of the Code using as basis the total amount obtained. Donations given to compulsory heirs will then be imputed against their legitime, while those given to strangers will be imputed against the disposable portion.[166] If such donations are inofficious in the sense that they

[162]6 Manresa, 7th Ed., pp. 454-457. In his original commentaries, however, Manresa was of the opinion that only donations to compulsory heirs must be collated. In the Philippines, Dr. Padilla still follows this view. *(See 2 Padilla, Civil Code, 1956 Ed., p. 922).*

[163]102 Phil. 577.

[164]429 Phil. 534.

[165]3 Tolentino, Civil Code, 956 Ed., p. 305, citing 5 Planiol & Ripert 349.

[166]Arts. 909, 910, Civil Code.

cannot be contained in the disposable portion, they must be reduced in accordance with the rules prescribed in Arts. 911 and 912 of the Civil Code.[167]

It must be noted that the act of imputation is merely a mathematical process of determining whether the value of the donation can be contained in the legitime or disposable portion, as the case may be, or not. In other words, the purpose is to determine whether it is inofficious or not. If it is not inofficious, it will be respected; the donee shall not be required to make any restoration to the hereditary estate. If it is inofficious, it will be reduced with respect to the excess; the donee shall be required to make an actual restoration to the hereditary estate in order not to impair the legitime of compulsory heirs.

It must also be noted that in the case of a donation to a compulsory heir, just because the value of the thing donated cannot be contained in his legitime does not necessarily mean that the donation is inofficious. The only effect in such case, would be to place the donation in the same category as a donation to a stranger with respect to the excess. Hence such excess will be imputed against the disposable portion. If it can be contained in such disposable portion, it is not inofficious; consequently, it will not be reduced. These rules, however, must be qualified by the provision of Art. 1062 of the Code, which declares that "collation shall not take place among compulsory heirs if the donor should have so expressly provided." This provision merely means that if the donor has expressly provided either in the deed of donation or in his will that the donation given to a compulsory heir shall not be collated, the value of such donation shall be imputable against the disposable portion and not against the legitime of such heir.

Idem; Illustrations. — The different steps in the distribution of the testator's estate among those who are called to inherit may be illustrated by the following problems:

> *Problem No. 1* — The value of the testator's estate at the time of his death is P40,000. However, the claims against his estate based on obligations incurred during his lifetime amount

[167]Ibid.

to P20,000. During his lifetime, he had also made two donations – P20,000 to A, his elder son, and P40,000 to X, a friend. In his will, he instituted his two legitimate children, A and B, who are his only compulsory heirs, as sole heirs, with the proviso that the entire free portion shall be given to B. How shall the estate be distributed?

Answer — First, deduct the debts amounting to P20,000 from the gross value of the estate, thus leaving a net remainder of P20,000. To this remainder, add or collate the value of the two donations, thus making a total of P80,000. It is from this amount that the legitime of A and B shall be determined. Their legitime is 1/2 of P80,000, or P40,000, or P20,000 each *(Art. 888)*. Since the donation of P20,000 to A is a donation to a compulsory heir, it shall be charged against his legitime of P20,000 *(Art. 909)*. There is neither a balance nor an excess. It is, therefore, presumed that the testator, in making the donation to A, had merely advanced his legitime. Consequently, A will no longer be entitled to any legitime. The donation of P40,000 to X, on the other hand, being a donation to a stranger, shall be charged against the disposable portion of P40,000 *(Art. 909)*. Again, there is neither a balance nor an excess. It will, therefore, stand without any reduction since it is not inofficious. However, the *proviso* in the will giving the entire free portion to B is rendered useless because there is no balance out of the disposable portion. Consequently, the net remainder of P20,000, which is available for distribution, will all be given to B in order to satisfy his legitime.

Problem No. 2 — The value of the testator's estate after his death is P40,000. However, the claims against his estate based on obligations incurred during his lifetime amount to P20,000. During his lifetime, he had made two donations — P40,000 to A, his elder son, given in 1950, and P20,000 to X, a friend, given in 1945. In his will, he instituted his two legitimate children, A and B, and his wife, W, who are his only compulsory heirs, as sole heirs, with the proviso that the entire free portion shall be given to W. How shall the estate be distributed?

Answer — The first step in the solution of the problem is to determine the gross value of the testator's estate. According to the facts stated, the gross value is P40,000.

The second step is to determine the amount of all debts and charges incurred by the testator during his lifetime. According to the facts stated, the debts amount to P20,000.

The third step is to determine the net value of the estate by deducting all debts from the gross value of the estate. That leaves an amount of P20,000.

The fourth step is to add or collate the value of all donations *inter vivos* to the net value of the estate. The aggregate sum is P80,000.

The fifth step is to determine the legitime of the three compulsory heirs, using as basis the amount of P80,000. The legitime of A and B is 1/2 of P80,000, or P40,000, or P20,000 each *(Art. 888)*. The legitime of W is equal to that of each legitimate child *(Art. 892),* or P20,000. The disposable portion is, therefore, P20,000. The donation of P40,000 given to A shall be charged against his legitime of P20,000. There is an excess of P20,000, which cannot be contained in the legitime. Consequently, A will no longer be entitled to any legitime because when the testator made the donation to him, it is presumed that he was merely advancing the payment of such legitime. As a matter of fact, he had advanced to him P20,000 more than the amount to which he is entitled by law. This excess of P20,000 shall, therefore, be placed in the same category as a donation to a stranger. Hence, this excess of P20,000 given to A as well as the donation of P20,000 given to X shall be charged against the disposable portion of P20,000. It is evident that such disposable portion is not sufficient to contain both of them. Which of the two shall be suppressed or reduced? In this case, Art. 773 of the Code is directly applicable. The excess of P20,000 given to A shall be suppressed on the ground that it is absolutely inofficious. It must be observed that while the donation to A was given only in 1950, the donation given to X was given in 1945. Consequently, the latter must be the first to be charged against the disposable portion of P20,000, applying the provision of Art. 773. It is not inofficious; hence, it will not be reduced. The excess of P20,000 given to A, on the other hand, is absolutely inofficious since there is no balance left out of the disposable free portion against which it can be charged. Hence, A can now be compelled to restore to the estate P20,000. This amount plus the net remainder of P20,000 will, therefore, make an aggregate total of P40,000, which will be distributed as follows:

B	.....	P20,000, as legitime
W	.....	20,000, as legitime

A, of course, will no longer be entitled to any legitime because he has already received it in advance. The testamentary

disposition giving the entire disposable free portion to W, on the other hand, is useless because there is nothing left out of such portion which can be given to her.

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 devisees 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.[168]

Reduction of Testamentary Dispositions and Donations. — The order of preference enunciated in the above article contemplates a case in which the legitime of compulsory heirs is impaired by inofficious testamentary dispositions and inofficious donations *inter vivos*. In such case, the rule is to reduce or suppress the testamentary disposition or even the donation if necessary. However, as between donations *inter vivos* and donations or dispositions *mortis causa,* preference is always given to the former. Therefore, in case of concurrence between the two and the disposable portion is not sufficient to cover both of them, the testamentary dispositions, such as legacies or devises, are the first to be reduced or even suppressed if necessary. If after such suppression, the value of the donations *inter vivos* cannot still be covered by the disposable portion, then such value shall be reduced in order to preserve the legitime of

[168]Art. 820, Spanish Civil Code, in modified form.

compulsory heirs. The principal reason for giving preference to donations *inter vivos* is found in the fact that they are irrevocable by their very nature. Acceptance by the donee is essential, so much so that they are perfected only from the moment the donor knows of the acceptance by the donee. Once perfected, they produce juridical effects; they become irrevocable. Testamentary dispositions, on the other hand, are unilateral in character. They produce juridical effects only after the death of the testator. Hence, to place both in the same level would be equivalent to allowing the donor to partially revoke an act, which by its very nature is irrevocable, by the simple expediency of providing for legacies or devises in his last will and testament, besides creating as a necessary consequence the disturbances which would be occasioned by the reduction of donations made by him while living.[169]

Idem; Procedure for reduction. — Under Art. 911, the order of preference is, therefore, as follows: *first,* legitime of compulsory heirs; *second,* donations *inter vivos; third,* preferential legacies or devices; and *fourth,* all other legacies or devises. If after satisfying the legitime of compulsory heirs, the disposable portion is sufficient to cover donations *inter vivos,* but not sufficient to cover the legacies and devises, the rule is that such legacies and devises will be reduced *pro rata, after* first satisfying all of those which the testator has declared to be preferential.

The formula for the *pro rata* reduction of legacies or devises which are not preferred is as follows:

$$\frac{\text{Reduced legacy}}{\text{Disposable portion}} \qquad \frac{\text{Legacy to be reduced}}{\text{Total of all legacies}}$$

This formula is based on the fact that the proportion which the reduced amount of the legacy or devise bears to the amount actually at the testator's free disposal is equal to the proportion which the value of the legacy or devise before reduction bears to the total value of all legacies or devises.

[169]6 Manresa, 7th Ed., pp. 464-465.

Problem — The net value of the testator's estate after his death is P40,000. During his lifetime, he donated to F P10,000. In his will, he bequeathed P10,000 to X, P5,000 to Y, and P5,000 to Z. He has two legitimate children — A and B. Distribute the state.

Answer — Collate or add the P10,000 to the value of the testator's estate. The sum is P50,000. Therefore, the legitime of A and B is P25,000, while the disposable portion is also P25,000. The aggregate sum of the donation and legacies is P30,000, which is more than the disposable portion. Since the P10,000 donation can be covered by the free portion, it shall not be reduced. However, the amount left out of the disposable portion will only be P15,000 which is less than the total amount of legacies. Hence, it shall be necessary to reduce the legacies *pro rata* in accordance with the formula given above. Thus —

Let x = reduced amount of legacy to X;

P15,000 = amount for free disposal;

P10,000 = value of legacy to X which must be reduced;

P20,000 = total value of all legacies.

$$\frac{x}{15{,}000} = \frac{10{,}000}{20{,}000}$$

x = P7,500, reduced amount of legacy to X.

Following the same procedure for Y and Z, their reduced legacies shall be P3,750 each.

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.[170]

[170]Art. 821, Spanish Civil Code.

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 make use of it, the property shall be sold at public auction at the instance of any one of the interested parties.[171]

Rules of Reduction of Devises. — Under Art. 912, it is clear that there are two sets of rules which must be complied with depending upon whether the devisee is one who is not entitled to a legitime or one who is entitled to a legitime because he is also a compulsory heir.

In the first case, if the reduction of the devise does not absorb one-half of the value of the property, said property shall go to the devisee, but with the obligation of the latter to reimburse the compulsory heirs in cash for what pertains to them by virtue of the reduction. If the reduction absorbs more than one-half of the property, said property shall go to the compulsory heirs. The latter, however, shall reimburse the devisee in cash in order to cover up the reduced amount of the devise. If the reduction absorbs exactly one-half of the property according to Manresa, the property shall go to the legatee;[172] but according to Sanchez Roman, it shall go to the compulsory heirs.[173] It is submitted that the latter opinion is more in conformity with the letter of the law.

Art. 914. The testator may devise and bequeath the free portion as he may deem fit.[174]

[171]Art. 822, Spanish Civil Code.

[172]6 Manresa, 7th Ed., p. 470.

[173]If natural parents concur with the surviving spouse, the legitime of the former is 1/4, while that of the latter is also 1/4.

[174]If testator is an illegitimate person, his natural parents are also excluded by presence of illegitimate children.

Table of Legitime Under The New Civil Code

Survivors	Legitimate Descendants (LD)	Legitimate Ascendants (LA)	Surviving Spouse	Illegitimate Children Ack. Nat. – (ANC) Ack. Not Nat.–(SC)
1. Any class alone	1/2 unless the testator and the SS were married in *articulo mortis* and the testator died within 3 months from the time of such marriage, in which case, legitime of SS as sole heir is 1/3			
2. All classes – but only one LD	1/2	Excluded	1/4	ANC–1/2 of that of a LD SC–2/5 of that of a LD If free portion is not sufficient – divide 5:4
3. All classes – but two or more LD	1/2	Excluded	Equal to that of each LD	
4. a. Legitimate Ascendants b. Surviving Spouse	—	1/2	1/4	–
5. a. Legitimate Ascendants b. Illegitmate Children	—	1/2	—	1/4 (5:4)
6. a. Surviving Spouse b. Illegitimate Children	—	—	1/3	1/3 (5:4)
7. a. Legitimate Ascendants b. Surviving Souse c. Illegitimate Children	—	1/2	1/8	1/4 (5:4)

Table of Legitime Under The Family Code

Survivors	Legitimate Descendants (LD)	Legitimate Ascendants (LA)	Surviving Spouse (SS)	Illegitimate Children (IC)
Any class alone	1/2, unless the testator and the SS were married in *articulo mortis* and the testator died within 3 months from the time of such marriage, in which case, legitime of SS as sole heir is 1/3.			
All classes–but only one LD	1/2	Excluded	1/4	1/2 of that of a LC. If free portion is not sufficient, divide equally among the LC
All classes–but two or more LD	1/2	Excluded	Equal to that of each LD	
a. Legitimate Ascendants b. Surviving Spouse	1/2	1/2*	1/4	—
a. Legitimate Ascendants b. Illegitimate Children	—	1/2**	—	1/4
a. Surviving Spouse b. Illegitimate Children	—	—	1/3	1/3
a. Legitimate Ascendants b. Surviving Spouse c. Illegitimate Children	—	1/2	1/8	1/4

*If the testator is an illegitimate person, his natural parents are also excluded by presence of illegitimate children.

**If natural parents concur with the surviving spouse, the legitime of the former is 1/4, while that of the latter is also 1/4.

Problem — Emil, the testator, has 3 legitimate children, Tom, Henry and Warlito; a wife named Adette; parents named Pepe and Pilar; an illegitimate child named Ramon; brother Mark; and a sister, Nanette. Since his wife Adette is well-off, he wants to leave his illegitimate child as much of his estate as he can legally do. His estate has an aggregate net amount of P1,200,000.00, and all the above-named relatives are still living. Emil now comes to you for advice in making a will. How will you distribute his estate according to his wishes without violating the law on testamentary succession? (2005)

Answer — P600,000.00 — legitime to be divided equally among Tom, Henry and Warlito as the legitimate children. Each will be entitled to P200,000.00 [Art. 888, NCC].

P100,000.00 — share of Ramon, the illegitimate child. This is equivalent to 1/2 of the share of each legitimate child [Art. 176, NCC].

P200,000.00 — Adette, the wife. Her share is equivalent to the share of one legitimate child [Art. 892, par. 2, NCC].

Pepe and Pilar, the parents are only secondary compulsory heirs and they cannot inherit if the primary compulsory heirs (legitimate children) are alive [Art. 887, par. 2, NCC].

Brother Mark and sister Nanette are not compulsory heirs since they are not included in the enumeration under Art. 887 of the NCC.

The remaining balance of P300,000.00 is the free portion which can be given to the illegitimate child as an instituted heir (Art. 914, NCC). If so given by the decedent, ramon would receive a total of P400,000.00 *(Suggested Answers to the 2005 Bar Examination Questions, PALS).*

Section 6. — Disinheritance

Art. 915. A compulsory heir may, in consequence of disinheritance, be deprived of his legitime, for causes expressly stated by law.[1]

Art. 916. Disinheritance can be effected only through a will wherein the legal cause therefor shall be specified.[2]

[1]Art. 848, Spanish Civil Code.
[2]Art. 849, Spanish Civil Code.

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.[3]

Concept of Disinheritance. — Disinheritance may be defined as the act of the testator in depriving a compulsory heir of his legitime for causes expressly stated by law.[4] It is the only instance recognized in the Civil Code by which a compulsory heir may be deprived of his legitime by the testator. The reason behind the recognition of this power of the testator is evident. It is a fact that there are certain instances when a person may not want his property or fortune for which he had slaved for so long to pass after his death to a compulsory heir because of some present or antecedent act of the latter. The law, therefore, allows him to punish such heir, but only in the cases expressly stated by law.

Requisites of Disinheritance. — In order that a compulsory heir may be deprived of his legitime through disinheritance, the following requisites must concur:

(1) The disinheritance must be for a cause expressly stated by law;

(2) The disinheritance must be effected only through a valid will;

(3) The legal cause for the disinheritance must be specified in the will itself;

(4) The cause for the disinheritance must be certain and true;

(5) The disinheritance must be total; and

(6) The disinheritance must be unconditional.

The most indispensable requisite of a valid disinheritance is that it must be for a cause expressly stated by law.[5] The cause may actually be a just one, or the testator may actually believe that he has a very strong ground for depriving a compulsory heir of any participation in the inheritance, but if such cause is not one of those

[3]Art. 850, Spanish Civil Code.
[4]Art. 915, Civil Code; 4 Castan, 6th Ed., pp. 367-368.
[5]Art. 915, Civil Code.

expressly recognized by law, he cannot disinherit such heir. It is, therefore, essential that the cause must be one of those designated by law; otherwise, the disinheritance is null and void.[6]

The second requisite is that the disinheritance must be effected only through a valid will.[7] Because the act of disinheritance involves the exercise of an exceptional power by virtue of which a compulsory heir is deprived of his legitime, the same requisites and formalities necessary for the disposition of properties *mortis causa* are also necessary for such act.[8] Consequently, if the will is invalid because it has not been executed in accordance with the formalities prescribed by law, the disinheritance is also invalid; if the will is valid, but subsequently it is revoked in accordance with law, the disinheritance is also revoked.[9]

The third requisite is that the cause for the disinheritance must be specified in the will itself.[10] From this it is evident that there can be no implied or tacit disinheritance. It must be noted, however, that the last will of the testator may be embodied in several documents. Taken together, they constitute his last will and testament. Therefore, if a compulsory heir is disinherited in one will without a specification of the cause, the defect may be cured if the cause thereof is specified in another will. It must also be noted that while the law requires that the cause must be express, there is no legal precept which requires that the specification must be couched in the exact language of the law or that details and other circumstances surrounding it must be given.[11]

The fourth requisite is that the cause specified in the will must be certain and true. This can be implied from the provision of Art. 917, which declares that 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. Consequently, the cause must not be a mere figment of the mind or an insane delusion. Neither must it be based on mere suspicion or on the biased opinion of others. As Manresa states it, the testator must not only have a knowl-

[6]6 Manresa, 7th Ed., p. 665; 6 Sanchez Roman 1106.
[7]Art. 916, Civil Code.
[8]6 Manresa, 7th Ed., pp. 664-665; Merza vs. Porras, 93 Phil. 142.
[9]6 Sanchez Roman, 1106.
[10]Art. 916, Civil Code.
[11]6 Manresa, 7th Ed., pp. 667-668.

edge of the cause, but it must also be in the process of being committed, or at least, it has already been committed at the time of the disinheritance. Hence, he cannot, with efficacy, state in his will: "If my wife should ever commit adultery, she shall not be entitled to any of my properties."[12] Such an act of disinheritance will violate two requisites which are clearly deducible from the law — that the cause must be certain and true and that it must be unconditional.

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.[13]

Imperfect Disinheritance. — Under the above article, there are three causes or instances where the disinheritance is considered imperfect or defective. They are: *first,* when it does not specify the cause; *second,* when it specifies a cause the truth of which, if contradicted, is not proved; and *third,* when it specifies a cause which is not one of those set forth in the Code. The enumeration, however, is not complete. It is clear that the disinheritance is also defective in those cases where the other requisites for a valid act of disinheritance are lacking, such as when it is not total or it is conditional. Consequently, we can very well define imperfect disinheritance as the expressed attempt of the testator in depriving a compulsory heir of his legitime without the requisite formalities prescribed by law.

Idem; Distinguished from preterition. — Imperfect disinheritance must not be confused with preterition as defined in Art. 854 of the Code. The two may be distinguished from each other in the following ways:

(1) In imperfect disinheritance, the person disinherited may be any compulsory heir, while in preterition, the person omitted must be a compulsory heir in the direct line.

(2) In the first, the attempt to deprive the heir of his legitime is always express, while in the second, the attempt is always implied.

[12]Ibid., pp. 668-669.
[13]Art. 851, Spanish Civil Code.

(3) In the first, the attempt to deprive the heir of his legitime is always intentional, while in the second, the attempt may be intentional or unintentional.

(4) In the first, the effect is a partial annulment of the institution of heirs, while in the second, the effect is a total annulment.

Problem No. 1 — X died leaving a will wherein he instituted as his heirs his wife, W, and his two daughters, A and B, without designating their shares. A third daughter, C, is ommitted entirely without being disinherited. In the will, X also bequeathed a legacy of P20,000 to A. The net value of his estate is P240,000. How shall such estate be distributed?

Answer — It must be observed that because of the omission of C in X's will, there is now a preterition of a compulsory heir in the direct line in the testator's will. According to the Civil Code, such preterition shall have the effect of annulling the institution of heirs entirely, but legacies and devises shall be valid insofar as they are not inofficious. Since there is a legacy of P20,000 given to A we must therefore, determine whether it is inofficious or not. The legitime of A, B and C is 1/2 of the entire estate, or P120,000, or P40,000 each. The legitime of W is the same as that of each of the legitimate children, or P40,000 also. The disposable free portion is therefore, P80,000. It is clear, that the legacy of P20,000 given to A is not inofficious because it can easily be contained in said disposable free portion. Therefore, it is valid. Consequently, it must be paid to A. That leaves a balance of P220,000 in the estate. Since the institution of heirs has been entirely annulled because of the preterition of C, the rules of intestacy shall now be applied with respect to this balance. It shall be divided equally among W, A, B, and C. The distribution shall, therefore, be as follows:

A	.....	P55,000,	as legal heir
		20,000,	as legatee
B	.....	55,000,	as legal heir
C	.....	55,000,	as legal heir
W	.....	55,000,	as legal heir
		P240,000	

Problem No. 2 — Suppose that C, in the above problem, was disinherited without any specification of the cause or ground for disinheritance, how shall the estate be distributed?

Answer — It must be observed that the disinheritance of C is defective because the testator did not state the cause or ground of disinheritance. Consequently, according to the Civil Code, such imperfect disinheritance shall annul the institution of heirs insofar as it prejudices the legitime of C, but legacies and devises shall be valid insofar as they are not inofficious. Hence, we must determine the legitime of the survivors and the disposable free portion. The legitime of A, B and C is 1/2 of the entire estate, or P120,000, or P40,000 each. The legitime of W is the same as that of each of the legitimate children, or P40,000 also. The disposable free portion is, therefore, P80,000. It is clear that the legacy of P20,000 given to A is not inofficious because it can easily be contained in said disposable free portion. Therefore, it is valid. Consequently it must be paid to A. That leaves a balance of P60,000 in the disposable free portion. This balance of P60,000 shall be given to W, A and B in accordance with the testator's will. That means P20,000 for each of them in addition to their legitime of P40,000. The distribution shall, therefore, be as follows:

A	.....	P40,000,	as compulsory heir
		20,000,	as voluntary heir
		20,000,	as legatee
B	.....	40,000,	as compulsory heir
C	.....	20,000,	as voluntary heir
W	.....	40,000,	as compulsory heir
		20,000,	voluntary heir
		P240,000	

Idem; Effect of imperfect disinheritance. — According to Art. 918, the imperfect disinheritance of a compulsory heir shall result in the annulment of 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. In other words, the imperfect disinheritance shall result in the annulment of the institution of heirs insofar as the legitime of the compulsory heir who is disinherited is prejudiced, although the devises and legacies and other testamentary dispositions shall be valid, provided that the legitime of compulsory heirs is not impaired. This effect is, therefore, different from that of preterition where the annulment of the institution of heirs is total.

Problem — A died leaving a will containing three testamentary clauses. In the first clause he instituted his two legitimate children, B and C, as his universal heirs; in the second clause he disinherited his legitimate child, D, without specifying the cause; and in the third clause he left a legacy of P10,000 to a third person E. The net remainder of his estate is P60,000. How shall such estate be distributed?

Answer — In the first place, since the only compulsory heirs surviving the testator are three legitimate children, B, C and D, therefore, 1/2 of the net remainder of the estate, or P30,000, is reserved as their legitime, while the other half, or P30,000, is free or disposable *(Art. 888)*. In the second place, the disinheritance of D is imperfect because there is no specification of the cause; consequently, it shall result in the partial annulment of the institution of B and C as heirs insofar as D's legitime of P10,000 is prejudiced *(Art. 918)*. In the third place, the legacy of P10,000 to E is not inofficous since it can easily be contained within the free portion of P30,000; hence it does not impair the legitime of the three compulsory heirs which is also P30,000 *(Art. 918)*. Therefore, the estate shall be distributed as follows:

B	.....	P10,000	as compulsory heir
		P10,000	as voluntary heir
C	.....	P10,000	as compulsory heir
		P10,000	as voluntary heir
D	.....	P10,000	as compulsory heir
E	.....	P10,000	as legatee
		P60,000	

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.[14]

Grounds for Disinheritance of Descendants. — Art. 919 enumerates eight different grounds for the disinheritance of children or descendants, whether legitimate or illegitimate. They are:

(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. Evidently, this ground refers to either attempted or frustrated parricide as defined and punished in the Revised Penal Code. Therefore, the first requisite is that the child or descendant must have committed either attempted or frustrated parricide. Furthermore, the law requires that there must have been a previous criminal conviction. Therefore, the second requisite is that the child or descendant must have been convicted for the criminal offense of attempted or frustrated parricide. It is, however, possible that even if there is no previous criminal conviction, the attempt, if it is made against the life of the testator, will constitute a valid ground for disinheritance, provided that it falls within the scope or purview of "maltreatment of the testator by word or deed" within the meaning of No. 6 of the article under discussion.

(2) When the 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. This ground requires the following requisites: *first,* the heir must have accused the testator of a crime; *second,* the penalty prescribed by law for such

[14]Arts. 756, 853, 674, Spanish Civil Code, in modified form.

crime must be six years imprisonment or more, and *third,* the accusation must have been found to be groundless. Since the law does not make any qualification whatsoever, it is clear that "accusation" includes not only the act of the disinherited heir of instituting the criminal action in the capacity of a complainant, but also any act of intervention such as being a witness for the prosecution, by which he accuses the testator of having committed the crime charged. Similarly, as regards the third requisite, it will not make any material difference whether the accusation was found groundless during the preliminary investigation, or during the trial, or on appeal.

(3) When the child or descendant has been convicted of adultery or concubinage with the spouse of the testator. As in the case of the first ground, a final judgment of conviction is an essential requisite. Mere adultery or concubinage with the spouse of the testator is not, therefore, a ground for the disinheritance of a child or descendant. It is, however, possible that even without a previous criminal conviction, adultery or concubinage with the spouse of the testator may be a ground for disinheriting the child or descendant, provided that it falls within the scope or purview of "living a disgraceful or dishonorable life" within the meaning of No. 7 of the article under discussion.

(4) When the child or descendant by fraud, violence, intimidation, or undue influence causes the testator to make a will or to change one already made. It must be noted that the fraud, violence, intimidation, or undue influence may have been employed either for the purpose of causing the testator to execute a will or for the purpose of causing the testator to change or will which has already been made. Consequently, what had been stated in a previous section with regard to fraud, violence, intimidation, and undue influence may also be applied here.

(5) When the child or descendant refuses without justifiable cause to support the testator. It must be noted that the refusal of the heir to give support must be without justifiable cause. Hence, if there was a justifiable cause for such refusal, the disinheritance would be ineffectual or imperfect. Examples of this would be those cases where the resources of the child or descendant have been reduced to the point where he cannot give the support without neglecting his own needs and those of his family, or when the testator

has improved his fortune in such a way that he no longer needs the allowance for his subsistence.[15]

(6) When the child or descendant maltreats the testator by word or deed. It is clear that this ground includes all acts of violence against the person of the testator. It also includes any maltreatment of the testator by words, whether such words are defamatory or not. A final judgment of conviction is not required. It is, however, necessary that the maltreatment must have been intentional or voluntary. Otherwise, if it was due to insanity, lack of discernment or tender years of the child or descendant, the maltreatment cannot be considered as a sufficient cause for disinheritance.[16] Thus, where the testator's granddaughter was only 14 years old at the time when she insulted and slapped him, and prior to that occasion, she had been suffering from fits of insanity, it was held that there is no sufficient ground for the testator in disinheriting her, since it is clear that she had acted without discernment.[17]

(7) When the child or descendant leads a dishonorable or disgraceful life. The scope of this ground under the old law was much more limited than its scope under the present law. Thus, according to No. 3, Art. 853 of the Spanish Civil Code, a daughter or granddaughter may be disinherited by the parents or ascendants if she becomes a prostitute. The old law, therefore, referred only to a limited extent to the immoral life of a daughter or granddaughter, but did not have any provision regarding the immoral conduct of a son or grandson. The Code Commission, believing that this ground for disinheritance should be broad enough to include both male and female descendants, has changed the old provision so that under our present law, it is now possible for parents or ascendants to disinherit any child or descendant who leads a dishonorable or disgraceful life.[18] Hence, any dishonorable or disgraceful conduct, such as engaging in a life of crime or immorality, provided that it characterizes the mode of living of the child or descendant disinherited, is a sufficient cause for disinheritance.

(8) When the child or descendant is convicted of a crime which carries with it the penalty of civil interdiction.

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[15]See Art. 303, Civil Code.
[16]6 Manresa, 7th Ed., p. 682.
[17]Pecson vs. Mediavillo, 28 Phil. 81.
[18]Report of the Code Commission, pp. 119-120.

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 ascendants 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.[19]

Grounds for Disinheritance of Ascendants. — Art. 920 enumerates eight different grounds for the disinheritance of parents or ascendants, whether legitimate or illegitimate. They are:

(1) When the parents have abandoned their children, or induced their daughters to live a corrupt or immoral life, or attempted against her virtue. Actually, this ground may be subdivided into three — *first,* when the parents have abandoned their children; *second,* when the parents have induced their daughters to live a corrupt or immoral life; and *third,* when the parents have attempted against the virtue of their daughters. According to Sanchez Roman,

[19]Arts. 756, 854, 674, Spanish Civil Code, in modified form.

"abandonment" within the meaning of the law refers to the failure of the parents to give to their children due care, instruction and support.[20] This definition is of course in consonance with the provision of what is now Art. 316 of the present Code to the effect that the father and mother have, with respect to their unemancipated children, the duty to support them, to have them in their company, educate and instruct them in keeping with their means, and to represent them in all actions which may redound to their benefit. Hence, failure to comply with these duties shall justify a child in disinheriting a parent. "Inducing their daughters to live a corrupt and immoral life" comprehends the act of the parents in inducing their daughters or granddaughters, by advice, force, intimidation, or any other positive act, to live a life of corruption and immorality. The law speaks of daughters only, but this must be taken to mean any daughter or granddaughter of the erring parent or parents. "Attempting against their virtue" includes any act of the parents either as principals, coprincipals, or accomplices, which can properly be classified as an attempt against the virtue of their daughters or granddaughters. This would include all criminal acts against the chastity of the latter.

(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. This ground is a common ground for the disinheritance of any compulsory heir. Consequently, what had been stated under Art. 919 with regard to this ground are also applicable here.

(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 groundless. This is the second common ground for the disinheritance of any compulsory heir. Consequently, what had been stated under Art. 919 with regard to this ground are also applicable here.

(4) When the parent or ascendant has been convicted of adultery or concubinage with the spouse of the testator. This is also a ground for the disinheritance of children or descendants. Consequently, what had been stated under Art. 919 with regard to this ground are also applicable here.

[20]7 Sanchez Roman 274-275.

(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. This is the third common ground for the disinheritance of any compulsory heir. Consequently, what had been stated under Art. 919 with regard to this ground are also applicable here.

(6) The loss of parental authority for causes specified in the Civil Code. It is evident that there must be an actual loss of parental authority; otherwise, the testator cannot disinherit the parent or ascendant. This is so, even granting that such parent or ascendant has committed an act or offense which constitutes a ground for loss of parental authority by judicial decree. The difficulty, however, is with regard to the proper interpretation which must be given to the phrase "for causes specified in this Code." We know that the causes specified in the Code and which can be used as grounds for disinheritance are the following: (1) emancipation; (2) adoption; (3) appointment of a general guardian; (4) subsequent marriage of the widowed mother; (5) deprivation by final judgment in a criminal case; (6) deprivation by final judgment in legal separation proceedings; and (7) deprivation by final judgment on the ground of excessive harshness, or of corrupting orders, counsels or examples, or of making them beg, or of abandonment.[21] We also know that there can be no question with regard to the right of the child or descendant to disinherit his parent or ascendant on the ground of actual loss of parental authority effected by final judgment, such as those specified in Arts. 330 and 332 of the Code. But suppose that the loss of the parental authority is effected by operation law, such as in emancipation, or in adoption, or when a general guardian is appointed, or when the widowed mother remarries — would there be a right of the child or descendant to disinherit the parent or ascendant? Under the Spanish Code, there is no difficulty regarding this question because the right to disinherit the parent or ascendant exists only when there is loss of parental authority effected by final judgment.[22] Unfortunately, under the new Code, there is no qualification whatsoever. Does that mean that even if the parent or ascendant is not guilty of any offense which constitutes a ground for deprivation of parental authority by final judgment, the child or descendant can still disinherit such par-

[21]See Arts. 327, 328, 330, 332, Civil Code.
[22]Art. 854, Spanish Civil Code.

ent or ascendant, provided that there is an actual loss of parental authority effected by emancipation, or adoption, or appointment of a general guardian, or remarriage of a widowed mother? If we shall answer this question in the affirmative on the ground that since the law does not impose any qualification, we must not also impose any qualification, we would be forced to witness the absurd spectacle of a child or descendant being allowed to disinherit a parent or ascendant just because he has already attained the age of 21, or because, for his protection, his parent had given his consent to his adoption, or because a general guardian had been appointed to take care of his person and property by reason of the insanity of the parent, or because the widowed mother remarried in order to protect her family. It is submitted that these causes were never contemplated by the law. Consequently, we believe that when the law speaks of the right of a child or descendant to disinherit a parent or ascendant if there is loss of parental authority "for causes specified in this Code," the cause referred to are those specified in Arts. 330 and 332 and not those specified in Arts. 327 and 329.

There is a second question which is taken up in connection with this ground for disinheritance. It must be observed that some of the causes of loss of parental authority are temporary in character. Thus, in case of legal separation, there is always the possibility of reconciliation. Similarly, in case of criminal conviction, there is always the possibility of absolute pardon. In such cases, there is a restoration of parental authority. What will be the effect of such restoration to the right to disinherit or to the disinheritance if it has already been made? There are two views. One view maintains that there is no effect upon the right to disinherit or upon the disinheritance if it has already been made, because the ground or basis for the disinheritance is not the loss of parental authority, but the offense committed by the offender.[23] Another view holds that the restoration of parental authority would have the effect of depriving the child or descendant of his right to disinherit the parent or ascendant or of rendering the disinheritance ineffectual if it has already been made, because the legal basis for disinheritance would no longer exist, since, it is admitted, that the disinheritance can take effect only upon the death of the testator.[24] We believe that the

[23]6 Sanchez Roman, p. 1120.
[24]6 Manresa, 7th Ed., p. 688.

first view is more in consonance with the law. After all, the law does not make any qualification which is similar to that which is provided for in Art. 922. Besides, the very philosophy of disinheritance contemplates a right by which the testator is permitted to punish the offender by depriving the latter of the legitime to which he would otherwise be entitled by operation of law. It is clear, therefore, that what the law allows the testator to punish is not the consequence of the offense, but the offense itself. Hence, even if there is a restoration of parental authority brought about by absolute pardon or by reconciliation of the spouses, although that will have the effect of erasing the existence of the offense as far as the State or the spouses are concerned, it cannot erase the existence of the offense against the testator. Consequently, the ground for disinheritance still exists. Of course, it must be noted that this conclusion is predicated upon the fact that there is no reconciliation between the offended and the offender, because, otherwise, the provisions of Art. 922 shall apply.

(7) When the parent or ascendant refuses without justifiable cause to support the testator. This is the fourth common ground for the disinheritance of any compulsory heir. Consequently, what had been stated under Art. 919 with regard to this ground are also applicable here.

(8) An attempt by one of the parents against the life of the other, unless there has been a reconciliation between them. It will be observed that unlike the grounds stated is Nos. 2 and 4 of the article under discussion, under this ground, a final judgment of conviction is not an essential requisite.

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.[25]

Grounds for Disinheritance of Spouse. — Art. 921 enumerates six different grounds for the disinheritance of the spouse. Those stated in Nos. 1, 2, 3 and 6 are, however, common grounds for the disinheritance of any compulsory heir. Consequently, what had been stated under Art. 919 with regard to these grounds are also applicable here. These six grounds for the disinheritance of the spouse are:

(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 groundless.

There is an interesting problem which was incidentally taken up by the Supreme Court in *Javier vs. Lucero*[26] in connection with this ground for disinheritance. The wife brought an action against her husband for bigamy. The latter was acquitted of the crime for lack of criminal intent, inasmuch as he believed that the divorce which he had obtained in the United States had already dissolved the first marriage. Would there be a ground for disinheritance or for refusal to give support in such a case? According to the Supreme Court, there would be no ground either for disinheritance or for refusal to give support, because the accusation was not "found to be false." After all, the accused got married, not only twice, but three times. We can, therefore, conclude that it is not enough that there must be an acquittal based on reasonable doubt. The law requires more than that. It is essential that the acquittal must be based on the fact that the offense charged has not been committed.

[25]Arts. 756, 855, 674, Spanish Civil Code, in modified form.
[26]50 Off. Gaz. 4845.

(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. Under the original project of the Civil Code as drafted by the Code Commission, this ground for disinheritance was not included. It was only when the project was being discussed by Congress that it was inserted. As it now stands, it is clear that by virtue of this provision, if the wife has committed adultery, or if the husband has committed concubinage, or if either of the spouses has made an attempt against the life of the other, the innocent spouse would be justified in disinheriting the offending spouse.[27] Thus, it has been held that criminal conviction is not a condition *sine qua non* in order that the wife can disinherit an unfaithful husband.[28] The same principle can also be applied to an attempt made by one spouse against the life of the other. There is, therefore, a partial conflict between this provision and that of No. 1 of the article under discussion. Under this provision, the mere attempt by one of the spouses against the life of the other without a previous final judgment of conviction is a sufficient cause for disinheritance, while under No. 1, a previous final judgment of conviction is an essential requisite. The effect of this conflict is that, unwittingly, the provision of No. 1 with regard to the conviction of the spouse of an attempt against the life of the testator has become practically useless. However, if the attempt is made against a descendant or an ascendant of the testator, conviction would still be essential.

(5) When the spouse has given grounds for the loss of parental authority. It must be observed that under this ground, the mere fact that there is a ground for the loss of parental authority is a sufficient cause for disinheritance, whereas under No. 6 of Art. 920, in order that a child or descendant can disinherit a parent or ascendant, it is essential that there must be an actual loss of parental authority.

(6) When the spouse refuses without justifiable cause to support the children or the other spouse.

[27]See Art. 97, Civil Code.
[28]Hilado vs. De Leon, (CA), 50 Off. Gaz. 222.

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.[29]

Effect of Subsequent Reconciliation. — During that period between the execution of the will and the death of the testator, it is always possible that the testator may pardon the offender. Such pardon, however, cannot have any possible effect either upon the testator's right to disinherit or upon the disinheritance if it has already been made. Under the law, before it can have any effect, it is essential that it must have been accepted by the offender thus resulting in a reconciliation between the two. It is, therefore, clear that what the law requires is a bilateral act and not a mere unilateral act. Once there is a reconciliation between the offender and the offended person, such reconciliation shall have the effect of depriving the latter of the right to disinherit the former or of rendering ineffectual any disinheritance that may have been made.

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.[30]

Effects of Disinheritance. — The most important effect of disinheritance is of course the deprivation of the compulsory heir who is disinherited of any participation in the inheritance including this legitime. However, if the compulsory heir has children or descendants of his own, such children or descendants, according to Art. 923, shall take his or her place and shall preserve his or her right with respect to the legitime, although the disinherited parents shall not have the usufruct or administration of the property which constitutes the legitime. According to Manresa, since disinheritance is a penalty which the testator may impose upon a compulsory heir who is guilty of any of the causes prescribed by law, its imposition upon the latter is undoubtedly in conformity with the requirements

[29]Art. 856, Spanish Civil Code.
[30]Art. 857, Spanish Civil Code.

of strict justice. But to impose it in the same manner upon the innocent children or descendants of the offender would be unjust.[31] Hence, under the law, after the death of the testator, the children and descendants of the disinherited heir shall represent the latter with respect to the legitime.

It must be noted, however, that Art. 923 cannot be applied to all cases in which the compulsory heir who is disinherited has children or descendants of his own. Although it appears to be of general application, yet it is undeniable that it is applicable only if the compulsory heir who is disinherited happens also to be a child or descendant of the testator. This is so, because, in reality, this article establishes or recognizes a right on the part of the children or descendants of the disinherited heir to represent the latter with regard to the legitime to which he would have been entitled had he not been disinherited, and it is a well-known principle of testamentary succession that the right of representation can take place only in the direct descending line, but never in the ascending.[32]

Section 7. — Legacies and Devises

Concept of Legacies and Devises. — Under Art. 782 of the Code, a legatee is defined as a person to whom a gift of personal property is given by virtue of a will, while a devisee is defined as a person to whom a gift of real property is given by virtue of a will. Hence, a legacy may be defined as a testamentary disposition by virtue of which a person is called by the testator to inherit an individual item of personal property. A devise, on the other hand, may be defined as a testamentary disposition by virtue of which a person is called by the testator to inherit an individual item of real property.

Art. 924. All things and rights which are within the commerce of man may be bequeathed or devised.[1]

Art. 925. A testator may charge with legacies and devises not only his compulsory heirs but also the legatees and devisees.

[31] 6 Manresa, 7th Ed., pp. 695-696.
[32] Art. 972, Civil Code.

[1] Art. 865, Spanish Civil Code, in modified form.

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 portion given them.[2]

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.[3]

Persons Charged With Legacies and Devises. — The following may be expressly charged by the testator with the payment or delivery of a legacy or devise: (1) Any compulsory heir; (2) any voluntary heir; (3) any legatee or devisee; and (4) the estate, represented by the executor or administrator.

If the will is silent with regard to the person who shall pay or deliver the legacy or devise, it is clear that the obligation constitutes a charge or burden upon the estate of the testator. Consequently, if there is an administration proceeding, the obligation will be performed by the executor or administrator;[4] if there is none, it will be performed by the heirs themselves.[5]

Idem; Extent of liability. — Since, by its very nature, a legacy or devise constitutes a charge or burden upon the disposable portion of the testator's estate, it is but logical that if the person who is charged with the obligation is a compulsory heir, he cannot be held liable beyond the amount of the disposable portion given him.[6] Thus, if, according to the law and the will of the testator, A, who is one of the compulsory heirs, is entitled to P10,000 in his capacity as compulsory heir and to P5,000 in his capacity as voluntary heir, and he is charged with the obligation of paying P10,000 to X, a third person, he can be held liable only for P5,000. This rule, stated in the second paragraph of Art. 925, is in conformity with the rule regarding the untouchability of the legitime of compulsory heirs. On the other hand, if the person who is charged with the obligation is a voluntary

[2]Art. 858, Spanish Civil Code, in modified form.
[3]Art. 859, Spanish Civil Code.
[4]See Sec. 1, Rule 85, Sec. 1, Rule 90, New Rules of Court.
[5]Art. 926, par. 2, Civil Code.
[6]Art. 925, par. 2, Civil Code.

heir, or a legatee, or a devisee, his liability shall extend to the entire share, or legacy, or devise received by him.[7] Although the law does not mention voluntary heirs, it is evident that they must be placed in the same class as legatees or devisees since their shares are also chargeable against the disposable portion of the estate.

Idem; Liability when no one is charged. — According to the second paragraph of Art. 926, should the testator not charge anyone in particular, all shall be liable in the same proportion in which they may inherit. This provision, which is copied verbatim from the Spanish Civil Code, does not consider the nature of legacies and devisees in relation with the provisions of the Rules of Court regarding the settlement of the estate of deceased persons. If the testator's will is silent with regard to the person who shall pay or deliver the legacy or devise, there is a presumption, clearly inferable from the provisions of the Rules of Court,[8] that such legacy or devise constitutes a charge against the decedent's estate. Therefore, the obligation must be performed by the executor or administrator as decreed by the court after the liquidation of all claims against the estate. Consequently, the provision of the second paragraph of Art. 926 is applicable only when there is no administration proceeding for the settlement of the decedent's estate.

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.[9]

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.[10]

Liability for Eviction. — According to the above article, if the legacy or devise is indeterminate or generic, the heir who is charged with the payment or delivery of the legacy or devise shall be liable in case of eviction. Hence, Art. 1548 of the Code, which provides for warranty by the vendor of the thing sold in case of eviction, shall

[7]*Ibid*.
[8]See Rules 88 to 90 New Rules of Court.
[9]New provision.
[10]Art. 860, Spanish Civil Code.

apply. However, if the legacy or devise is determinate or specific, the heir who is charged cannot be held liable in case of eviction. The reason for this is that the heir, certainly, would not be at fault if the thing bequeathed or devised by the testator had a defective title. It is different when the thing is indeterminate because then the acquisition or choice shall depend upon him.[11]

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.[12]

Legacy of Things Belonging Partly to Strangers. — The presumption is that the testator desires to bequeath or devise only that which belongs to him. Hence, if he bequeaths or devises a thing which belongs partly to him and partly to a third person, the legacy or devise shall be understood limited only to the part or interest belonging to him. The same rule is applied where the thing belongs partly to the heir, legatee or devisee and partly to a third person. The legacy or devise is limited only to the part or interest belonging to such heir, legatee or devisee.[13] There is, however, an exception to the rule and that is when the testator expressly declares that he bequeaths or devises the thing in its entirety. However, before this exception can be applied, there must be: *first,* an express declaration to that effect appearing in the will itself; and *second,* knowledge on the part of the testator that the thing belongs partly to a third person. Such knowledge may be proved either from the context of the will itself or from extrinsic evidence. Obviously, such knowledge on the part of the testator of his limited right is essential because, otherwise, the legacy or devise would be void under Art. 930.[14]

Idem; Effect of partition. — It may happen that subsequently the thing which is bequeathed or devised is finally divided or partitioned between the owners in common. If the thing is physically divisible or convenient of division, the rules stated are still applicable. However, if the thing is physically indivisible or inconvenient

[11]6 Manresa, 7th Ed., pp. 712-713.

[12]Art. 864, Spanish Civil Code, in modified form.

[13]This was what used to be known as a sub-legacy under the old Code (Art. 863, Spanish Civil Code).

[14]6 Manresa, 7th Ed., p. 723; 6 Sanchez Roman 1309-1310.

of division, the rules applicable shall depend upon whether the thing is finally adjudicated to the testator or to the other owner applying the provisions of Arts. 929 and 930.

In the first case, *i.e.,* where the thing is adjudicated to the testator, there is no question that the same rules are still applicable with greater force. If what is bequeathed or devised by the testator is that part which belonged to him before the partition, the legacy or devise still subsists without any change. If what is bequeathed or devised, however, is the entire property in accordance with the exception provided for in Art. 929, the whole property shall pass in its entirety to the legatee or devisee, applying again the rule stated in Arts. 929 and 930.

In the second case, *i.e.*, when the thing is adjudicated to the other owner, the rules applicable shall depend upon whether or not the testator has expressly declared that he bequeaths or devises the property in its entirety. If he has not expressly declared that he bequeaths or devises the property in its entirety, the legacy or devise shall be without effect, applying the provision of No. 2 of Art. 957, which declares that the alienation of the thing bequeathed or devised shall result in the legal revocation of the legacy or devise.

If he has expressly declared that he bequeaths or devises the property in its entirety and the property subsequently is adjudicated to the other owner, the legacy or devise shall be without effect only with respect to what had formerly belonged to him, again applying the rule stated in No. 2 of Art. 957. However, the legacy or devise is still effective with respect to the part belonging to the owner or third person to whom the entire property was adjudicated, again applying the provisions of Arts. 929 and 23.[15]

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.[16]

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

[15]6 Manresa, 7th Ed., pp. 724-725.

[16]Art. 862, Spanish Civil Code, in modified form.

heir upon whom the obligation is imposed or the estate 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 of the estate shall only be obliged to give the just value of the thing.[17]

Legacy of Things Belonging to Strangers. — It will be observed from a study of Arts. 930 and 931 that the all-important factor in the determination of the validity of a legacy or devise of a thing belonging to another is the knowledge of the testator that the thing bequeathed or devised belonged to another at the time of the execution of the will. If the testator erroneously believed that the thing belonged to him and not to another, the legacy or devise is void. On the other hand, if the testator knew that the thing belonged to another, the legacy or devise is valid because it is presumed that his intention is that such thing which is bequeathed or devised must be acquired either by the executor or administrator of his estate or by the heir expressly charged with such obligation for the benefit of the legatee or devisee.[18]

It is clear that, under the law, there are two instances where the testator may be considered to have disposed of the thing with knowledge that it belongs to another. They are: *first,* where he subsequently acquires the thing from the owner by whatever title; and *second,* where he expressly orders in his will that the thing shall be acquired in order that it be given to the legatee or devisee. In both instances, the disposition is valid.

With respect to the second case, it must be observed that the law expressly provides that either the heir upon whom the obligation is imposed or the estate, *i.e.,* the executor or administrator, must acquire it and give the same to the legatee or devisee. If the owner 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. Thus, if the testator provides in his will: "I charge the executor of my estate with the obligation of acquiring the Italian – made car of my neighbor, X, to be delivered to my friend, A," the executor shall have to acquire the car from X. If X refuses to sell or

[17]Art. 861, Spanish Civil Code, in modified form.
[18]6 Manresa, 7th Ed., pp. 718-719.

charges, let us say, P100,000 for the car (the real value of the car is P20,000), then the executor shall give to A only the just value of the car.

Where the testator, however, erroneously believed at the time of the execution of the will that the thing belonged to him, the legacy or devise is void. There is only one exception to this rule and that is when he subsequently acquires the thing by whatever title. In such case, the legacy or devise is valid. Although he may have been ignorant of the fact that the thing belonged to another at the time of the execution of the will, yet it is presumed that once he was appraised of his mistake, he subsequently acted in order to remove all obstacles to his will.[19]

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.[20]

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.[21]

Legacy of Things Belonging to Legatee. — The legacy or devise referred to in the above articles is a legacy or devise in favor of the person to whom the thing bequeathed or devised belongs. The rule with regard to such legacy or devise is that it shall be ineffective whether or not the testator had knowledge of the fact. The

[19]Ibid., p. 719.
[20]Art. 866, Spanish Civil Code, in modified form.
[21]Art. 879, Spanish Civil Code, in modified form.

rule applies even though another person may have some interest therein. The rule also applies even though the legatee or devisee who is supposed to be favored may have subsequently alienated the thing. To hold otherwise would be to permit the testator to play a grotesque joke in his dispositions *mortis causa*. If he did not know that the thing or property belonged to the legatee or devisee favored at the time of the execution of the will, the law presumes that had he known of the fact, he would not have bequeathed or devised the thing.[22]

It must be observed, however, that the second paragraph of Art. 932 provides that if another person has an interest in the thing which is the object of the legacy or devise and the testator expressly orders that the thing be freed from such interest or encumbrance, the legacy or devise shall be valid to that extent. This is of course just and proper because what is being bequeathed or devised is no longer something which belongs to the legatee or devisee.

It is, therefore, clear that if the thing bequeathed or devised belonged to the legatee or devisee at the moment of the execution of the will, the legacy or devise is ineffective. If subsequently, the thing is alienated to a third person, the legacy or devise is still ineffective. The heir or heirs or the estate represented by the executor or administrator in such case shall not be bound to acquire the thing from the third person after the death of the testator for the benefit of the legatee or devisee. Manresa, however, mentions one exception to this rule and that is when the testator himself before his death acquires the thing by whatever title. In this exceptional case, the legacy or devisee would be valid applying the provision of Art. 930.

Idem; Effect of acquisition by legatee. — The phraseology of the second paragraph of Art. 933 is not very clear. The question is: does this constitute an exception to the rule stated in the first paragraph or not? Briefly stated, the rule in the first paragraph is that the legacy or devise of a thing belonging to the legatee or devisee at the time of the execution of the will shall be without effect, even though it is subsequently alienated. This same rule is also stated in Art. 932. The second paragraph follows with the rule — "If the legatee or devisee acquires it gratuitously after such time," the legacy or devise is still ineffective; "but if it has been acquired by onerous title,

[22]6 Manresa, 7th Ed., p. 730.

he can demand reimbursement from the heir or the estate." Does the last part of the paragraph constitute an exception to the rule stated in the first paragraph of the article? It is clear from an analysis of the entire provision that when the law speaks of the gratuitous or onerous acquisition of the thing bequeathed or devised "after such time," the time referred to is the moment of the execution of the will, not the moment of alienation by the legatee or devisee favored. Therefore, such acquisition by such legatee or devisee must have been made between the execution of the will and the death of the testator. For purposes of clarity, let us divide the different cases that may possibly arise under this provision:

(1) If the thing belonged to a third person at the time of the execution of the will: In this case, the testator may or may not have any knowledge of the fact that the thing belonged to a third person at the time when he executed his will. If he erroneously believed that the thing pertained to him, the legacy or devise is void. The subsequent, acquisition of the thing by the legatee or devisee favored cannot, therefore, have any effect upon such legacy or devise. However, if he had knowledge that the thing belonged to a third person, the second paragraph of Art. 933 is applicable.

(2) If the thing belonged to the testator at the time of the execution of the will: In this case, the thing may be alienated by the testator subsequently either to a third person or to the legatee or devisee favored. If the thing is alienated in favor of a third person, clearly the legacy or devise is revoked by express provision of Art. 957. Hence, the subsequently acquisition by the legatee or devisee cannot revive the legacy or devise. If the thing is alienated in favor of the legatee or devise. If the thing is alienated in favor of the legatee or devisee himself, there is no revocation. As a matter of fact, there is a clear intention to comply with the legacy or devise if the alienation is gratuitous. If such alienation is onerous, the second paragraph of Art. 933 applies.[23]

(3) If the thing belonged to the beneficiary at the time of the execution of the will: In this case, the provision of the second paragraph of Art. 933 cannot apply because this case is precisely what is contemplated by the first paragraph of the same article.

[23]Ibid., pp. 773-774.

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.[24]

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.[25]

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.[26]

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.[27]

Legacy of a Credit. — The legacy of a credit taken up in Art. 935, takes place when the testator bequeaths to the legatee a credit

[24]Art. 867, Spanish Civil Code, in modified form.
[25]Art. 870, Spanish Civil Code, in modified form.
[26]Art. 871, Spanish Civil Code.
[27]Art. 872, Spanish Civil Code.

which he has against a third person. There are, therefore, three parties involved — the testator-creditor, the legatee, and the debtor. In this type of legacy, there is a novation of the credit by subrogating the legatee in the rights of the original creditor.[28] Thus, if X, a third person, is indebted to the testator for P5,000, and the latter, in his will, bequeaths the right to collect the credit to A, the estate of the testator upon his death, can comply with the legacy by assigning to A all rights of action which it may have against X.

Legacy of Remission of Debts. — The Civil Code distinguishes three different kinds of legacies of remission or release of debts. They are: *first,* specific legacy for the remission of a definite debt; *second,* generic legacy for the remission of all debts of the legatee existing at the time of the execution of the will; and *third,* legacy to the debtor of the thing pledged by him.[29] The first is regulated by Art. 935, the second, by Art. 937, and the third, by the second paragraph of Art. 936.

The legacy of remission or release of a definite debt of the legatee, which is taken up in Art. 935, involves only two parties – the testator-creditor and the legatee-debtor. Thus, if D is indebted to his uncle, C, for P5,000, and in the will of the latter, he expressly condones the obligation, the estate, upon his death, can comply with the legacy by giving D an acquittance from the debt, should he request one.

The generic legacy of remission or release of all debts of the legatee, which is taken up in Art. 937, is not very different from a specific legacy of remission with regard to the rules which are applicable. The only fundamental difference is that when the release is specific, such release can only refer to the debt which is specifically mentioned in the will of the testator; but if the release is generic, such release comprises all debts existing at the time of the execution of the will, but not subsequent ones. Whether the legacy is specific or generic, the rule that the legacy shall comprise only what is due the testator at the time of his death shall apply.

Revocation of Legacy. — Whether the legacy is of a credit against a third person or of a release or remission of a debt of the

[28]6 Sanchez Roman 1315.
[29]Ibid., p. 1317.

legatee, such legacy shall be considered revoked (Art. 936 says it shall lapse) if the testator, after having made it, shall 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 law expressly states "if the testator should bring an action against the debtor." This must be construed to mean a judicial action; hence, an extrajudicial demand shall not be sufficient to revoke the legacy.[30]

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.[31]

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.[32]

Legacy to Creditors. — The general rule is that a legacy or devise made to a creditor shall not be applied to his credit. Thus, if the testator is indebted to X for P5,000, and, in his will, he bequeaths P3,000 to him, X shall have two claims against the estate of the testator after the latter's death — one as creditor for P5,000, and the other as legatee for P3,000. As creditor, he shall file his claim during the testate proceedings just like any other creditor; as legatee, he shall wait until all claims against the estate and expenses of administration had been paid in accordance with the Rules of Court.

The exception to the above rule is when the testator expressly declares that the legacy or devise must be applied to the credit. Thus, if the testator is indebted to A for P10,000 and, in his will, he states — "I give to A P10,000 in payment of the P10,000 which I borrowed from him in 1960," it is clear that A can collect only P10,000

[30]Ibid.
[31]Art. 873, Spanish Civil Code, in modified form.
[32]New provision.

as legatee if he is willing to accept the legacy since he is a creditor for the same amount anyway.

The second paragraph of the article provides that if the testator expressly declares that the legacy or devise shall be applied to the credit, the creditor shall have the right to collect the excess, if any, of the credit or of the legacy or devise. Consequently, if the legacy is P10,000 and the debt is only P4,000, and the testator declares in his will that the legacy shall be applied to the payment of the debt there will still be an excess of P6,000 in the legacy which the creditor shall still be able to collect. If the legacy is P5,000 and the debt is P7,000, after applying the legacy to the payment of the debt, there will still be a balance of P2,000 which the creditor can still collect from the estate of the testator like any ordinary creditor.

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.[33]

Alternative Legacies and Devises. — Alternative legacies or devises refer to those where the testator bequeaths or devises two or more things but which can be complied with by the delivery of only one of them to the beneficiary. The most peculiar feature of this type of legacy or devise is that a choice will have to be made upon the death of the testator before it can be complied with. The testator may designate any one of the heirs, legatees or devisees, or even the beneficiary himself, to make the choice. If no particular person is designated, the right of choice pertains to the executor or admin-

[33]Art. 874, Spanish Civil Code, in modified form.

istrator of the estate. If the heir, legatee, or devisee who may have been designated to make the choice dies before he is able to make it, the right shall pass to his heirs. Once the choice is made, it becomes irrevocable. The legacy or devise will no longer be alternative, but simple. These principles, which are all enunciated in Art. 940 of the Code may be illustrated by the following example: Before his death, the testator executed a will. One of the testamentary dispositions found in the will is a legacy, whereby the testator bequeaths to A either his automobile or his champion race horse. It is clear that this legacy is alternative since it can be complied with the delivery of either the automobile or the horse. Since no person is designated in the will to make the choice, the executor or administrator of the estate will, therefore, have to make the choice. If such executor or administrator chooses the automobile, he must notify the court which has jurisdiction over the settlement proceedings. From that very moment, the choice is irrevocable. In other words, the legacy ceases to be alternative; it has become a simple legacy to deliver the automobile to A.

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.[34]

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.[35]

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.[36]

Generic Legacies. — A generic legacy refers to a legacy consisting of personal property designated merely by its class or genus

[34]Art. 875, Spanish Civil Code, in modified form.
[35]Art. 876, Spanish Civil Code, in modified form.
[36]Art. 877, Spanish Civil Code, in modified form.

without any particular designation or physical segregation from all others of the same class. Thus, if the testator, in his will, bequeaths "ten horses" to A, the legacy is generic. Even granting that there are no horses in the estate of the testator after his death, the legacy is valid.[37] The obligation in such a case can be complied with by the delivery to A of ten horses which must be neither of superior nor inferior quality.[38] As in the case of alternative legacies, a choice must have to be made. The right of choice shall pertain to the person designated by the testator. Anyone of the heirs, legatees, or devisees, or even the beneficiary himself may be designated to make the choice.[39] If the heir, legatee or devisee cannot make the choice, his right shall pass to his own heirs.[40] If no person is designated to make the choice, the executor or administrator of the estate shall make it.[41] Once made, the choice becomes irrevocable.[42] In other words, the legacy ceases to be generic; it becomes determinate.

Generic Devises. — A generic devise refers to a devise consisting of real property designated merely by its class or genus without any particular designation or physical segregation from all others of the same class. Thus, if the testator devises five hectares of "rice lands" or "sugar lands" to A, the devise is generic. In such case, the same rules specified in the preceding comments are applicable.

The law, however, declares that a devise of indeterminate real property shall be valid only if there be immovable property of its kind in the estate of the testator.[43] The reason for this is that, unlike personal property, there is no such thing as a predetermined species with respect to real or immovable property, since its individualization, depends exclusively upon the will of man.[44] Consequently, if the testator devises five hectares of ricelands to A, but after his death it is found out that his estate consists entirely of fish ponds, it is clear that, under the law, the devise is void.

[37]Art. 941, Civil Code.
[38]Ibid.
[39]Art. 942, Civil Code.
[40]Art. 943, Civil Code.
[41]Art. 941, Civil Code.
[42]Art. 943, Civil Code.
[43]41, Civil Code.
[44]6 Manresa, 7th Ed., pp. 762-763.

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, 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.[45]

Legacy for Education or Support. — According to Art. 879 of the Spanish Civil Code, a legacy for education shall last until the legatee reaches the age of majority. This legacy is made more extensive in Art. 944 of the New Civil Code which provides that "a legacy for education last 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.[46]

The amount of the legacy, whether for education or for support, shall depend upon the testator. If the amount is not fixed, it shall be fixed in accordance with the circumstances and social standing of the legatee and the value of the estate. The only limitation is that the legacy must not impair the legitime of compulsory heirs.

The last paragraph particularizes the criterion to be followed in case the testator did not fix the amount of the legacy, if during his lifetime he had been in the habit of giving the legatee by way of support a certain sum of money. The law provides that in such case, the same amount shall be deemed bequeathed, unless it be markedly disproportionate to the value of the estate.

[45]Art. 879, Spanish Civil Code, in modified form.
[46]Report of the Code Commission, p. 120.

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.[47]

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.[48]

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.[49]

When Right to Legacy or Devise Vests. — The rule stated in the above article is merely a restatement of the general principle declared in Art. 777 of the Code to the effect that the rights to the succession are transmitted at the moment of the death of the decedent. Although the article mentions only pure and simple legacies and devises, even those which are subject to a suspensive term or period must be included within the purview of the rule. This is so because in such legacies or devises, what is suspended by the term or period is not the acquisition of the right but merely the demandability of the right. Consequently, even if the legatee or devisee, after the death of the testator, dies before the expiration of the term or period, he can transmit his rights to his own heirs.[50] In the case of conditional legacies or devises, however, if the condition is suspensive, what is acquired upon the death of the testator by the legatee or devisee is only a mere hope or expectancy. Such hope or expectancy is converted into a perfected right only from the moment of the fulfillment of the condition. Consequently, if the legatee or devisee, after the death of the testator, dies before the fulfillment of the condition, he cannot transmit his expectancy to his own heirs.

[47]Art. 880, Spanish Civil Code, in modified form.
[48]Art. 868, Spanish Civil Code, in modified form.
[49]Art. 881, Spanish Civil Code, in modified form.
[50]Art. 878, Civil Code.

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 benefited by its increase or improvement, without prejudice to the responsibility of the executor or administrator.[51]

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.[52]

Transmission of Right of Ownership. — The scope or purview of Arts. 948 and 949 must be distinguished from that of Art. 947. The latter article refers to the moment when the legatee or devisee acquires a right to the legacy or devise, while Arts. 948 and 949 refer to the moment when the legatee or devisee becomes the owner of the thing which is bequeathed or devised, depending upon whether the legacy or devise is determinate or generic.

Idem; In determinate legacies or devises. — The rule stated in Art. 948 springs logically from the general principle enunciated in Art. 777 of the Code. It is, however, essential before the legatee or devisee can acquire ownership of the thing bequeathed or devised upon the death of the testator that the thing is determinate and that the legacy or devise is pure and simple. If the legacy or devise is subject to a suspensive term or period or to a suspensive condition, the rule cannot be applied. In the first, the legatee or devisee becomes the owner of the thing bequeathed or devised only upon the expiration of the term or period; in the second, only upon the fulfillment of the condition.

Hence, if the legacy or devise is pure and simple, from the moment of the testator's death, the thing bequeathed or devised shall

[51]Art. 882, Spanish Civil Code, in modified form.
[52]Art. 884, Spanish Civil Code, in modified form.

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.[53] This is an application of the principle that the thing perishes for its owner. However, if such loss or deterioration of the thing is through the fault or negligence of the executor or administrator, the latter can be held liable for damages.

Idem; In generic legacies and devises. — If the legacy or devise is generic (or alternative), there is a right of choice governed by the provisions of Arts. 941 to 943 of the Code. Once the choice or selection has been made in accordance with these provisions, the legacy or devise ceases to be generic; it becomes a pure and simple legacy or devise. It will be only then that the legatee or devisee can be considered as the owner of the thing which is chosen or selected. Consequently, from that very moment, the legatee or devisee shall be entitled to all of the fruits and interests of the thing, unless the testator has expressly ordered in his will that such fruits and interests shall pertain to the legatee or devisee from the moment of his death.[54]

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 or 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*.[55]

[53]Art. 948, Civil Code.
[54]Art. 949, Civil Code.
[55]Art. 887, Spanish Civil Code, in modified form.

Order of Payment of Legacies and Devises. — The order of payment of legacies and devises which is specified in the above article should be distinguished from the rule stated in Art. 911 of the Code regarding the *pro rata* reduction of legacies and devises. Art. 911 applies in the following cases: (1) When the reduction is necessary to preserve the legitime of compulsory heirs from impairment, whether there are donations *inter vivos* or not; and (2) when, although the legitime has been preserved by the testator himself by leaving the compulsory heirs sufficient property to cover their legitime, there are donations *inter vivos* concurring with the legacies and devises within the free portion.[56] In all other cases not included within the scope of Art. 911, Art. 950 applies. More specifically, the latter applies in all cases where the conflict is exclusively among the legatees or devisees themselves. This is possible in either of two cases:

(1) When there are no compulsory heirs and the entire estate is distributed by the testator as legacies or devises; or

(2) When there are compulsory heirs, but their legitime has already been provided for by the testator and there are no donations *inter vivos*.

The application of the order of payment provided for in Art. 950 may be illustrated by the following problems:

> *Problem No. 1* — The testator, not having any compulsory heir, made the following bequests in his will: P10,000 to R as a reward for past services; P10,000 preferential legacy to P; P15,000 to S for support; P15,000 to E for education, P15,000 and P5,000 to X and Y, respectively, as ordinary legacies. The value of his estate at the time of his death is P100,000. There are, however, debts amounting to P40,000. How shall the legacies be satisfied?
>
> *Answer* — After deducting the debts of the testator, the net value of the estate is only P60,000. It is evident that it is not sufficient to satisfy all of the legacies, since the total amount bequeathed by the testator is P70,000. Consequently, we apply the order of preference established in Art. 950. The legacies to R, P, S, and E are paid in the order named leaving a remainder of P10,000 which shall be divided *pro rata* (3:1) between X and Y.

[56]3 Tolentino, Civil Code, 1956 Ed., p. 313.

Problem No. 2 — The testator gives P20,000 to his children A and B. He bequeaths P5,000 to a friend, R, as remuneration for past services, P10,000 to S for support, P15,000 to E for education, and P10,000 to X as ordinary legacy. The net value of his estate is only P40,000. How shall the estate be distributed?

Answer — Since the legitime of the two children has already been provided for by the testator, it is evident that the conflict with regard to the disposable portion is exclusively among the legatees. Hence, Art. 950 shall apply. The legacy to R shall be satisfied ahead of the others. That leaves only P15,000 out of the free portion. The legacy to S shall then be satisfied. That leaves only P5,000 out of the free portion, all of which, shall go to E. Hence, nothing remains for X.

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.[57]

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.[58]

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.[59]

Art. 954. The legatee or devisee cannot accept a part of the legacy or devise and repudiate the other, if the latter be onerous.

[57]Art. 883, Spanish Civil Code, in modified form.
[58]Art. 886, Spanish Civil Code, in modified form.
[59]Art. 885, Spanish Civil Code, in modified form.

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.[60]

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.[61]

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.[62]

Effect of Ineffective Legacies or Devises. — There are three cases or situations contemplated by the above article.

In the first place, the legatee or devisee may be incapacitated to succeed the testator in accordance with the rules laid down in Arts. 1024 to 1040 of the Code; in the second place, he may repudiate the legacy or devise which is his perfect right in accordance with the rules stated in Arts. 1041 to 1057; and in the third place, the legacy or devise may become ineffective for some reason such as transformation, alienation or destruction of the object, or the non-fulfillment of a suspensive, condition. In all of these cases, the legacy or devise shall be merged with the mass of the hereditary estate, except in cases of substitution or accretion.

[60]Art. 889, Spanish Civil Code, in modified form.
[61]Art. 890, Spanish Civil Code, in modified form.
[62]Art. 888, Spanish Civil Code, in modified form.

Parish Priest of Roman Catholic Church of Victoria, Tarlac vs. Rigor
89 SCRA 493

The record discloses that Fr. Pascual Rigor died in 1935. He left a will which was duly admitted to probate. The project of partition was also approved and implemented. Named as devisees were the testator's nearest relatives, namely, his three sisters and a first cousin. In addition, it contained the controversial devise or bequest of four parcels of land with a total area of forty four hectares in favor of his nearest male relative who would study for the priesthood and become a priest. Attached to this conditional devise is the appointment of the parish priest of Victoria, Tarlac as administrator of the four parcels of land during the interval of time that no nearest male relative of the testator was studying for the priesthood.

About thirteen years after the approval of the project of partition, the parish priest of Victoria filed a petition in the pending testate proceeding for the appointment of a new administrator because the old one died. A new administrator was appointed. Subsequently, the priest filed a petition for the delivery of the four parcels of land to the Church as trustee. This petition was opposed by the intestate heirs.

The petitioner contends that the intention of the testator in case no nearest relative of his should become a priest is to create a public charitable trust with the church as trustee or substitute devisee. The intestate heirs, on the other hand, contend that since the devise became inoperative because of the fact that no nearest relative of the testator became a priest, the rules of intestacy should now apply with respect to the subject matter of the devise.

Speaking through Justice Aquino, the Supreme Court held:

> "In this case, as in cases involving the law of contracts and statutory construction, where the intention of the contracting parties or of the lawmaking body is to be ascertained, the primary issue is the determination of the testator's intention which is the law of the case *(dicat testator et erit lex).* (*Santos vs. Manarang*, 27 Phil. 209, 215; *Rodriquez vs. Court of Appeals,* L-28734, March 28, 1969, 27 SCRA 546).
>
> "The will of the testator is the first and principal law in the matter of testaments. When his intention is clearly

and precisely expressed, any interpretation must be in accord with the plain and literal meaning of his words, except when it may certainly appear that his intention was different from that literally expressed *(In re Estate of Calderon, 26 Phil. 333)*.

"'The intent of the testator is the cardinal rule in the construction of wills." It is "the life and soul of a will." It is "the first greatest rule, the sovereign guide, the polestar, in giving effect to a will". (See Dissent of Justice Moreland in *Santos vs. Manarang*, 27 Phil. 209, 223, 237-8).

"One canon in the interpretation of the testamentary provisions is that "the testator's intention is to be ascertained from the words of the will, taking into consideration the circumstances under which it was made", but excluding the testator's oral declarations as to his intention (Art. 789, Civil Code of the Philippines).

"To ascertain Father Rigor's intention, it may be useful to make the following restatement of the provisions of his will:

1. That he bequeathed the ricelands to anyone of his nearest male relatives who would pursue an ecclesiastical career until his ordination as a priest.

2. That the devisee could not sell the ricelands.

3. That the devisee at the inception of his studies in sacred theology could enjoy and administer the ricelands, and once ordained as a priest, he could continue enjoying and administering the same up to the time of his death but the devisee would cease to enjoy and administer the ricelands if he discontinued his studies for the priesthood.

4. That if the devisee became a priest, he would be obligated to celebrate every year twenty massess with prayers for the repose of the souls of Father Rigor and his parents.

5. That if the devisee is excommunicated, he would be divested of the legacy and the administration of the ricelands would pass to the incumbent parish priest of Victoria and his successors.

6. That during the interval of time that there is no qualified devisee, as contemplated above, the administration of the ricelands would be under the responsibility

of the incumbent parish priest of Victoria and his successors, and

7. That the parish priest-administrator of the ricelands would accumulate annually the products thereof, obtaining or getting from the annual produce five percent thereof for his administration and the fees corresponding to the twenty masses with prayers that the parish priest would celebrate for each year, depositing the balance of the income of the devise in the bank in the name of his bequest.

"From the foregoing testamentary provisions, it may be deduced that the testator intended to devise the ricelands to his nearest male relative who would become a priest, who was forbidden to sell the ricelands, who would lose the devise if he discontinued his studies for the priesthood, or having been ordained a priest, he was excommunicated, and who would be obligated to say annually twenty masses with prayers for the repose of the souls of the testator and his parents.

"On the other hand, it is clear that the parish priest of Victoria would administer the ricelands only in two situations: one, during the interval of time that no nearest male relative of the testator was studying for the priesthood and two, in case the testator's nephew became a priest and he was excommunicated.

"What is not clear is the duration of *"el intervalo de tiempo que no haya legatario acondicionado",* or how long after the testator's death would it be determined that he had a nephew who would pursue an ecclesiastical vocation. It is that patent ambiguity that has brought the controversy between the parish priest of Victoria and the testator's legal heirs.

"Interwoven with that equivocal provision is the time when the nearest male relative who would study for the priesthood should be determined. Did the testator contemplate only his nearest male relative at the time of his death? Or did he have in mind any of his nearest male relatives at anytime after his death?

"We hold that the said bequest refers to the testator's nearest male relative living at the time of his death and not to any indefinite time thereafter. "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" (Art. 1025, Civil Code).

"The said testamentary provisions should be sensibly or reasonably construed. To construe them as referring to the testator's nearest male relative at anytime after his death would render the provision difficult to apply and create uncertainty as to the disposition of his estate. That could not have been his intention.

"In 1935, when the testator died, his nearest legal heirs were his three sisters or second-degree relatives, Mrs. Escobar, Mrs. Manaloto and Mrs. Quiambao. Obviously, when the testator specified his nearest male relative, he must have had in mind his nephew or a son of his sister, who would be his third-degree relative, or possibly a grandnephew. But since he could not prognosticate the exact date of his death or state with certitude what category of nearest male relative would be living at the time of his death, he could not specify that his nearest male relative would be his nephew or grandnephews (the sons of his nephew or niece) and so he had to use the term "nearest male relative."

"It is contended by the legal heirs that the said devise was in reality intended for Ramon Quiambao, the testator's nephew and godchild, who was the son of his sister, Mrs. Quiambao. To prove that contention, the legal heirs presented in the lower court the affidavit of Beatriz Gamalinda, the maternal grandmother of Edgardo Cunanan, who deposed that after Father Rigor's death, her own son, Valentin Gamalinda, Jr., did not claim the devise, although he was studying for the priesthood at the San Carlos Seminary, because she (Beatriz) knew that Father Rigor had intended that devise for his nearest male relative belonging to the Rigor family (pp. 105-114, Record on Appeal).

"Mrs. Gamalinda further deposed that her own grandchild, Edgardo G. Gunanan, was not the one contemplated in Father Rigor's will and that Edgardo's father told her that he was not consulted by the parish priest of Victoria before the latter filed his second motion for reconsideration which was based on the ground that the testator's grandnephew, Edgardo, was studying for the priesthood at the San Jose Seminary.

"Parenthetically, it should be stated at this juncture that Edgardo ceased to be a seminarian in 1961. For that reason, the legal heirs appraised the Court of Appeals that the probate court's order adjudicating the ricelands to the parish priest of Victoria had no more leg to stand on (p. 84, Appellant's brief).

"Of course, Mrs. Gamalinda's affidavit, which is tantamount to evidence *aliunde* as to the testator's intention and which is hearsay, has no probative value. Our opinion that the said bequest refers to the testator's nephew who was living at the time of his death, when his succession was opened and the successional rights to his estate became vested, rests on a judicious and unbiased reading of the terms of the will.

"Had the testator intended that the "cualquier pariente mio varon mas cercano que estudie la carrera eclesiastica" would include indefinitely anyone of his nearest male relatives *born after his death,* he could have so specified in his will. He must have known that such a broad provision would suspend for an unlimited period of time the efficaciousness of his bequest.

"What then did the testator mean by "el intervalo de tiempo que no haya legatario acondicionado"? The reasonable view is that he was referring to a situation whereby his nephew living at the time of his death, who would like to become a priest, was still in grade school or in high school or was not yet in the seminary. In that case, the parish priest of Victoria would administer the ricelands before the nephew entered the seminary. But the moment the testator's nephew entered the seminary, then he would be entitled to enjoy and administer the ricelands and receive the fruits thereof. In that event, the trusteeship would be terminated.

"Following that interpretation of the will, the inquiry would be whether at the time Father Rigor died in 1935 he had a nephew who was studying for the priesthood or who had manifested his desire to follow the ecclesiastical career. That query is categorically answered in paragraph 4 of appellant priest's petitions of February 19, 1954 and January 31, 1957. He unequivocally alleged therein that "no nearest male relative of the late (Father) Pascual Rigor has ever studied for the priesthood" (pp. 25 and 35, Record on Appeals).

"Inasmuch as the testator was not survived by any nephew who became a priest, the unavoidable conclusion is that the bequest in question was ineffectual or inoperative. Therefore, the administration of the ricelands by the parish priest of Victoria, as envisaged in the will, was likewise inoperative.

"The appellant in contending that a public charitable trust was constituted by the testator in his favor assumes that he was a trustee or a substitute devisee. That contention is untenable. A reading of the testamentary provisions regarding the disputed bequest does not support the view that the parish priest of Victoria was a trustee or a substitute devisee in the event that the testator was not survived by a nephew who became a priest.

"It should be understood that the parish priest of Victoria could become a trustee only when the testator's nephew living at the time of his death, who desired to become a priest, had not yet entered the seminary or, having been ordained a priest, he was excommunicated. Those two contingencies did not arise, and could not have arise, in this case because no nephew of the testator manifested any intention to enter the seminary or ever became a priest.

"The Court of Appeals correctly ruled that this case is covered by Article 888 of the old Civil Code, now Article 956, which provides that if "the bequest for any reason should be inoperative, it shall be merged into the estate, except in cases of substitution and those in which the right of accretion exists" ("el legado x x x por qualquier causa, no tenga efecto, se refundira en la masa de la herencia, fuera de los casos de sustitucion y derecho de acrecer").

"This case is also covered by Article 912 (2) of the old Civil Code, now Article 960 (2), which provides that legal succession takes place when the will "does not dispose of all that belongs to the testator." There being no substitution nor accretion as to the said ricelands, the same should be distributed among the testator's heirs. The effect is as if the testator had made no disposition as to the said ricelands.

"The Civil Code recognizes that a person may die partly testate and partly intestate, or that there may be mixed succession. The old rule as to the indivisibility of the testator's will is no longer valid. Thus, if a conditional

legacy does not take effect, there will be intestate succession as to the property covered by the said legacy (Macrohon Ong Ham vs. Saavedra, 51 Phil. 267).

"We find no merit in the appeal. The Appellate Court's decision is affirmed. Costs against the petitioner.

"SO ORDERED."

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 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 of 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.[63]

Revocation of Legacies and Devises. — The different causes for the revocation of legacies and devises enumerated in the above article are examples of what is known as revocation by "implication of law" within the meaning of No. 1 of Art. 830 of the Code. They take effect automatically and by operation of law. The enumeration, however, is not complete. We can add as a fourth cause or ground the act of the testator in bringing an action against the debtor for payment of the debt as applied to legacies of a credit or of remission of a debt. Under Art. 936, such an action will also have the effect of revoking the legacy.

[63]Art. 869, Spanish Civil Code, in modified form.

Idem; Revocation by transformation. — If the testator transforms the thing bequeathed in such a manner that it does not retain both the form and the denomination it had, there is an implied revocation of the legacy or devise. It is essential, therefore, that the transformation must be both with respect to the form and denomination. Transformation with respect to the form only but not with respect to the denomination is not sufficient. Neither is transformation with respect to the denomination but not with respect to the form. The form refers to the external appearance of the thing bequeathed or devised; the denomination refers to the name by which the thing is known. Thus, if the thing devised is a parcel of rice land, and subsequently, the testator transforms it into a fish pond, there is an implied revocation of the devise. If the thing bequeathed is a diamond ring, and subsequently, the testator transforms it into a bracelet, there is also an implied revocation of the legacy. However, if there is a mere enlargement or a mere incorporation of the thing to another — so that there is no change in either form or denomination, there can be no revocation. In the latter case, the rule of accession shall apply.[64]

It must also be noted that the transformation of the object must have been made by the testator himself or by some other person acting for him as agent. Otherwise, if it was made by a third person without any authority from the testator, there would be no revocation.[65]

Idem; Revocation by alienation. — If the testator by any title, whether by sale or any other act of disposition *inter vivos,* alienates the thing bequeathed or any part thereof, there is also an implied revocation of the legacy or devise. If only a part of the thing is alienated, the legacy or devise shall take effect with respect to the part untouched. Hence, there would be only a partial revocation.

There can be no revival of the legacy or devise once revoked impliedly by alienation. This is clear from a mere reading of the law. The rule is applicable even when the thing alienated should again belong to the testator even if it be by reason of the nullity of the contract. Obviously, "nullity of the contract" does not refer to want or

[64]6 Manresa, 7th Ed., pp. 740-741.
[65]Ibid., p. 741.

absence of consent, such as when violence, or intimidation, or fraud has been used upon the testator. In these cases, there can never be any intention of the testator to alienate. Hence, there can be no implied revocation of the legacy. If, therefore, the thing is returned to the testator, the legacy is still valid. Therefore, when the law speaks of the "nullity of the contract," if refers to causes of nullity predicated upon the fact that the alienation is voluntary and absolute, such as a sale made by a minor who has already made a will, or a donation made by the testator subsequent to the execution of the will but which is void as to form. What matters is that the presumed intention of the testator to revoke has already been expressed or manifested by a positive act. The mere reacquisition of the thing does not mean that this intention has changed.[66]

There is, however, one exception to the rule. The law declares that if after the alienation the thing should again belong to the testator, 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." Hence, if the testator sells the thing which is the subject matter of the legacy or devise with right of repurchase subsequent to the execution of the will, the revocation is conditional. If he exercises his right of redemption there is no revocation; the legacy or devise will, therefore, take effect. If he does not exercise his right of redemption, the revocation becomes absolute.

Idem; Revocation by loss or destruction. — If the thing bequeathed is totally lost during the lifetime of the testator or after his death without the heir's fault, obviously, the legacy or devise can no longer take effect. If the thing bequeathed or devised is determinate, there is no liability for eviction on the part of the person obliged to pay or deliver the legacy or devise; if it is indeterminate as to its kind, the latter shall be liable in accordance with the provision of Art. 928.

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.[67]

[66]Ibid., pp. 743-744.
[67]New provision.

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.[68]

Dispositions in Favor of Relatives. — The rule stated in the above article is applicable not only to legacies and devises, but also to institution of heirs. Therefore, if the testator states in his will that he is leaving all of his properties to all of his relatives, or that all of his personal or real properties shall be divided among his relatives, according to the above article, the testamentary disposition shall be understood to be in favor of those nearest in degree. In other words, there is only one rule that will apply and that is the rule of proximity.[69] Consequently, the other rules of intestate succession, such as the rule of preference between lines, the right of representation and the rule of double share for full-blood collaterals are not applicable.[70] It must, however, be noted that the law speaks only of dispositions made in general terms in favor of the testator's relatives. Thus, in *Vda. de Singson vs. De Lim,*[71] where the testator stated in his will that all of his properties not disposed of in the will "shall be distributed in equal parts to all who are entitled thereto," it was held that the rule enunciated in what is now Art. 959 of the Code cannot be applied. The testator, who was a lawyer, by referring to "all who are entitled thereto," instead of his relatives, clearly intends that the properties shall be given to those entitled thereto in accordance with the rules of intestate succession. Therefore, not only the rule of proximity, but other rules of intestate succession, such as the right of representation, must be applied.

The application of the rule enunciated in Art. 959 may be illustrated by the following problem:

> *Problem* — Before his death in an automobile accident, A was able to execute a will. In the will he expressly stated that he is leaving all of his properties to all of his relatives. During the proceedings for the settlement of his estate, the following filed their claims as heirs: (1) B, his widow; (2) C and D, his brothers; and (3) E and F, his nephews, children of a deceased sister. The net remainder of his estate is P60,000. How shall the distribution be made?

[68] Art. 751, Spanish Civil Code.
[69] See Art. 962, par. 1, Civil Code.
[70] 6 Manresa, 7th Ed., pp. 42-43.
[71] 74 Phil. 109.

Answer — It is clear that the case falls squarely within the purview of Art. 959 of the Code. The disposition is made in general terms in favor of the testator's relatives. Hence, there is only one rule that will apply and that is the rule of proximity. E and F, nephews of the testator, cannot inherit by right of representation, not only because of the rule that only a compulsory heir can be represented in testamentary succession (and certainly a brother or sister is not a compulsory heir), but also because of the fact that Art. 959 of the Code excludes the application of such right. Hence, they are excluded by C and D, brothers of the testator. B, the widow of the testator, on the other hand, is not a "relative" of the testator within the meaning of Art. 959. Under this article, "relatives" refer to those who are related to the testator by consanguinity, not by affinity. Therefore, B cannot participate in the inheritance, but only with respect to the disposable free portion. Being a compulsory heir, her legitime cannot be impaired. Consequently, the inheritance shall be distributed as follows:

B	.....	P30,000,	as a compulsory heir,
C	.....	15,000,	as a voluntary heir,
D	.....	15,000,	as a voluntary heir.

Chapter III

LEGAL OR INTESTATE SUCCESSION

Section 1. — General Provisions

Concept of Legal or Intestate Succession. — Legal or intestate succession is that which is effected by operation of law in default of a will. It is legal because it takes place by operation of law; it is intestate because it takes place in the absence or in default of a last will of the decedent.

Because of man's tendency to make a will only when death approaches and because death sometimes strikes without any warning, even when a person intends to make a will, yet he dies without one. Even when a will exists, it may be void or defective; the instituted heirs may die before the testator, or be incapacitated to inherit from such testator, or even repudiate their inheritance; the condition attached may or may not be fulfilled resulting either in the prevention of the birth of a right or in its extinguishment depending upon the nature of the condition. In order to cope with any of these possibilities, the Code has provided for what is known as legal or intestate succession by designating the person or persons who shall succeed the decedent. Its essential feature is that it is the law which operates, not the will of the decedent, but even when it is the law which designates the persons who are to succeed, the basis of the designation is the presumed will of the decedent. It proceeds on the principle that if the decedent had made a will he would have provided, *first,* for his children or descendants, *second,* for his parents or ascendants, and *third,* for his collaterals. Love or affection, as a commentator once said, descends, then ascends, and finally spreads. In the absence of the persons for whom the decedent would have provided, it is presumed that he would have desired his property to pass to the State.[1]

[1] 7 Manresa, 6th Ed., pp. 34-35.

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.[2]

Causes of Intestacy. — The most common cause of intestacy is if the decedent dies without a will. In such case, the law comes into operation and disposes of his property in accordance with his presumed will. But even where he has made a will there is always the possibility that it is void because of the existence of any of the grounds for the disallowance of wills enumerated in Art. 839 of the Code, in which case, it cannot be admitted to probate by the probate court. And even when the will was not defective at the time of its execution, there is also the possibility that it might subsequently lose its validity before the testator's death, such as when there is a revocation in accordance with the requisite formalities prescribed by law. In such cases, in default of any other legal or intestate succession shall take place.

Another common cause of intestacy is if the testator executes a will but disposes of only a part of his properties. In such case, mixed succession shall take place, because evidently, the rules of legal intestate succession shall be applied with respect to those properties not disposed of. This cause includes those cases where the institution of heirs is void with respect to the disposition of certain properties but valid with respect to the disposition of other properties.[3]

[2]Art. 912, Spanish Civil Code, in modified form.
[3]7 Manresa, 6th Ed., p. 47.

Another cause of intestacy is if a testamentary disposition becomes ineffective or inoperative, such as when the condition which is attached is fulfilled or not fulfilled, or when the instituted heir, or legatee, or devisee dies before the testator, or is incapacitated to inherit from such testator, or repudiates his inheritance, legacy or devise.

If a testamentary disposition is made to depend upon the fulfillment of a suspensive condition and such condition does not happen or is not fulfilled, the result is that the testamentary disposition becomes ineffective. Consequently, the heir, legatee or devisee acquires nothing. Hence, legal or intestate succession shall take place. On the other hand, if the testamentary disposition is subject to a resolutory condition and such condition is fulfilled, the result is that the right of the heir, legatee or devisee which he had already acquired at the time of the death of the testator is extinguished. Although this is not included among the causes of intestacy as enumerated in Art. 960, evidently, legal or intestate succession shall also take place in such a case.

If the instituted heir, legatee or devisee dies before the testator, or is incapacitated to inherit from the testator, or repudiates the inheritance, legacy or devise, the result is a vacancy in the inheritance. In such case, the rules of intestate succession shall be applied to the portion or property which is rendered vacant. This is, however, without prejudice to the following rights: *first,* the right of the substitute if one has been designated by the testator; *second,* the right of representation when it properly takes place; and *third,* the right of accretion when it properly takes place.

Idem; Other causes of intestacy. — In addition to those enumerated in Art. 960, there are other causes of intestacy, such as (1) when there is a preterition in the testator's will of one, or some, or all of the compulsory heirs in the direct line, or (2) when a testamentary disposition is subject to a resolutory condition and such condition is fulfilled, or (3) when a testamentary disposition is subject to a term or period and such term or period expires, or (4) when a testamentary disposition is impossible of compliance or is ineffective.[4]

[4]Ibid., p. 53.

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.[5]

Order of Intestate Succession. — The above article states in its general form the order of intestate succession. The order is based on the presumed will of the decedent. In default of testamentary heirs, it is presumed that he would have provided: *first,* for legitimate relatives; *second,* for illegitimate relatives; *third,* for the surviving spouse; and *fourth,* for the State.

The order of intestate succession is prescribed by law. Hence, any agreement or partnership contract entered into by the parties cannot affect the hereditary rights which belong to the relatives of the deceased predecessor-in-interest nor alter the order prescribed by law for intestate succession.[6]

Idem; Rule of preference between lines. – One of the most important principles of legal or intestate succession is what is sometimes known as the *rule of preference between lines*. According to this principle, those in the direct descending line shall exclude in the succession those in the direct ascending and collateral lines, and those in the direct ascending line shall, in turn, exclude those in the collateral line. This principle is clearly deducible from the provision of Art. 961, defining the order of intestate succession. It is expressly recognized in the provisions of Arts. 978, 985, 988, 995, 1003, and 1011 of the Code regulating the order of intestate succession.

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.[7]

[5]Art. 913, Spanish Civil Code, in modified form.
[6]Rodriguez vs. Ravilan, 17 Phil. 63.
[7]Art. 921, Spanish Civil Code, in modified form.

Rules of Proximity. — In every inheritance, whether testamentary or intestate, the relatives nearest in degree to the decendent shall exclude the more distant ones. Hence, a son excludes the grandson, a father excludes the grandfather, a brother excludes the nephew. It must be observed, however, that this rule presupposes that all of the relatives belong to the same line. In other words, the rule of proximity is subordinated to the rule of preference between lines by virtue of which those in the direct descending line shall exclude those in the direct ascending and collateral lines, while those in the direct ascending line shall exclude those in the collateral line. Hence, although the son and the father of the decedent are both one degree removed from the latter, the son shall exclude the father. The grandson is two degrees removed from the decedent; so is the latter's brother; but the grandson shall exclude the decedent's brother in the succession.[8]

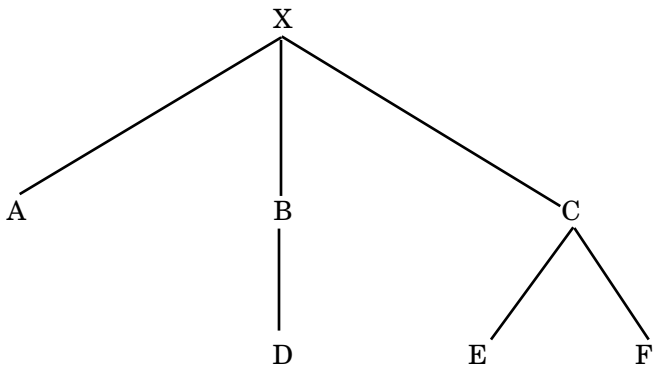
Idem; Exception. — The rule of proximity is modified by the right of representation as defined in Art. 970 of the Code. As a general rule, a grandson is excluded by a son. Representation, however, prevents such exclusion. Thus, if the decedent is survived by his son, A, and by his grandchildren, C and D, children of a deceased, or incapacitated, or disinherited child, B under the law, C and D are not excluded by A in the succession in spite of the rule of proximity, because, by right of representation, they are raised to the place and degree of their deceased or incapacitated, or disinherited father. As a general rule, nephews and nieces are excluded by a brother, but such exclusion is nullified by representation. Thus if the decedent is survived by his brother, X, and his nephews, A and B, children of a deceased brother, Y, such nephews shall still participate in the succession by right of representation.[9]

Rule of Equal Division. — Another rule of fundamental importance in legal or intestate succession is the principle enunciated in the second paragraph of Art. 962. Relatives of the same degree shall inherit in equal shares. Like the rule of proximity, this rule presupposes that all of the relatives belong to the same line. In other words, it is subordinated to the rule of preference between lines. Hence, although a grandson of the decedent is a relative of the latter

[8]7 Manresa, 6th Ed., p. 68; 6 Sanchez Roman.
[9]7 Manresa, 6th Ed., pp. 68-69.

in the second degree, while the father of such decedent is a relative in the first degree, yet the former, who is in the direct descending line, shall exclude the latter, who is in the direct ascending line.

Idem; Exceptions. — There are, however, three exceptions to the rule that relatives of the same line and degree shall inherit in equal shares. They are: *first,* when the inheritance is divided between paternal and maternal grandparents; *second,* when the inheritance is divided among brothers and sisters, some of whom are of the full blood and others of the half blood; and *third,* in certain cases when the right of representation takes place. In the first, when the decedent is survived by two grandparents in the paternal line and by one grandparent in the maternal line, the inheritance shall be divided in such a way that one-half shall pass to the grandparents in the paternal line, while the other one-half shall pass to the surviving grandparent in the maternal line.[10] In the second, those of the full blood shall be entitled to double the share of those of the half blood.[11] In the third, whenever there is succession by representation, the division of the estate shall be made *per stirpes,* in such manner that the representatives, although of the same degree, shall not inherit more than what the person they represent would inherit, if he were living or could inherit.[12] This may be illustrated by the following example:



[10]Art. 987, par. 2, Civil Code.
[11]Art. 1006, Civil Code.
[12]Art. 974, Civil Code.

X is survived by his son, A, and his grandchildren, D, E and F. D is the child of a deceased son of X (B); E and F are the children of another deceased son of (C). It is clear that A shall inherit in his own right, while the grandchildren shall inherit by right of representation. D shall receive the share that would have gone to his father if the latter were alive; E and F shall also receive the share that would have gone to their father if the latter were also alive. Hence, although they are all two degrees removed from the decedent, D shall receive twice as much as either E or F.

Subsection 1. — Relationship

Art. 963. Proximity of relationship is determined by the number of generations. Each generation forms a degree.[1]

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.[2]

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.[3]

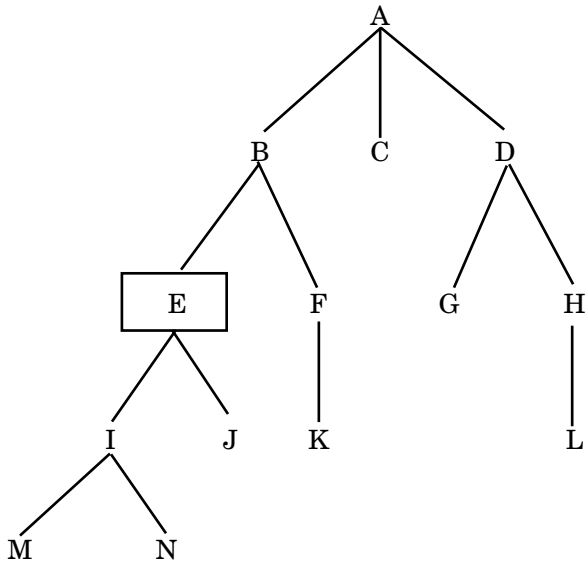
Art. 966. In the line, as many degrees are counted as there are generations or persons, excluding the progenitor.

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.

[1]Art. 915, Spanish Civil Code.
[2]Art. 916, Spanish Civil Code, in modified form.
[3]Art. 917, Spanish Civil Code.

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.[4]

Computation of Degrees. — The rules for computation of degrees may be illustrated by the following example:



A is the common ancestor; B, C and D are the children of A; E and F are the children of B G and H are the children of D; I and J are the children of E; K is the child of F; L is the child of H; and M and N are the children of I. Let us assume that E is the *propositus* or person with whom the computation is made.

In terms of degrees, how is E related to his grandson, M? In this case, descent is made from E to M, counting the number of persons from E to M — minus one. Therefore, E is two degrees removed from his grandson, M. How is E related to his grandfather, A? The

[4]Art. 918, Spanish Civil Code, in modified form.

same procedure is followed. Ascent is made from E to A, counting the number of persons from E to A — minus one. Therefore, E is two degrees removed from his grandfather, A. How is E related to his brother, F? In this case, ascent is made from E to their common ancestor, B, and then descent is made to F counting the number of persons from E up to B down to F — minus one. Therefore, E is two degrees removed from his brother, F. How is E related to his uncle, C? The same procedure is followed. Ascent is made to E to their common ancestor, A, and then descent is made to C, counting the number of persons from E up to B to A down to C — minus one. Therefore, E is three degrees removed from his uncle, C. How is E related to his first cousin, H? The same procedure is again followed. Ascent is made from E to their common ancestor, A, and then descent is made to H, counting the number of persons from E up to B to A down to D to H — minus one. Therefore, E is four degrees removed from his first cousin H.

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.[5]

Art. 968. If there are several relatives of the same degree, and one or more 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.[6]

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.[7]

Effect of Incapacity or Repudiation. — Arts. 968 and 969 give the general effects of incapacity or repudiation upon the order of intestate succession. It must be noted that while Art. 968 refers to

[5]Art. 920, Spanish Civil Code, in modified form.
[6]Art. 922, Spanish Civil Code.
[7]Art. 923, Spanish Civil Code.

a case where one or some of the surviving relatives of the decedent of the same class and degree are incapacitated to inherit from him or have repudiated their inheritance, Art. 969, on the other hand, refers to a case where all of such relatives have repudiated their inheritance.

Under Art. 968, in case of incapacity, the share or shares which are rendered vacant shall pass to the co-heirs of the incapacitated heir or heirs by right of accretion. This rule, however, is not absolute. If the incapacitated heir happens to be a child or descendant of the decedent and he has children or descendants of his own, then the share which is rendered vacant by reason of incapacity shall pass to such children or descendants by right of representation. It is, therefore, evident that the right of representation is superior to the right of accretion.

On the other hand, in case of repudiation by one or some of the relatives, the share or shares which are rendered vacant shall pass to the co-heirs of the renouncer or renouncers by right of accretion. This rule is absolute, even assuming that the renouncer is a child or descendant of the decedent and he has children or descendants of his own. This is so because of the principle that an heir who repudiates his inheritance may not be represented.[8]

Under Art. 969, all of the relatives of the decedent of the same class and degree called by the law to succeed have repudiated their inheritance. What is the effect of this total vacancy? According to the law, those of the following degree shall inherit in their own right. They cannot inherit by right of representation because of the principle that an heir who repudiates his inheritance may not be represented.[9] Consequently, if the decedent is survived by, let us say, four legitimate children, and all of them repudiate their inheritance, the effect of such repudiation is that those of the following degree shall be called to the succession. But such relatives shall inherit in their own right and not by right of representation, even if they are the grandchildren of the decedent. Hence, the inheritance shall be distributed among them *per capita*. It would be different if instead of repudiation by all of the heirs, all of them died before the decedent or all of them are incapacitated to inherit. In such case, the grand-

[8]Art. 977, Civil Code.
[9]*Ibid*.

children shall inherit by right of representation and not in their own right.[10] Hence, the inheritance shall be distributed among them *per stirpes*[11] and not *per capita*.

Problem No. 1 — X died intestate survived by: (1) A, B, C, D and E, his legitimate children; (2) F, G, H and I, legitimate children of B; (3) J and K, legitimate children of C; (4) L and M, legitimate children of D; and (5) N and O, legitimate children of E. B, C, D and E, however, are incapacitated to inherit from X. Once upon a time, they were all convicted of frustrated parricide. If the net value of the estate of X is P400,000, how shall it be divided? Reasons.

Answer — A shall inherit in his own right, while the legitimate children of B, C, D and E shall inherit by right of representation *(Arts. 968, 981, 982, 1035, Civil Code)*. Consequently, the estate shall be divided *per stirpes (Art. 974, Civil Code)*. In other words, F, G, H, I, J, K, L, M, N and O shall be subrogated to the rights of their parents had the latter not been incapacitated. Therefore, the division shall be as follows:

A	P80,000,	in his own right
F	20,000,	as representative of B
G	20,000,	as representative of B
H	20,000,	as representative of B
I	20,000,	as representative of B
J	40,000,	as representative of C
K	40,000,	as representative of C
L	40,000,	as representative of D
M	40,000,	as representative of D
N	40,000,	as representative of E
O	40,000,	as representative of E
Estate	P400,000	

Problem No. 2 — Suppose that in the above problem B, C, D and E have the required capacity to inherit from X, but they all repudiated their inheritance, how shall the estate be divided.

[10]See Art. 982, Civil Code.
[11]Art. 974, Civil Code.

Answer — In such a case, since B, C, D and E cannot be represented by their children *(Art. 977, Civil Code)*, their shares which are rendered vacant will pass to A by right of accretion *(Arts. 978, 1018, Civil Code)*.

Problem No. 3 — Suppose that in the above problem, all of the children of X are incapacitated to inherit from him, how shall the P400,000 estate be divided?

Answer — In such a case, the grandchildren shall inherit by right of representation *(Arts. 982, 1015, Civil Code)*. Consequently, the division of the estate shall be *per stirpes* **and not** *per capita (Art. 974, Civil Code)*. Disregarding A altogether because his share which is rendered vacant by incapacity will be merged in the hereditary estate, the division is as follows:

F	.....	P25,000,	in his own right
G	.....	25,000,	as representative of B
H	.....	25,000,	as representative of B
I	.....	25,000,	as representative of B
J	.....	50,000,	as representative of B
K	.....	50,000,	as representative of C
L	.....	50,000,	as representative of C
M	.....	50,000,	as representative of D
N	.....	50,000,	as representative of D
O	.....	50,000,	as representative of E
		P400,000	

Problem No. 4 — Suppose that in the above problem, all of the children of X have the necessary capacity to inherit from him but all of them repudiated their inheritance, how shall the P400,000 estate be divided?

Answer — This is the only exceptional case where grandchildren can inherit in their own right and not by right of representation. Representation in the instant case is, of course, impossible because of the principle that an heir who repudiates his inheritance cannot be represented *(Arts. 969, 977, Civil Code)*. Therefore, the division of the P400,000 estate shall be *per capita* and not *per stirpes*. Consequently, each of the grandchildren shall inherit P40,000.

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.[1]

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.[2]

Concept of Representation. — In every inheritance, the relative nearest in degree excludes the more remote ones. This is known as the *rule of proximity* which is one of the guiding principles of our system of compulsory succession in both testamentary and intestate succession. It is primarily a rule of exclusion. Thus, the son excludes the grandson, the father excludes the grandfather, the brother excludes the uncle or nephew. As a matter of fact, in legal or intestate succession, it is one of the bases of the order of succession. However, it is not absolute in character. There is one very important exception. This exception is what is known as the *right of representation*. By virtue of this right, the relative nearest in degree does not always exclude the more remote ones, because, by fiction of law, more distant relatives belonging to the same class as the person represented, are raised to the place and degree of such person, and acquire the rights which the latter would have acquired if he were living or if he could have inherited.[3]

Characteristics. – The most important characteristics of the right of representation are the following: *first,* it is a right of subrogation; *second,* it constitutes an exception to the rule of proximity and the rule of equal division among relatives of the same class and degree; *third,* the representative is called to the succession by the law and not by the person represented; *fourth,* the representative succeeds the decedent and not the person represented; *fifth,* it can

[1]Art. 924, Spanish Civil Code, in modified form.
[2]New provision.
[3]7 Manresa, 6th Ed., pp. 73-74.

only take place when there is a vacancy in the inheritance brought about by either predecease, or incapacity, or disinheritance of an heir; and *sixth,* as a general rule, the right can be exercised only by grandchildren or descendants of the decedent.

Probably, the most significant among these characteristics are the third and the fourth which are now expressly stated in Art. 971 of the New Civil Code. The representative does not succeed the person represented but the one whom the person represented would have succeeded. Thus, a grandson is called to succession by law because of his blood relationship. He does not succeed his father (the person represented) who predeceased his grandparent. The grandson succeeds his grandparent whom his father would have succeeded.[4]

Because of the principle that the representative inherits from the decedent and not from the person represented, the following consequences will necessarily follows: *first,* the representative must be capable of succeeding the decedent;[5] *second,* even if the representative is incapable of succeeding the person represented, he can still inherit by right of representation so long as he is capable of succeeding the decedent; and *third,* even if the representative had repudiated his inheritance coming from the person represented, he can still inherit from the decedent by right of representation.[6]

When Representation Takes Place. — In testamentary succession, the right of representation can take place only in the following cases: *first,* when the person represented dies before the testator; *second,* when the person represented is incapable of succeeding the testator; and *third,* when the person represented is disinherited by the testator. In all of these cases, since there is a vacancy in the inheritance, the law calls the children or descendants of the person represented to succeed by right of representation. It must be noted, however, that in testamentary succession *the person represented must be a compulsory heir of the testator in the direct descending line*. It will be recalled that under Art. 856 of the Code, a voluntary heir cannot transmit any right to his own heirs in case he dies before the testator. The same rule can also be applied if he is incapable of succeeding the testator. This rule is absolute in

[4]Rosales vs. Rosales, G.R. No. 40789, February 27, 1987.
[5]Art. 973, Civil Code.
[6]Art. 976, Civil Code.

character. A compulsory heir in the direct descending line on the other hand, can transmit his rights, but only with respect to the legitime. In other words, if a compulsory heir in the direct line dies before the testator, his own children or descendants shall still participate in the succession, not in their own right, but by right of representation. The same rule can also be applied if such heir is incapable of succeeding the testator or is disinherited.

In legal or intestate succession, the right of representation can take place only in the following cases: *first,* when the person represented dies before the decedent; and *second,* when the person represented is incapable of succeeding the decedent. In both of these cases, since there is a vacancy in the inheritance, the law calls the children or descendants of the person represented to succeed by right of representation to the entire portion which is rendered vacant.

From what has been stated, it is clear that the principle of representation is applicable whenever there is a vacancy in the inheritance brought about by their predecease, or incapacity, or disinheritance. In all of these cases, the basis like that of other rights of succession which take effect by operation of law, is the presumed will of the decedent. As far as the decedent is concerned, the son or daughter who is unworthy or who has been disinherited is dead. As a penalty, the law or the paternal will, therefore, deprives such child of his inheritance. This penalty, however, must not be vested upon the grandchildren. On the contrary, the decedent must be drawn to them more for the misfortune of having such an unworthy father or mother.[7]

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.[8]

Representation in Direct Descending Line. — According to the above article, the right of representation takes place in the direct descending line, but never in the ascending line. This is

[7] 7 Manresa, 6th Ed., pp. 75-76. For the effect of disinheritance incapacity upon the right of representation, *see* Arts. 923 and 1035, Civil Code.

[8] Art. 925, Spanish Civil Code.

the general rule. As Laurent expresses it, affection, like a river, descends; it does not ascend. This is the law of human nature which the lawmaker must respect. This law is crystallized in the concept of representation.[9]

Thus, the right of representation in the direct line takes place in the following cases: *first,* when children concur with grandchildren, the latter being the children of other children who died before the decedent or who are incapable of succeeding the decedent; *second,* when all the children are dead or are incapable of succeeding the decedent and grandchildren concur with great-grandchildren, the latter being the children of other grandchildren who died before the decedent or are incapable of succeeding the decedent; and *third,* when all children are dead or are incapable of succeeding the decedent leaving children or descendants of the same degree.[10]

Representation in Collateral Line. — As a rule, the right of representation takes place only in the direct descending line. However, there is an exceptional case where the right does not take place in the direct descending line but in the collateral line in favor of children of brothers and sisters of the decedent, whether they be of the full blood or half blood. The right, however, is subject to the following limitations:

(1) The right can be exercised only by nephews and nieces of the decedent. This is clear from the provisions of Arts. 972 and 975 of the Code. Consequently, it cannot be exercised by grandnephews and grandnieces.

(2) The right can be exercised by the nephews or nieces of the decedent if they will concur with at least one brother or sister of the decedent. This limitation is expressly provided for in Art. 975. Otherwise, if they are the only survivors, they shall inherit in their own right and not by right of representation.[11]

> *Problem No. 1* — X died intestate survived by the following: A and B, nephews through a predeceased sister, Y and M and N, grandnieces through a predeceased nephew, Z, M and N claim the right to inherit one-third of the estate of X by repre-

[9]7 Manresa, 6th Ed., p. 87.
[10]Ibid.
[11]Pavia vs. Iturralde, 5 Phil. 176; Sarita vs. Candia, 23 Phil. 443.

sentation of their parent, Z. Is their claim legally tenable? Reasons. (1971 Bar Problem)

Answer — The claim of M and N to inherit one-third of the estate of X by representation of their parent, Z, is untenable. It must be observed that they are merely grandnieces of the decedent, X. Under the Civil Code, representation in the collateral line can only take place in favor of nephews and nieces *(Art. 972),* never in favor of grandnephews and grandnieces. As a matter of fact, nephews and nieces can inherit from the decedent by right of representation only when they survive or concur with at least one uncle or aunt, who is a brother or sister of said decedent *(Art. 975).* Even this condition is not present in the instant case. It is clear from the facts that the only survivors are nephews (A and B) and grandnieces (M and N). Therefore, since the only possible way by which such survivors can inherit would be in their own right, the rule of proximity is applicable. Only A and B can inherit from X.

Problem No. 2 — A and B are C's brothers. D is the child of A, and E of B, while F is the child of D. C died without leaving a will. A, B and D are likewise dead. May F inherit from C? Explain. (1973 Bar Problem)

Answer — F cannot inherit from C. True, he is a fourth degree relative by blood of the decedent, but he is excluded by E, a nephew, and therefore, a third degree relative by blood of said decedent.

Actually, the right of representation does not take place in the instant case. In the collateral line, representation takes place only in favor of the children of brothers and sisters, whether they be of the full or half blood *(Art. 972),* and only if they survive with at least one uncle or aunt who is a brother or sister of the decedent *(Art. 975).* Both conditions are not present here. F is a grandnephew of the decedent C, not a nephew. He concurs with a nephew of the decedent, not with a brother or sister. Therefore, the only way by which he can inherit would be in his own right. Unfortunately for him, under the principle of proximity recognized in Art. 962 of the Civil Code, he is excluded by E.

(3) The right of representation in the collateral line is possible only in intestate succession; in other words, it cannot possibly take place in testamentary succession. Although the law does not include this limitation in this subsection of the Civil Code, yet it can easily be inferred from the provisions of Art. 856. According to

this article, a voluntary heir cannot transmit any right to his own heirs in case he dies before the testator; in other words, (and this can also be applied to incapacity), if a voluntary heir dies before the testator, survived by children or descendants of his own, he cannot be represented in the succession by such children or descendants. From these principles which are enunciated in Art. 856 of the Code, two conclusions can be inferred. In the first place, the right of representation in testamentary succession is possible only when the person represented is a compulsory heir in the direct descending line; in the second place, the right of representation in testamentary succession pertains only to the legitime, which is rendered vacant by either predecease, incapacity or disinheritance, and never to the free portion. Consequently, since brothers and sisters of the testator are voluntary heirs and not compulsory heirs, if some or all of them are instituted as heirs in the testator's will, and one of them dies before the testator or is incapable of succeeding the testator, such brother or sister cannot transmit any right at all to his own heirs. The portion of the inheritance which is rendered vacant shall, therefore, pass to his co-heirs by right of accretion.[12]

Art. 973. In order that representation may take place, it is necessary that the representative himself be capable of succeeding the decedent.[13]

Capacity of Representative. — The above rule is a logical consequence of the principle enunciated in Art. 971 of the Code to the effect that the representative succeeds the decedent and not the person represented. Consequently, even if the representative is incapable of succeeding the person represented, he can still inherit by right of representation, provided that he is capable of succeeding the decedent.

Art. 974. Whenever there is succession by representation, the division of the estate shall be made *per stirpes,* in such manner that the representatives shall not inherit more than what the person they represent would inherit, if he were living or could inherit.[14]

[12]Arts. 1015, *et seq.,* Civil Code.
[13]New provision.
[14]Art. 926, Spanish Civil Code, in modified form.

Effect Upon Division of Estate. — The most fundamental effect of succession by representation is that the representative is, by legal fiction, raised to the place and degree of the person represented. As a consequence, such representative is subrogated to all of the rights to which the person represented would have been entitled by operation of law if he were living or if he could have inherited. Thus, in testamentary succession, the representative acquires all of the rights which the person represented had with respect to his legitime, while in legal or intestate succession he acquires all of the rights which the person represented had with respect to his entire legal portion. In both cases, according to Art. 974, 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.

It must be observed that the essential difference between representation in testamentary succession and representation in intestate succession is that in the former, the right which is acquired by the representatives is the right to the legitime of the compulsory heir who dies before the testator, or who is unworthy to succeed, or who is disinherited, while in the latter, the right which is acquired is the right to the legal portion which is rendered vacant by reason of the fact that the legal heir dies before the decedent or is unworthy to succeed. In other words, in testamentary succession, the right of representation refers to the legitime, while in intestate succession, the right refers to the whole share with would have been acquired by the person represented.

The above principles may be illustrated by the following problems:

> *Problem No. 1* — X executed a will instituting his three legitimate children, A, B and C, as sole heirs — A to inherit 1/2 of the free portions, B, 1/4 of the free portion, and C, 1/ 4 of the free portion. B and C, however, were both killed in an accident before the death of the testator. The latter died a few days later without changing his will. B is survived by his legitimate children, D, E, F, and G, while C is survived by his legitimate children, H and I. The net remainder of the estate is P48,000. How shall such estate be divided among the heirs?
>
> *Answer* — If the instituted heirs, A, B and C, were all living at the time of the death of X and they could all inherit, the division of the inheritance would have been as follows:

A	.....	P 8,000,	as compulsory heir
	.....	12,000,	as voluntary heir
B	.....	8,000,	as compulsory heir
		6,000,	as voluntary heir
C	.....	8,000,	as compulsory heir
		6,000,	as voluntary heir

However, the shares which would have passed to B and C are now vacant. What will happen to these vacant shares? Under the law, D, E, F, and G shall now represent their father, B, but only with respect to the legitime of P8,000. The P6,000 which would have passed to B as a voluntary heir shall accrue to A *(Arts. 1015, 1016)*. H and I shall also represent their father, C, but only with respect to the legitime of P8,000. The P6,000 which would have passed to C as a voluntary heir shall also accrue to A *(Arts. 1015, 1016)*. Consequently, the division shall be as follows:

A	.....	P 8,000,	as compulsory heir
		12,000,	as voluntary heir
		12,000,	by right of accretion
D	.....	2,000,	by right of representation
E	.....	2,000,	by right of representation
G	.....	2,000,	by right of representation
F	.....	2,000,	by right of representation
H	.....	4,000,	by right of representation
I	.....	4,000,	by right of representation
		P48,000	

Problem No. 2 — Suppose that in the above problem, X died without a will, how shall the division be made?

Answer — The division of the estate shall be as follows:

A	.....	16,000,	in his own right
D	.....	4,000,	by right of representation
E	.....	4,000,	by right of representation
F	.....	4,000,	by right of representation
G	.....	4,000,	by right of representation
H	.....	8,000,	by right of representation
I	.....	8,000,	by right of representation
		P 48,000	

Problem No. 3 — X died testate in 1980. In his will, he instituted as heirs his four legitimate children A, B, C, and D to inherit in equal shares. B and C, however, died before X. B is survived by two legitimate children, E and F, while C is also survived by two legitimate children, G and H. D, on the other hand, survived, but repudiated his inheritance. He has two legitimate children of his own, I and J. The net value of the estate is P120,000. How shall this estate be distributed?

Answer — Had all the instituted heirs survived the testator and accepted their inheritance, the distribution would have been as follows:

A	.....	P15,000, as compulsory heir
		P15,000, as voluntary heir
B	.....	P15,000, as compulsory heir
		P15,000, as voluntary heir
C	.....	P15,000, as compulsory heir
		P15,000, as voluntary heir
D	.....	P15,000, as compulsory heir
		P15,000, as voluntary heir

B and C, however, died before the testator and D repudiated his inheritance. There are, therefore, three vacant portions in the inheritance. These vacant portions shall now be distributed as follows:

(1) Share of B —The legitime of P15,000 to which B would have been entitled shall be given to his children, E and F, by right of representation, while the free portion of P15,000 to which he would have been entitled as voluntary heir shall be given to his co-heir. A, by right of accretion. *(See Arts. 856, 972, 1015, 1016, Civil Code.)*

(2) Share of C — The legitime of P15,000 to which C would have been entitled shall be given to his children, G and H, by right of representation, while the free portion of P15,000 to which he would have been entitled as voluntary heir shall be given to his co-heir, A, by right of accretion. *(Ibid.).*

(3) Share of D — Since D has repudiated his inheritance, the effect of such repudiation is as follows: The legitime of P15,000 to which he would have been entitled cannot be given to his children, I and J, because of the principle that an heir who repudiates his inheritance cannot be represented *(Art. 977,*

Civil Code). Consequently, it shall pass to the legal heirs of X by right of intestate succession *(Art. 1021, Civil Code).* These legal heirs are A, the children of B, and the children of C. The division shall be as follows: A shall be entitled to 1/3, or P5,000; E and F shall also be entitled to 1/3, or P5,000, which they shall divide equally; and C and H shall also be entitled to 1/3, or P5,000, which they shall also divide equally. As far as the free portion of P15,000 to which D would have been entitled as a voluntary heir is concerned, the entire portion shall be given to his co-heir, A, by right of accretion *(Arts. 1015, 1016, Civil Code).*

Therefore, the distribution shall be as follows:

A	P15,000,	as compulsory heir
	15,000,	as voluntary heir
	5,000,	as legal heir to D's legitime
	15,000,	by right of accretion from B's share
	15,000,	by right of accretion from C's share
	15,000,	by right of accretion from D's share
E	7,500,	by right of representation
	2,500,	as legal heir to D's legitime
F	7,500,	by right of representation
	2,500,	as legal heir to D's legitime
G	7,500,	by right of representation
	2,500,	as legal heir to D's legitime
H	7,500,	by right of representation
	2,500,	as legal heir to D's legitime
I	None	
J	None	
Estate	P120,000	

Problem No. 4 — Suppose that X in the above problem, died intestate, how shall the distribution be made?

Answer — Had all of the children survived and accepted their inheritance, the distribution would have been as follows:

A	P30,000
B	P30,000
C	P30,000
D	P30,000

B and C, however, predeceased X and D repudiated his inheritance thus creating three vacant portions in the inheritance. These vacant portions shall now be distributed as follows:

(1) Share of B — The entire P30,000 to which B would have been entitled shall be given to his children, E and F, by right of representation.

(2) Share of C — The entire P30,000 to which C would have been entitled shall be given to his children, G and H, by right of representation.

(3) Share of D — Since D repudiated his inheritance, his children, I and J, cannot represent him *(Art. 977, Civil Code).* Consequently, the entire P30,000 which he has repudiated shall now accrue to his co-heirs *(Art. 1018, Civil Code).* A is the only co-heir. It is obvious that E, F, G and H are not co-heirs; they are merely representatives of B and C.

Therefore, the distribution shall be as follows:

A	P30,000,	as legal heir
	30,000,	by right of accretion
E	15,000,	by right of representation
F	15,000,	by right of representation
G	15,000,	by right of representation
H	15,000,	by right of representation
Estate	P120,000	

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 portion.[15]

Art. 976. A person may represent him whose inheritance he has renounced.[16]

Repudiation by Representative. — Thus, under the above article, if a child renounces or repudiates his inheritance when his father died, he may still represent the latter, when subsequently,

[15]Art. 927, Spanish Civil Code.
[16]Art. 928, Spanish Civil Code, in modified form.

his grandfather dies. Let us make the example more concrete. In 1960, B died, survived by his son, X, X repudiated his inheritance. Subsequently in 1970, A, father of B, died, survived by his son, C, and his grandson, X. May X represent his father, B, with respect to the inheritance coming from A? Under Art. 976, he may.

The provision of Art. 976 is a necessary consequence of the rule stated in Art. 971. If the Code had not provided for such a rule, the principle involved would still apply by necessary implication. It must be remembered that the representative does not inherit from the person represented; he inherits from the decedent or the person from whom the person represented would have inherited if he were living or had the capacity to succeed. Hence, his capacity or incapacity to inherit from the person represented is immaterial; the same is true with regard to his acceptance or repudiation of the inheritance coming from the person he is supposed to represent. What is material, therefore, is his capacity to inherit from the decedent and his acceptance of the inheritance coming from such decedent.

The situation is different if it is the person is supposed to be represented who repudiates the inheritance. In such case, Art. 977 applied. There can be no right of representation.

Art. 977. Heirs who repudiate their share may not be represented.[17]

Effect of Repudiation by Heir. — When an heir called either by will or by law to succeed repudiates his inheritance, the circumstances are different from that of predecease, incapacity or disinheritance. He deprives, by his own positive act, his children or descendants of the right of representation. This is logical because a person cannot transmit a right which he does not have. The basis of the exercise of the right of representation by the children or descendants of the person who dies before the decedent, or is unworthy to succeed, or is disinherited is the fact that the person represented is dead or, at least, presumed to be dead as far as the decedent is concerned. This is not possible in case of renunciation or

[17]Art. 929, Spanish Civil Code, in modified form.

repudiation, because, in this case, by renouncing the right which the law has accorded to him, he gives a positive proof of his existence.[18] Consequently, according to the law, he cannot be represented. Hence, in conformity with the presumed will of the decedent, the share which is rendered vacant as a consequence of such repudiation shall pass to the other heirs by right of intestate succession or by right of accretion depending upon the circumstances of each case.[19]

Section 2. — Order of Intestate Succession

Order of Intestate Succession in General. — In enumerating the order of succession to the estate of the decedent, we must distinguish between the normal or regular order of intestate succession and the abnormal or irregular one. The first refers to the order of succession if the decedent is a legitimate person, while the second refers to the order of succession if the decedent is an illegitimate person.

The regular order of intestate succession is as follows:

(1) Legitimate children or descendants;

(2) Legitimate parents of ascendants;

(3) Illegitimate children or descendants;

(4) Surviving spouse;

(5) Brothers and sisters, nephews and nieces;

(6) Other collateral relatives within the fifth degree; and

(7) The State.

The irregular order of intestate succession is as follows:

(1) Legitimate children or descendants;

(2) Illegitimate children or descendants;

(3) Illegitimate parents;

(4) Surviving spouse;

[18]7 Manresa, 6th Ed., pp. 100-101.
[19]See Art. 1015, *et seq.,* Civil Code.

(5) Brothers and sisters, nephews and nieces; and

(6) The State.

The provisions of the Civil Code which relate to the order of intestate succession (Arts. 978 to 1014) enumerate with meticulous exactitude the intestate heirs of a decedent, with the State as the final intestate heir. The conspicuous absence of a provision which makes a daughter-in-law an intestate heir of the deceased all the more confirms this observation. If the legislature intended to make the surviving spouse an intestate heir of the parent-in-law, it would have so provided in the code.[1]

If the decedent is an adopted person, the above orders of intestate succession are still followed, but with a difference in connection with parents or ascendants. According to the Child and Youth Welfare 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" *(Art. 39, No. 4, P.D. No. 603).* Thus, if the adopted person is legitimate and his natural parents are both dead, the adopter shall then occupy the second position in the line or order of succession by substitution; if he is illegitimate and his natural parents are both dead, the adopter shall then occupy the third position in the line or order of succession by substitution. (Please observe that the foregoing was repealed by Art. 190 of the Family Code where the new rule is that when 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.)

Can the widow whose husband predeceased his mother inherit from the latter (her mother-in-law)?

There is no provision in the Civil Code which states that a widow (surviving spouse) is an intestate heir of her mother-in-law. The entire Code is devoid of any provision which entitles her to inherit from her mother-in-law either by her own right or by the right of representation.[2]

[1]Rosales vs. Rosalaes, *supra*.

[2] Rosales vs. Rosalaes, *supra*.

Nature and Basis. — Under the Spanish Code, the order of intestate succession is based primarily on the principle of exclusion. Hence, the first in the order of succession excludes the second and all of the others, the second excludes the third and all of the others, the third excludes the fourth and all of the others, and so on. Of course, this rule must be applied in such a way that the legitime of those legal or intestate heirs who are also primary compulsory heirs at the same time shall not be impaired. In other words, even if a legal or intestate heir is excluded in conformity with the order of intestate succession, if it so happens that he is a primary compulsory heir at the same time, he will still be entitled to his legitime. Hence, where primary compulsory heirs are involved, the principle of exclusion is applied only to the disposable portion of the hereditary estate. In the other cases, the principle is applied literally.

Under our Code, although the order of intestate succession found in the Spanish Code is preserved, the philosophy underlying such order has been modified to a certain extent. Probably, it would be more accurate to say that it is based both on the principle of exclusion and the principle of concurrence. This can be inferred or deduced from an examination of the provisions of Art. 978 to 1014 of the Code. Evidently, the principle of exclusion is still applied literally to the case of parents or ascendants, collateral relatives, and the State. Such heirs are totally excluded by those who precede them in the order of intestate succession. But in the case of the others, the principle of concurrence is applied. We have, therefore, preserved the system of compulsory succession found in the Spanish Code, but with certain changes on modifications. The position of illegitimate children and the surviving spouse, who are not only legal or intestate heir but are also primary compulsory heirs, has been improved. Under the principle of concurrence as applied in the new Code, even where they concur with legitimate children or descendants or with legitimate parents or ascendants, they are not only entitled to their legitime, but they are also given a share in the disposable free portion.

Subsection 1. — Descending Direct Line

Art. 978. Succession pertains, in the first place, to the descending direct line.[1]

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.[2]

Legitimate Children or Descendants. — The first in the order of intestate succession are legitimate children or descendants. This class includes not only legitimate children or descendants proper, but also legitimated children or descendants and adopted children. Consequently, what had been stated under Art. 887 of the Code regarding legitimate children or descendants as compulsory heirs are also applicable here.

It must be noted, however, that although Art. 978 declares that succession pertains, in the first place, to those in the descending direct line, this rule must be understood to be without prejudice to the concurrent rights of illegitimate children or descendants and the surviving spouse.

It must also be noted that in the case of adopted children, although the second paragraph of Art. 979 declares that an adopted child succeeds to the property of the adopting parents in the same manner as a legitimate child this rule is not absolute in character.[3] According to Art. 343 of the Code (now Art. 39, No. 4, P.D. No. 603), 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. Furthermore, an adopted child cannot inherit from the legitimate parents or ascendants of the adopter either by right of representation or in his own right. Neither can his legitimate children or descendants inherit by right of representation or in their own right from the adopter. The reason for this is that although adoption creates a relationship between

[1]Art. 930, Spanish Civil Code.
[2]Art. 931, Spanish Civil Code, in modified form.
[3]See Art. 39, P.D. No. 603, Child and Youth Welfare Code.

the adopter and the adopted child which is similar to that which results from legitimate paternity and filiation,[4] it does not create any relationship between the adopted child and the legitimate relatives of the adopter or between the adopter and the legitimate relatives of the adopted child. Besides, the provisions of Arts. 971 and 973 of the Code preclude the right of children or descendants of the adopted child from inheriting from the adopting parent by right of representation.

Art. 980. The children of the deceased shall always inherit from him in their own right, dividing the inheritance in equal shares.[5]

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.[6]

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.[7]

Rules of Division. — The above articles enunciate the different rules which must be followed in the division of the inheritance if the decedent is survived by legitimate children or descendants. The rules may be restated as follows:

(1) If all of the survivors are legitimate children, such children shall inherit in their own right. Consequently, the inheritance shall be divided among them *per capita* or in equal shares.

(2) If some of the survivors are legitimate children and the others are legitimate descendants of other legitimate children who died before (or who are incapable of succeeding) the decedent, the former shall inherit in their own right and the latter shall inherit by right of representation. Consequently, the inheritance shall be divided among them *per stirpes*. Hence, if the decedent, for instance,

[4]Prasnick vs. Rep. of the Phil., 52 Off. Gaz. 3030.
[5]Art. 932, Spanish Civil Code.
[6]Art. 934, Spanish Civil Code.
[7]Art. 933, Spanish Civil Code.

is survived by two legitimate children, A and B, and by two legitimate grandchildren, D and E, children of C, another legitimate child who is already dead or who is incapable of succeeding, the inheritance shall be divided in such a way that A and B shall be entitled to 1/3 each in their own right, while D and E shall be entitled to the remaining 1/3 by right of representation which they shall divide in equal shares.

(3) If all of the survivors are legitimate grandchildren, such grandchildren shall inherit by right of representation. Similarly, if some of the survivors are legitimate grandchildren and the others are legitimate children or descendants of other legitimate grandchildren who died before or who are incapable of succeeding the decedent, such grandchildren and descendants shall inherit by right of representation. In both cases, the inheritance shall be divided among them *per stirpes*. Hence, if the only survivors, for instance, are A and B, children of a deceased son, C and D, children of another deceased son, and E, child of a deceased daughter, since all of them are grandchildren of the decedent, and, as a consequence, shall inherit by right of representation, the inheritance must be divided among them in such a way that 1/3 shall be given to A and B, another 1/3, to B and C, and the remaining 1/3, to E.

It must be observed, however, that grandchildren do not always inherit by right of representation. There is one exceptional case where they are called to inherit in their own right. If all of the children should repudiate their inheritance, according to Art. 969 of the Code, those of the following degree shall inherit in their own right. Hence, if there are grandchildren surviving, they shall be called to the inheritance because they are next in degree and not because of representation. This is, of course, in conformity with the principle that heirs who repudiate their inheritance cannot be represented.[8]

Art. 983. If illegitimate children survive with legitimate children, the shares of the former shall be in the proportions prescribed by Article 895.[9]

[8]Art. 977, Civil Code.
[9]New provision.

Legitimate and illegitimate Children. — If illegitimate children should survive with legitimate children, according to the above article, the inheritance shall be divided among them in accordance with the proportion prescribed in Art. 895 of the Code, as repealed by the second sentence of Art. 176 of the Family Code. The proportion referred to is 10:5. In other words, the share of an acknowledged natural child by legal fiction or an acknowledged illegitimate child who is not natural is 1/2 of that of a legitimate child.

It must be noted, however, that in distributing the estate in accordance with the above proportions, one very fundamental rule must be observed. The legitime of compulsory heir must never be impaired. Under our system of compulsory succession, whether testamentary or intestate, it is axiomatic that the legitime of compulsory heirs must be preserved. As a rule, it cannot be impaired by the will of the decedent whether expressed or presumed. Consequently, if the decedent dies intestate, survived only by legitimate and illegitimate children, the distribution of the inheritance in accordance with the proportions prescribed in Art. 895 as repealed by the second sentence of Art. 176 of the Family Code must be made in such a way that the legitime of the survivors will not be impaired. This limitation is necessary especially if the decedent is survived by only one or two legitimate children and by many illegitimate children. In such a case, if the distribution of the inheritance is made directly in accordance with the proportion of 10:5 as prescribed in Art. 176 of the Family Code, evidently, there would be an impairment of the legitime of the legitimate child or children. Thus, if the decedent is survived by only one legitimate child and eight acknowledged natural children the proportion of distribution, if made directly, would be 2:1:1:1:1:1:1:1:1. That means that the legitimate child whose legitime is supposed to be 1/2 of the entire estate would be entitled to only 2/10 or 1/5 of the entire estate, while each of the acknowledged natural children would be entitled to 1/10. Certainly, such a possibility, or situation cannot be countenanced by our law. Therefore, in the distribution of the inheritance in accordance with the proportions referred to, *it is absolutely necessary that the legitime of the survivors must first be satisfied*.

The method of distribution may be illustrated by the following problems:

Problem No. 1 — X died intestate, survived by one legitimate child, A, two acknowledged natural children, B and C, and two acknowledged illegitimate children who are not natural, D and E. The estate is P72,000. How shall the distribution be made?

Answer — According to Art. 983 of the Code, the distribution shall be made in accordance with the proportions prescribed in Art. 895. Since there is a concurrence of one legitimate child, two acknowledged natural child, and two acknowledged illegitimate children who are not natural in the succession, the proportion of 10:5:5:4:4 must, therefore, be observed. To apply this proportion directly would result in the impairment of the legitime of A. Consequently, we must first satisfy the legitime of the survivors. A shall therefore, be entitled to 1/2 of P72,000, or P36,000. Now, if we are going to give to B and C 1/2 each of P36,000, or P18,000 each, nothing will remain for D and E. Hence, the remainder or balance of P36,000 shall be divided among B, C, D and E in the proportion of 5:5:4:4. Therefore, B and C shall be entitled to 5/18 each of P36,000, or P10,000 each, while D and E shall be entitled to 4/18 each of P36,000, or P8,000 each. Consequently, the distribution shall be as follows:

A	.....	P36,000
B	.....	10,000
C	.....	10,000
D	.....	8,000
E	.....	8,000
		P72,000

Under the new provisions of the Family Code, more particularly the second sentence of Art. 176, both acknowledged natural children and acknowledged illegitimate children who are not natural are simply classified as illegitimate children and the legitime of such illegitimate children consists of one-half of the legitime of the legitimate child. Thus, the proportion of 10:5:5:5:5 must, therefore be observed. The distribution of the estate shall be as follows:

A	.....	P36,000
B	.....	9,000

C	.....	9,000
D	.....	9,000
E	.....	9,000
		P72,000

Problem No. 2 — X died intestate, survived by two legitimate children, A and B, and one acknowledged natural child, C. The estate is P80,000. How shall the distribution be made?

Answer — Two different theories have been advanced in order to solve the above problem. The first theory is based upon the principle of exclusion, while the second is based upon the principle of concurrence. Hence, for the sake of convenience, we shall call the first the exclusion theory and the second the concurrence theory.

Under both theories, the legitime of the survivors must be satisfied first. Hence, since A and B are legitimate children of the decedent, they shall be entitled to 1/2 of P80,000. Consequently, each of them shall be given P20,000. On the other other hand, since C is an acknowledged natural child, he shall be entitled to 1/2 of P20,000, or P10,000. There is, therefore, a balance of P30,000. How shall this balance be divided? It is here where there is a conflict between the two theories.

According to the exclusion theory, the balance of P30,000 shall be given to A and B, in conformity with the order of intestate succession. Consequently, under this theory, the share of each survivors shall be as follows:

A	.....	P 35,000
B	.....	P35,000
C	.....	P10,000
		P80,000

According to the concurrence theory,[10] the balance of P30,000 shall be divided among the three survivors in the proportion of 2:2:1, in conformity with the provision of Art. 983

[10]Proponents of the concurrence theory normally solve this problem directly by using the proportion of 2 is to 2 is to 1 (2:1:1) since it is obvious that there can be no possible impairment of the legitime of the legitimate children. Thus, A shall be entitled to 2/5 of P80,000, or P32,000; B to 2/5 of P80,000, or P32,000; and C to 1/5 of P80,000, or P16,000. See discussion under Art. 999 *(infra.)*.

of the Code. A and B shall, therefore, be entitled to 2/5 each of P30,000, or P12,000 each, while C shall be entitled to 1/5 of P30,000, to P6,000. Consequently, under this theory, the share of each survivor shall be as follows:

A	.....	P32,000
B	.....	32,000
C	.....	16,000
		P80,000

It is submitted that the solution according to the concurrence theory is the correct solution. The provision of Art. 983 is explicit. Where there is a concurrence of legitimate and illegitimate children in the succession, the article declares that the "proportions prescribed by Art. 895" shall be observed. Under the exclusion theory, such proportions are not observed; as a matter of fact, they are discarded altogether. Besides, we must not lose sight of the philosophy underlying the application of the order of intestate succession. As a result of the changes or innovations in the New Civil Code, it would be more accurate to say that the order of intestate succession is now based on the principle of exclusion but subject to the principle of concurrence whenever legitimate children, illegitimate children and the surviving spouse are the survivors. Consequently, the old method of distribution whereby acknowledged natural children (and under the present Code, acknowledged illegitimate children who are not natural) would be entitled only to their legitime has no longer any place under our law.

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.[11]

Rules governing the legal or intestate succession to the estate of the adopted under Art. 190 of the Family Code, legal or intestate succession to the estate of the adopted shall be governed by the following rules:

[11]New provision.

(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 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.

The foregoing rules repealed the rule stated in Art. 984 of the Civil Code which states that 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. The purpose of the repealed rule was to prevent adoption with an ulterior motive because if the parents by adoption were the ones to inherit from the adopted child, many would adopt rich children in order to inherit from them, and not for sentimental purposes or reasons.[12] The only exceptions then to the repealed rule where the adopter may inherit by operation of law from the adopted should the latter die intestate as found in Art. 39, No. 4, of the Child and Youth Welfare Code (P.D. No. 603) are the following:

[12]2 Capistrano, Civil Code, 1950 Ed. p. 467.

First: Where the adopted had received during his lifetime any property from the adopter by gratuitous title. According to the Welfare Code, such property shall revert to the adopter should the adopted predecease the former without legitimate issue unless the adopted had, during his lifetime, alienated such property. This is, however, subject to the following limitations should the adopted leave no property other than that received from the adopter:

(1) If the adopted is survived not only by the adopter but also by illegitimate children or his or her spouse, such illegitimate children collectively or spouse shall receive one-fourth (1/ 4) of the property; and

(2) If he is survived not only by the adopter but also by illegitimate children and his or her spouse, then the illegitimate children collectively shall receive one-fourth (1/4) of the property, while the spouse shall also receive one-fourth (1/4).

In both cases, the balance of the property shall revert to the adopter. In the case of illegitimate children, the proportion provided for in Art. 895 of the Civil Code was always then observed.

(Under the Family Code, however, the legal reversion recognized in P.D. No. 603 was eliminated. Thus, Art. 190 of the Family Code is now applicable.)

Second: Where the parents by nature of the adopted are both dead. In such a case, the adopter shall take the place of the natural parents in the line of succession, whether testate or intestate. It must be observed that this is a very exceptional example of succession by legal substitution which makes the position of the adopter very attractive.

The above exceptions are illustrated by the following:

Problem No. 1 — A, an adopted person, died intestate, survived by the adopter, X, and his natural parents, F and M. His entire estate consists of several properties valued at P400,000, which he had acquired by gratuitous title during his lifetime from X. Distribute the estate.

Answer — Although F and M are the legal heirs of A, nevertheless, the above properties shall revert to the adopter, X. This is so because of the legal reversion *(reserva adoptiva)* which is expressly recognized in No. 4 of Art. 39 of Child and Youth Welfare Code *(P.D. No. 603)*. According to the law, 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.

However, as above-stated, under the Family Code, the legal reversion recognized in P.D. No. 603 was eliminated. Art. 190(2) of the Family Code is now applicable. The entire estate, although consisting of the properties acquired by A during his lifetime from X by gratuitous title shall be divided as follows: one-half to be inherited by F and M, and the other half, by X.

Problem No. 2 — Suppose that in the above problem, in addition to the properties which A had acquired by gratuitous title from X, A left other properties valued at P200,000 which he had acquired through his own effort or industry, how shall you distribute the estate?

Answer — The properties which A had acquired by gratuitous title from X shall all revert to the latter pursuant to No. 4 of Art. 39 of the Child and Youth Welfare Code *(P.D. No. 603),* while the other properties which A had acquired through his own effort or industry shall pass to F and M in accordance with the normal rules of intestate succession. It must be observed that under our law on adoption *(Arts. 27-42, P.D. No. 603, which have repealed Arts. 334-348, Civil Code)*, although the adopted becomes a legal heir of the adopter, the adopter, as a rule, does not become a legal heir of the adopted. In the instant case, the legal heirs of A are his natural parents, F and M.

The foregoing law was repealed by the rules on legal or intestate succession provided for by the Family Code. Hence, pursuant to Art. 190(2) of the Family Code, all the properties, although consisting of those acquired by gratuitous title from X and those acquired through A's effort or industry, shall be divided as follows: one-half to be inherited by F and M, and the other half by X. (Please note that the adopter gets a share of the estate of the adopted although both parents by nature are still alive).

Problem No. 3 — X adopted A, legitimate child of F and M. Two years later, both F and M were killed in a vehicular accident. A died recently, survived by X and his two paternal

grandparents, Y and Z. His net estate is P200,000 cash which he had acquired through his own effort and industry. Distribute the estate.

Answer — According to the last paragraph of No. 4 of Art. 39 of the Child and Youth Welfare Code, "the adopter shall not be 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." Thus, the entire estate shall pass to X. A's paternal grandparents, Y and Z, cannot inherit from him because they are excluded by X. This is clear from the Child and Youth Welfare Code.

Art. 190 (2) of the Family Code repealed the foregoing law. Pursuant to the new rules on legal or intestate succession to the estate of the adopted, when the legitimate ascendants of the adopted concur with the adopters, they shall divide the entire estate, one-half to be inherited by the ascendants and the other half by the adopters. Thus, distribution of the estate shall be as follows:

(1) Y and Z shall be entitled to one-half of the estate, or P100,000;

(2) X shall be entitled to one-half of the estate, or P100,000.

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.[1]

Legitimate Parents or Ascendants. — The second in the order of intestate succession are legitimate parents or ascendants. It must be noted that they are called to the succession only in default of legitimate children or descendants. They cannot, however, be excluded by an adopted child.[2] It must also be noted that, although they can exclude collaterals, they cannot exclude illegitimate children and the surviving spouse.

[1]Art. 935, Spanish Civil Code, in modified form.
[2]Art. 343, Civil Code.

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.[3]

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.*[4]

Rules of Division. — The above articles enunciate the different rules which must be followed in the division of the inheritance if the decedent is survived only by legitimate parents or ascendants.

In default of the father and mother, the rule of proximity shall be applied; in other words, the ascendants nearest in degree shall inherit.[5] Should there be more than one 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 pass to the paternal and the other half to the maternal lines. In each line the division had be *per capita*.[6] Thus, if the decedent is survived only by A, paternal grandfather, and B and C, maternal grandparents, 1/2 of the entire inheritance shall be given to A, while the other half shall be given to B and C, which they shall divide *per capita*.

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.[1]

[3]Art. 936, Spanish Civil Code.
[4]Art. 937, Spanish Civil Code.
[5]Art. 987, Civil Code.
[6]*Ibid.*

[1]Art. 939, Spanish Civil Code, in modified form.

Illegitimate Children. — The third in the order of intestate succession are illegitimate children. It must be noted that even in the presence of legitimate children or descendants or legitimate parents or ascendants or the surviving spouse, such children, under the principle of concurrence, always participate in the division of the inheritance. Like legitimate children or descendants and legitimate parents or ascendants, they exclude collaterals. In this sense, they are superior to the surviving spouse since the latter cannot exclude brothers and sisters or nephews and nieces.

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.[2]

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.[3]

Rules of Division. — It is clear that in default of legitimate children or descendants, legitimate parents or ascendants, and the surviving spouse, the entire inheritance shall pass to the illegitimate children. But suppose that some of the survivors are acknowledged natural children or natural children by legal fiction and the others are acknowledged illegitimate children who are not natural, how shall the inheritance be divided among them? The law is silent with respect to this point. Under the Civil Code, however, it can be inferred from its provision stated in Art. 983 that the proportions prescribed in Art. 985 must still be preserved. In other words, the share of an acknowledged illegitimate child who is not natural must still be 4/5 of the share of an acknowledged natural child. Hence, if the decedent, for instance, is survived by two acknowledged natural children, A and B, and by two acknowledged illegitimate children who are not natural, C and D, and the estate is P36,000, the division must be made in the proportion of 5:5:4:4. Consequently, A and B shall each be entitled to 5/18 of P36,000, or P10,000 each, while C and D shall each be entitled to 4/18 of P36,000, or P8,000 each. The

[2]Art. 940, Spanish Civil Code, in modified form.
[3]Art. 941, Spanish Civil Code, in modified form.

5:5:4:4 proportion is no longer applicable under the Family Code. Thus, the entire estate shall be divided among all the four children equally, that is, A, B, C and D shall be entitled to P9,000.00 each.

Idem; Right of representation. — It is also clear from the provisions of Arts. 989 and 990 that the descendants of illegitimate children can inherit by right of representation. As a matter of fact, the word "descendant" as used in these articles can refer to any kind of descendant, whether legitimate or illegitimate. This is obvious from the provisions of Arts. 998 and 999. In other words, it is immaterial whether the representative is legitimate or illegitimate; what is material is that the person to be represented is illegitimate.

There must, therefore, be a distinction between the right of representation when the person to be represented is a legitimate person and the right of representation when the person to be represented is an illegitimate person. If the person to be represented is legitimate, then it is indispensable that the representative must also be legitimate. Otherwise, there would be a violation of the prohibition stated in Art. 992. However, if the person to be represented is illegitimate, then it is immaterial whether the representative is legitimate or illegitimate.

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.[4]

Illegitimate Children and Legitimate Ascendants. — If legitimate parents or ascendants concur with illegitimate children, the share of the former shall be 1/2, while the share of the latter shall also be 1/2. The number of legitimate ascendants or illegitimate children is immaterial.

The application of the rule stated in Art. 991 may be illustrated by the following problems:

> *Problem No. 1* — X died intestate, survived by his legitimate parents, A and B, his adopted child, C, and an acknowledged illegitimate child who is not natural, D. His estate is P36,000. How shall the distribution be made?

[4]Art. 942, 841, Spanish Civil Code, in modified form.

Answer — According to No. 4 of Art. 39 of the Child and Youth Welfare Code, if the adopted is survived by legitimate parents or ascendants and by an adopted child, the latter shall not have more successional rights than an acknowledged natural child. Hence, in this exceptional instance, the adopted child shall be placed in the same category as an acknowledged natural child. Therefore, the provision of Art. 991 shall apply 1/2 of P36,000, or P18,000, shall be given to A and B, which they shall divide equally, while the other 1/2 shall be given to C and D, which they shall divide in the proportion of 5:4. C shall be entitled to 5/9 of P18,000, or P10,000, while D shall be entitled to 4/9 of P18,000, or P8,000. Consequently, the distribution shall be as follows:

A	.....	P 9,000
B	.....	9,000
C	.....	10,000
D	.....	8,000
		P36,000

As abovestated, the 5:4 proportion is no longer applicable under the Family Code. Hence the distribution shall be as follows:

A	.....	P 9,000
B	.....	9,000
C	.....	9,000
D	.....	9,000
		P36,000

Problem No. 2 — Before his death, X executed a will bequeathing P10,000 to his friend, Y. There is no other disposition found in the will. He is survived by his legitimate father, A, and an acknowledged natural son, B. His estate is P40,000. How shall be distribution be made?

Answer — It is evident that mixed succession shall take place in this case. There is of course no question that the legacy of P10,000 in favor of Y shall have to be satisfied. After all, it is not inofficious. How shall the balance of P30,000 be divided? Shall the provision of Art. 991 now be applied literally so that A shall be entitled to P15,000 and B shall also be entitled to P15,000? It is evident that if this solution is followed, there

would be an impairment of the legitime of A. Under the law on legitime, he is entitled to 1/2 of P40,000, or P20,000, by operation of law. Such legitime cannot be impaired whether by the expressed or presumed will of the decedent. Consequently, the distribution must be as follows:

A	.....	P20,000
B	.....	10,000
C	.....	10,000
		P40,000

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.[5]

Separation of Legitimate and Illegitimate Families. — The above article enunciates what is known as the "principle of absolute separation between the legitimate family and the illegitimate family." Under this principle, an impassable barrier exists separating or dividing the members of the legitimate family from those of the illegitimate family. Although in reality an illegitimate child is related by blood to the members of the legitimate family, the law ignores it; hence, such illegitimate child cannot inherit by intestate succession from the legitimate children or relatives of his father or mother; neither can such legitimate children or relatives inherit in the same manner from the illegitimate child. Thus, applying this principle, it has been held that natural children cannot represent their natural father or mother with regard to the inheritance coming from the legitimate ascendants of the latter.[6] Neither can such natural children inherit in their own right from their first cousins[7] or from the other legitimate relatives of their natural parents.[8]

The reason for this impregnable barrier between the two families is obviously the intervening antagonism and incompatibility between members of the legitimate family and those of the

[5]Arts. 943, Spanish Civil Code, in modified form.
[6]Llorente vs. Rodriguez, 10 Phil. 585; Oyao vs. Oyao, 94 Phil. 204.
[7]Grey vs. Fabe, 68 Phil. 128.
[8]Anuran vs. Aquino, 38 Phil. 29; Dir. of Lands vs. Aguas, 63 Phil. 279; Rodriguez vs. Reyes, 51 Off. Gaz. 5188.

illegitimate family.[9] Although an illegitimate child is related by blood to the legitimate children or relatives of his father or mother, in legal contemplation it does not exist. This attitude of the law is based on the fact that the members of the legitimate family always look down at the illegitimate child as the product of sin, a palpable evidence of a blemish upon the honor of the family; the illegitimate child, in turn, always look up with envy at the privileged position of the members of the legitimate family.[10]

In the Spanish Civil Code of 1889, the right of representation was admitted only within the legitimate family, so much so that Art. 943 of that Code prescribed that an illegitimate child cannot inherit *ab intestato* from the legitimate children and relatives of his father and mother.

The Civil Code of the Philippines apparently adhered to this principle since it reproduced Art. 943 of the Spanish Civil Code in its Art. 992, but with fine inconsistency in subsequent articles (990, 995 and 998). Our Code allows the hereditary portion of the illegitimate child to pass to his own descendants, whether legitimate or illegitimate. So that while Art. 992 prevents the illegitimate issue of a legitimate child from representing him in the intestate succession of the grandparent, the illegitimate issue of an illegitimate child can now do so.

This difference being indefensible and unwarranted, in the future revisions of the Civil Code, we shall have no choice and decide either that the illegitimate issue enjoys in all cases the right of representation, in which case Art. 992 must be suppressed; or contrarywise, maintain said article and modify Arts. 995 and 998. The first solution would be more in accord with an enlightened attitude vis-a-vis illegitimate children.[11]

The principle may be illustrated by the following problem:

Problem — A died intestate survived by the following children:

(a) B, legitimate child of a deceased legitimate son;

[9]Cuartico vs. Cuartico, (CA), 52 Off. Gaz. 1489.
[10]7 Manresa, 6th Ed., pp. 139-140.
[11]Diaz vs. Pamuti, G.R. No. L-66574, February 21, 1990.

(b) C, illegitimate child of a deceased legitimate daughter;

(c) D, legitimate child of a deceased illegitimate son; and

(d) E, illegitimate child of a deceased illegitimate daughter.

Can such grandchildren inherit from A by right of representation

Answer — B, D and E can inherit from A by right of representation, but C cannot. C is excluded from the succession because under Art. 992 of the Civil Code, an illegitimate child cannot inherit *ab intestato* from the legitimate relatives of his natural parents.

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 children's filiation is duly proved as to both parents, who are both living, they shall inherit from him share and share alike.[12]

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.[13]

Order of Intestacy in Illegitimate Filiation. — As stated previously, if the decedent is an illegitimate person, the order of intestate succession as far as his hereditary estate is concerned is as follows: *first,* legitimate children or descendants; *second,* illegitimate children; *third,* illegitimate parents; *fourth,* the surviving spouse subject to the concurrent rights of brothers and sisters, nephews and nieces; *fifth,* illegitimate brothers and sisters, nephews and nieces; and *sixth,* the State. This irregular order of intestate succession is not expressly stated in the Code. However, it can be inferred from the provisions of the above articles as well as from other provisions.

[12]Art. 944, Spanish Civil Code, in modified form.
[13]Art. 995, Spanish Civil Code, in modified form.

Idem; Children or descendants. — Legitimate children or descendants are, of course, the first in the order of succession to the estate of the illegitimate child. Since the same rules stated in Arts. 979 to 984 are also applicable here, it is, therefore, unnecessary to repeat them. It must, however, be observed that illegitimate children occupy the second position in the order of intestate succession. This is clear from the provision of Art. 993. Consequently, if the decedent is survived by his illegitimate children and his illegitimate parents or parents by nature, the latter are excluded by the former. The same rule is also followed in testamentary succession with respect to the legitime. This rule, however, must not be confused with the rule stated in Art. 991. Art. 991 refers to a decedent who is legitimate, while Art. 993 refers to one who is illegitimate.

Idem; Illegitimate parents. — In default of children or descendants, whether legitimate or illegitimate, the illegitimate parents or parents by nature shall succeed to the entire estate of the illegitimate child, without prejudice to the concurrent rights of the surviving spouse. It must be noted, however, that this right is subject to proof of filiation. If the decedent's filiation is duly proved as to both parents, who are living, such parents shall inherit from him share and share alike. Consequently, the provisions of the Civil Code with respect to proof of paternity and filiation must also be considered. As a matter of fact, we submit that in order that such parents will be able to inherit from their illegitimate child, it is essential that the latter should have recognized them either voluntarily or by means of a final judgment of a competent court (if this is possible). If such a requirement is imposed upon the illegitimate child in order that he will be able to inherit from the presumed or putative parent, there is no reason why it should not be imposed also upon the parent in order that he will be able to inherit from the child.

It must also be noted that the succession to the estate of the illegitimate child does not go beyond the parents by nature. In other words, other ascendants are not considered as legal or intestate heirs of the illegitimate child. This is, of course, logical because, otherwise, there would be a violation of the principle of absolute separation between the legitimate family and the illegitimate family as enunciated in Art. 992.

Idem; Surviving spouse. — In default of children or descendants, whether legitimate or illegitimate, and the illegitimate

parents, the surviving spouse shall succeed to the entire estate, without prejudice to the concurrent rights of brothers and sisters, nephews and nieces. It must be observed that Art. 993 specifically provides that "if an illegitimate child should die without issue, either legitimate or illegitimate, his father or mother shall succeed to his entire estate." Does this provision mean that if the decedent who is illegitimate is survived only by his parents by nature and his spouse, the former shall exclude the latter? We believe that this interpretation could never have been intended by the law. In the first place, the surviving spouse is a primary compulsory heir, and it is an incontestable fact that a legal heir who is a primary compulsory heir at the same time can never be excluded in intestate succession. In the second place, it would indeed be absurd if the surviving spouse can be excluded by illegitimate parents and yet he or she cannot be excluded by legitimate parents or ascendants. And in the third place, Art. 993 of the Code refers only to a case where the decedent is survived by his illegitimate parents; consequently, its scope must not be extended in such a way as to include the surviving spouse, especially where such extension will result in an interpretation that is evidently absurd.

It must be admitted, however, that the failure of the law to provide for a situation where there is a concurrence between the illegitimate parents and the surviving spouse in the succession has created a void in our law which is difficult to solve. We cannot directly apply the provision of Art. 997 because this provision refers to a case where there is a concurrence in the succession of legitimate parents or ascendants and the surviving spouse. Consequently, if the decedent is survived by his illegitimate parents and his spouse, how shall the inheritance be divided? Two theories have been advanced in order to solve this problem. As in the case of the concurrence of legitimate and illegitimate children under Art. 983, one theory is based upon the principle of exclusion, while the other is based upon the principle of concurrence. According to the first theory, the illegitimate parents are entitled not only to their legitime of 1/4, but also to the entire disposable portion of 1/2, while the surviving spouse is entitled only to his or her legitime of 1/4. The basis of this solution is, of course, the principle of exclusion. Since the law is silent, the general order of intestate succession must be applied. According to the second theory, the illegitimate parents are entitled to 1/2 of the entire estate, while the surviving spouse is entitled to

the other 1/2. The basis of this solution is, of course, the principle of concurrence. We believe that this solution is more acceptable than the first. In the first place, in a case where there is a concurrence of parents and the surviving spouse in the succession, it would indeed be absurd if the law would give 3/4 of the entire inheritance if the parents are illegitimate and only 1/2 if they are legitimate. In the second place, where there is an omission in the law (and the omission in this case is evidently unintentional) it would be more in conformity with the rules of statutory construction to apply by analogy the provisions of Arts. 997 and 903 rather than the general order of succession especially since the general order of succession with respect to the estate of an illegitimate child is not even specified in the law itself. And in the third place, if the new provisions of the Code regarding successional rights of illegitimates are designed to improve the condition of such illegitimates, certainly, if those who are responsible for the illegitimacy of the decedent are given 3/4 of the inheritance and the one who decided to cast his or her lot with such decedent is given only 1/4, exactly the opposite effect would be attained. If the decedent is survived by his adulterous father and his widow, undoubtedly, it would be unjust to give 3/4 of the inheritance to the former and only 1/4 to the latter.

If the surviving spouse, however, concurs with brothers and sisters, nephews and nieces, the law is definite with regard to the division of the estate. One-half shall be given to the brothers and sisters, nephews and nieces.[14]

Idem; Brothers and sisters, nephews and nieces. — In default of children or descendants, whether legitimate or illegitimate, parents, and the surviving spouse, the brothers and sisters, nephews and nieces, of the decedent shall succeed to the entire estate. Although this is not specifically provided by the law, it can easily be inferred from the provision of the second paragraph of Art. 994 of the Code. It would indeed be illogical if such brothers and sisters, nephews and nieces, are allowed to inherit 1/2 of the entire estate if they concur with the surviving spouse, but they are not allowed to inherit anything if they are the only survivors.

[14]Art. 994, Civil Code.

What is meant by the law when it speaks of brothers and sisters, nephews and nieces, as legal or intestate heirs of an illegitimate child? It must be noted that under Art. 992 of the Code, there is a barrier dividing members of the illegitimate family from members of the legitimate family. It is clear that by virtue of this barrier, the legitimate brothers and sisters as well as the children, whether legitimate or illegitimate, of such brothers and sisters, cannot inherit from the illegitimate child. Consequently, 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. As far as the distribution of the estate among such brothers and sisters, or nephews and nieces, is concerned, the rules specified in Arts. 1003 to 1008 must be applied.[15] In default of brothers and sisters, nephews and nieces, the law does not go any farther. Other collaterals are not allowed to inherit by intestate succession from the illegitimate child. Consequently, the entire estate shall pass to the State.

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.[1]

Surviving Spouse. — Under the present Civil Code, the surviving spouse is now raised to the fourth position in the order of intestate succession. Furthermore, he or she is now entitled, not only to the usufruct, but also to the ownership of his or her share in the inheritance. In the words of the Code Commission, this measure seems to be more acceptable and more in conformity with Filipino family life.[2]

[15]7 Manresa, 6th Ed., pp. 147-149.

[1]Art. 946, Spanish Civil Code, in modified form.
[2]Report of the Code Commission, p. 115.

Art. 995 must not be construed to mean that the surviving spouse shall inherit from the decedent only in default of legitimate descendants and ascendants, and illegitimate children and their descendants. As already stated in previous articles, he or she shall always inherit. Under our system of compulsory succession, whether in testamentary or in intestate succession, the universal rule is that a legal heir who is also a primary compulsory heir at the same time is always entitled to the legitime which the law has reserved for him. Such legitime to which he or she is entitled in testamentary succession is the "irreducible minimum" to which he or she is entitled in intestate succession. He or she might be given more, but, certainly, he or she cannot be given less.

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.[3]

Surviving Spouse and Legitimate Descendants. — If the decedent is survived by the widow or widower and legitimate children or descendants, the share of the widow or widower shall be the same as the share of each of the children. It is here where the principle of concurrence is applied in full force. The surviving spouse is placed in the same category as each of the legitimate children. Consequently, if the decedent, for instance, is survived by his widow and four legitimate children, and the inheritance is P60,000, the method of distribution would be merely to divide the P60,000 by five. The result would be P12,000 for each, of the survivors.

But if the decedent is survived by the widow or widower and only one legitimate child, we come across, probably, the most controversial question of succession. The controversial aspect can be better illustrated by means of an example. Let us suppose that A died without a will. He is survived by his widow, B, and by one legitimate son, C. The estate is P60,000. How shall the distribution be made? Four different solutions have been advanced to solve this problem. They are as follows:

(1) C shall be entitled to 1/2 of P60,000, while B shall be entitled to the other 1/2. Consequently, the share of C shall be

[3]Art. 834, Spanish Civil Code, in modified form.

P30,000, while the share of B shall be the same. The basis of this solution is, of course, the provision of Art. 996 itself.

(2) C shall be entitled to 3/4 of P60,000, while B shall be entitled to only 1/4. Consequently, the share of C shall be P45,000, while the share of B shall be P15,000. This solution is based upon the principle of exclusion. Since Art. 996 speaks only of the widow or widower surviving with legitimate children or descendants, therefore, according to the exponents of this theory, the rule stated in the article cannot be applied to a case where the widow or widower survives with only one legitimate child. Hence, the general order of intestate succession shall apply. This is effected by satisfying the legitime of the two and then giving the disposable portion to the one who is preferred in the order of succession.

(3) C shall be entitled to 2/3 of P60,000, while B shall be entitled to 1/3. Consequently, the share of C shall be P40,000, while the share of B shall be P20,000. This principle is based upon the principle of concurrence. Like the second solution, it proceeds on the proposition that the rule stated in Art. 996 cannot be applied to a case where the widow or widower survives with only one legitimate child. Therefore, according to the exponents of this theory, we must now apply by analogy the proportion prescribed by the first paragraph of Art. 892. This is effected by satisfying the legitime of the two and then dividing the disposable portion of 1/4 in the proportion of 2:1.

(4) C shall be entitled to P37,500, while B shall be entitled to P22,500. This division is obtained by satisfying the legitime of the two and then dividing the disposable portion of 1/4, or P15,000, equally between the two in accordance with the provision of Art. 996.

It is submitted that the first solution is more in conformity with the rules of statutory construction. Art. 996 expressly declares that the share of the widow or widower shall be the same as that of each of the children. It is, of course, well known that the plural must be understood to include the singular. Consequently, the provision can be applied even to a case where the surviving spouse concurs with only one legitimate child. It must, however, be admitted that the third solution is the most equitable. Unfortunately, it lacks statutory basis.

The above was written in 1959. Several years later, the Court of Appeals, in a case similarly situated *(Eraso, et al. vs. Hansen, 3 C.A. Rep. 1121),* choose the first solution. According to the Court:

> "We now come to the issue of determining the share of the widower surviving with one legitimate child of the decedent. On this matter, four theories have been suggested under Article 996 of the new Civil Code which provides:
>
> 'If a widow or widower and legitimate children on descendants are left; the surviving spouse has in the succession the same share as that of each of the children.'
>
> (a) Professors Tolentino, Paras and Jurado believe that the case is governed by Article 996 under the rule of statutory construction that the plural can be understood to include the singular (50 Am. Jur., p. 251, Sec. 256), despite the apparent unfairness to the child, as acknowledged by Tolentino, who does not get increase over his legitime, while the spouse receives double his legitime which, moreover, has been converted from usufruct to full ownership. Hence, "both will get equal intestate shares, in accordance with the clear intent of the law to *consider the spouse as a child."* Under this view, the widower and the child each gets 1/2 of the estate.
>
> (b) Professors Padilla and Caguioa, like Justice J.B.L. Reyes and Professor Puno, opine that the instant case is not covered by Article 996, which governs only where the surviving spouse concurs with legitimate children or descendants, that is more than one. In other words, in intestate succession, "there is no provision where there is only one legitimate child concurring with the surviving spouse, as was done in testamentary succession where there is specific provision for legitime of the widow or widower when concurring with one legitimate child" (Art. 892). However, these authors are not unanimous on how the property shall be distributed. According to the first two, "compulsory succession takes place in every succession. Consequently, you must first apply the rule of compulsory succession and the law provides that the legitime of the surviving spouse concurring with one legitimate child is one fourth of the estate and since the legitime of the legitimate child is one half, there, therefore, remains a vacant portion of one fourth" which should go "to the legitimate child because he is the first in the order of intestate succession." Thus, the widower gets one-fourth and the child, three-fourths of the entire estate. This solution has been criticized as violative of the principle of concurrence and unfair to the spouse who receives no increase in his legitime.

(c) Justice Reyes and Professor Puno favor the following solution:

Legitimate child gets 1/2 (legitime) plus 1/8 (share in intestacy) equals 5/8 of estate, and the spouse, 1/4 (legitime) plus 1/8 (share in intestacy) equals 3/8 of estate. It is claimed that this proportion complies with the spirit of Article 996 and also provides *equal* increase over the respective legitimes. "In reality, intestate succession rules do not apply to legitimes which are due to forced succession unless otherwise expressly provided. Compare Arts. 996 and 999, with Arts. 997, 998 and 1000. The last three use the term 'of the inheritance' or 'of the estate' (as a whole); but the first two do not use the same referent (3 J.B.L. Reyes and Puno, Outline of Philippine Civil Law, p. 159).

(d) The fourth theory would give the legitimate child 1/ 2 (legitime) plus 2/12 (share in intestacy) equals 2/3 of estate; while the spouse gets 1/4 (legitime) plus 1/2 (share in intestacy) equals 1/3 of entire estate. Objection to this theory is that the proportion follows the ratio of the legitimes, but is not authorized by, and is violative of, the text of Article 996.

After a careful consideration of the different theories, we are constrained to adopt the first theory as more acceptable and with statutory basis. Its seeming unfairness to the child can only be corrected by legislative amendment."

The above doctrine was confirmed by the Supreme Court in *Santillan vs. Miranda* (G.R. No. L-19281, June 3, 1965, 14 SCRA 563). In this case, the Court, speaking through Chief Justice Bengzon, declared:

"Petitioner rests his claim to 3/4 of his father's estate on Art. 892 of the New Civil Code which provides that: 'If only the legitimate child or descendant of the deceased survives, the widow or widower shall be entitled to one-fourth of the hereditary estate.' As she gets one-fourth, therefore, I get 3/ 4, says Claro. Perfecta, on the other hand, cites Art. 996 which provides: '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.'

"Replying to Perfecta's claim, Claro says the article is unjust and 'inequitable to the extent that it grants the widow the same share as that of the children in intestate succession, whereas in testate, she is given 1/4 and the only child 1/2.

"Oppositor Perfecta Miranda, on the other hand, contends that Art. 996 should control, regardless of its alleged inequity, being as it is, a provision on intestate succession involving a surviving spouse and a legitimate child, inasmuch as in statutory construction, the plural word 'children' includes the singular 'child'.

"Art. 892 of the New Civil Code falls under the chapter on Testamentary Succession; whereas Art. 996 comes under the chapter on Legal or Intestate Succession. Such being the case, it is obvious that Claro cannot rely on Art. 892 to support his claim to 3/4 of his father's estate. Art. 892 merely fixes *the legitime* of the surviving spouse and Art. 888 thereof, *the legitime* of children in *testate succession*. While it may indicate the intent of the law with respect to the ideal shares that a child and a spouse should get when they concur with each other, it does not fix the amount of shares that such child and spouse are entitled to *when intestacy occurs*. Because if the latter happens, the pertinent provision on intestate succession shall apply, *i.e.*, Art. 996.

"Some commentators of our New Civil Code seem to support Claro's contention; at least, his objection to fifty-fifty sharing. But other confirm the half and half idea. x x x.

"The theory of those holding otherwise seems to be premised on these propositions: (a) Art. 996 speaks of 'children,' therefore, it does not apply when there is only one 'child'; consequently Art. 892 (and Art. 888) should be applied thru a process of judicial construction and analogy; (b) Art. 996 is unjust or unfair because, whereas in testate succession, the widow is assigned one-fourth only (Art. 892), she would get one-half in intestate.

"It is a maxim of statutory construction that words in plural include the singular (82 C.J.S. 675, 676). So Art. 996 could or should be read (and so applied): 'If the widow or widower and a legitimate *child* are left, the surviving spouse has the same share as that of the *child*.' Indeed, if we refuse to apply the article in this case on the ground that 'child' is not included in 'children,' the consequences would be tremendous, because 'children' will not include 'child' in the following articles: Art. 887 and Art. 896. In fact, those who say 'children' in Art. 996 does not include 'child' seem to be inconsistent when they argue from the premise that "in testate succession the only legitimate child gets one-half and the widow, one-fourth.' The inconsistency is clear, because the only legitimate child gets one-half under Art.

888, which speaks of 'children', not 'child.' So if 'children' in Art. 888 includes 'child,' the same meaning should be given to Art. 996.

"On the point (of unfairness of Art. 996), it is not correct to assume that in testate succession the widow or widower 'gets only one-fourth.' She or he may get one-half — if the testator so wishes. So, the law virtually leaves it to each of the spouses to decide (by testament), whether his or her only child shall get more than his or her survivor.

"Our conclusion (equal shares) seems a logical inference from the circumstance that whereas Art. 834 of the Spanish Civil Code, from which Art. 996 was taken, contained two paragraphs governing two contingencies, the first, where the widow or widower survives with legitimate children (general rule), and the second, where the widow or widower survives with only one child (exception), Art. 996 omitted to provide for the second situation, thereby indicating the legislator's desire to promulgate just one general rule to both situations.

"The resultant division may be unfair as some writers explain — and this we are not called upon to discuss — but it is the clear mandate of the statute, which we are bound to enforce."

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.[4]

Surviving Spouse and Legitimate Ascendants. — Should the surviving spouse survive with legitimate parents or ascendants, the estate shall be divided in such a way that 1/2 shall be given to the former, while the other 1/2 shall be given to the latter. It must be remembered that in testamentary succession, the legitime of the surviving spouse is only 1/ 4, while the legitime of legitimate parents or ascendants is 1/ 2 of the estate.[5] In intestate succession, the law has allotted the disposable portion to the surviving spouse, thus equalizing the shares of the two.

[4]Art. 836, Spanish Civil Code, in modified form.
[5]Art. 893, Civil Code.

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.[6]

Surviving Spouse and Illegitimate Children. — Should the surviving spouse survive with illegitimate children or their descendants, the estate shall also be divided in such a way that 1/2 shall be given to the former, while the other 1/2 shall be given to the latter. Thus, if A dies intestate, survived by his widow, B, an acknowledged natural child, C, and an acknowledged illegitimate child who is not natural, D, and the estate is P36,000, B shall be entitled to 1/2 of P36,000, or P18,000, while C and D shall also be entitled to the other 1/2 of P36,000, or P18,000. How shall this amount of P18,000 be divided between the two illegitimate children? The law is silent. However, since according to Art. 983, should legitimate children or descendants survive with illegitimate children, the estate shall be divided among them in accordance with the proportions prescribed in Art. 895, the same proportions must still be applied here in order to maintain a uniformity of division where different classes of illegitimate children should concur in the succession. Consequently, the amount of P18,000 shall be divided between C and D in the proportion of 5:4. Therefore, C shall be entitled to 5/9 of P18,000, or P10,000, while D shall be entitled to 4/9 of P18,000, or P8,000. (This is no longer true under the provisions of the Family Code. Considering that C and D are both classified as illegitimate children, C and D shall be entitled to P9,000 each.)

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.[7]

Surviving Spouse and Legitimate and Illegitimate Descendants. — If the decedent is survived by the widow or widower, legitimate children or their descendants, and illegitimate children or their descendants, whether legitimate or illegitimate, three re-

[6]New provision.
[7]New provision.

lated provisions must be applied. These provisions are those found in Arts. 999, 983 and 895. According to the first provision, the share of the widow or widower is equal to the share of a legitimate child; according to the second provision, the estate shall be divided in accordance with the proportions prescribed in Art. 895 but which was repealed by the second sentence of Art. 176 of the Family Code, and according to the third provision, this new proportion is 10:5. Since the widow or widower has the same share as that of a legitimate child, the proportions are, therefore, 10 for the legitimate child, 10 for the widow or widower, 5 for the acknowledged natural child, for the natural child by legal fiction, or the acknowledged illegitimate child who is not natural, now all simply classified as illegitimate children. In other words, the distribution of the estate must be made, using the share of the legitimate child as the basis of computation, in such a way that the share of the widow or widower shall be the same as that of the legitimate child, that of the acknowledged natural child or natural child by legal fiction or the acknowledged illegitimate child who is not natural (now all classified as illegitimate children), 1/2 the share of the legitimate child.

However, as we have observed in the discussion under Art. 983, this method of proportionate division is subject to the principle of compulsory succession by virtue of which the legitime of compulsory heirs must never be impaired. Consequently, the distribution cannot be made directly; otherwise, there would be an impairment of the legitime of the legitimate children, especially where there is only one or two surviving. Therefore, in distributing the estate, we must first satisfy the legitime of the survivors. If after satisfying the legitime of the legitimate children, the balance of 1/2 should not be sufficient to cover the legitime of the surviving spouse and the illegitimate children, we shall then apply the rule stated in Art. 895. The legitime of the surviving spouse must first be fully satisfied and what is left shall be divided equally among the illegitimate children.

Re: Mario V. Chanliongco
79 SCRA 364

Atty. Mario V. Chanliongco, an employee of the Supreme Court, died intestate, survived by his widow, Fidela, a legitimate son, Mario II, and two illegitimate children, Angelina and Mario, Jr., whom he had duly recognized. The records show that he failed to state in his application for membership with the GSIS the beneficiary or beneficiaries of his retirement benefits.

How shall such benefits be divided? The Supreme Court, speaking through Mr. Justice Makasiar, held:

"The retirement benefits shall accrue to his (Atty. Chanliongco) estate and will be distributed among his legal heirs in accordance with the law on intestate succession, as in the case of a life insurance if no beneficiary is named in the insurance policy *(Vda. de Consuegra vs. GSIS, 37 SCRA 315, 325).*

"Insofar, therefore, as the retirement benefits are concerned, We adopt *in toto,* for being in accordance with law, the GSIS determination of the amount of retirement gratuity, the legal heirs and their respective shares x x x, to wit:

"(a) Amount of retirement gratuity:

1.	Total creditable service	P37.57169 years
2.	Highest rate of salary.....	P1,558.33333/mo.
3.	Gratuity in terms of months	50.14336 mo.
4.	Amount of gratuity (higher salary) x (highest x (No. of gratuity months) .	P78,140.10

"(b) Legal heirs:

1.	Fidela	Widow
2.	Mario II	legitimate son
3.	Ma. Angelina.....	illegitimate child
4.	Mario Jr.	illegitimate child

"(c) Distribution:

1.	8/16 share to Mario II	P39,070.050
2.	4/16 share to widow, Fidela salary) P19,535.025	
3.	2/16 share, or P9,767.5125 each to Angelina and Mario Jr...	P19,535.025
	Total	P78,140.10"

The *raison d'etre* for the above distribution is very well explained by Mr. Justice Aquino in his concurring opinion, thus:

"I concur. The provisions on legitime are found under the rubric of testamentary succession. That does not mean that the legitime is taken into account only in testamentary succession.

The legitime must also be taken into consideration in legal succession.

"There may be instances, like the instant case, where in legal succession the estate is distributed according to the rules on legitime without applying the rules on intestate succession. The reason is that sometimes the estate is not even sufficient to satisfy the legitimes. The legitimes of the primary compulsory heirs, like a child or descendant, should first be satisfied.

"In this case the decedent's legal heirs are his legitimate child, his widow and two illegitimate children. His estate is partitioned among those heirs by giving them their respective legitimes.

"The legitimate child gets one-half of the estate as his legitime which is regarded as his share as a legal heir *(Art. 888, Civil Code)*.

"The widow's legitimate is one-fourth of the estate. That represents also her share as a legal heir *(Art. 892, 1st sentence, Civil Code)*.

"The remaining one-fourth of the estate, which is the free portion, goes to the illegitimate children in equal shares, as their legitime, pursuant to the provision that "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." *(Last par., Art. 895, Civil Code)*.

"The rule in *Santillon vs. Miranda*, L-19281, June 30, 1965, 14 SCRA 563, that when the surviving spouse concurs with only one legitimate child, the spouse is entitled to one-half of the estate and the child gets the other half, pursuant to Article 996 of the Civil Code, does not apply to this case because here illegitimate children concur with the surviving spouse and the legitimate child.

"In this case, to divide the estate between the surviving spouse and the legitimate child would deprive the illegitimate children of their legitime.

"So, the decedent's estate is distributed in the proportion of 1/2 for the legitimate child, 1/4 for the widow and 1/8 each for the two illegitimate children.

"Also not of possible application to this is the rule that the legitime of an acknowledged natural child is 1/2 of the legitime

of the legitimate child and that the legitime of the spurious child is 2/5 of that of the legitime of the legitimate child or 4/5 of that of the acknowledged natural child.

"That rule cannot be applied because the estate is not sufficient to cover the legitimes of all the compulsory heirs. That is one of the flaws of the law of succession.

"A situation, as in the instant case, may arise where the illegitimate children get less than their legitime."

The following problems are illustrative:

Problem No. 1 — X died, survived by: (1) his widow, W; (2) his two legitimate children, A and B; (3) is two acknowledged natural children, C and D; and (4) his two acknowledged spurious children, E and F. The net value of his estate is P288,000.

(a) How much is the legitime of the above survivors?

(b) If X died intestate, how shall his estate be divided?

Answer — (a) The legitime of A and B is one-half (1/2) of the hereditary estate, or P140,000, or P72,000 each *(Art. 888, Civil Code)*. The legitime of W is the same as that of each of the legitimate children, or P72,000 *(Arts. 892, 897, 898, Civil Code)*. That leaves a balance of P72,000 in the free portion. Now, according to the Code, the legitime of C or D, who are acknowledged natural children, shall be one-half (1/ 2) of the legitime of A or B, who are legitimate children, while the legitime of E or F, who are acknowledged spurious children, shall be four-fifths (4/5) of the legitime of C or D, or two-fifths (2/5) of the legitime of A or B *(Art. 895, pars. 1 & 2, Civil Code)*. It is obvious that if we apply the law literally, the balance of P72,000 in the free portion will not be sufficient to satisfy such legitimes. Consequently, such balance shall be divided among C, D, E, and F in the proportion of 5 is to 5 is to 4 is to 4 (5:5:4:4) *(Art. 895, par. 3, Civil Code)*. C shall be entitled to a legitime of 5/18 of P72,000, or P20,000; D, 5/18 of P72,000, or P20,000; E, 4/18 of P72,000, or P16,000; and F, 4/18 of P72,000, or P16,000. Nothing remains for free disposal.

Thus, the distribution shall be as follows:

A	.....	P72,000
B	.....	72,000
W	.....	72,000
C	.....	20,000

D	.....	20,000
E	.....	16,000
F	.....	16,000
For free disposal	.....	none
Estate	.....	P286,000

Under the Family Code, C, D, E and F are all simply classified as illegitimate children. Hence, the proportion of 5 is to 5 is to 4 is to 4 (5:5:4:4) shall be inapplicable. Thus, the distribution of the estate shall be:

A	.....	P72,000
B	.....	72,000
W	.....	72,000
C	.....	18,000
D	.....	18,000
E	.....	18,000
F	.....	18,000
For free disposal	.....	none
Estate	.....	P288,000

(b) If X died intestate, his estate shall be divided in exactly the same way as that mentioned above. In other words, the survivor shall be entitled only to their legitime. It is in cases such as this where the legitime of compulsory heirs must also be taken into consideration in legal or intestate succession. The reason is that the entire hereditary estate is already reserved by operation of law for the benefit of the legal heirs who are all primary compulsory heirs. As a matter of fact, it is not even sufficient to satisfy the legitimes of the four illegitimate children.

Problem No. 2 — X died, survived by: (1) his widow, W; (2) his two legitimate children, A and B; (3) his four acknowledged natural children, C, D, E, and F; and (4) his two acknowledged spurious children, G and H. The net value of his estate is P224,000. If he died intestate, how shall such estate be divided?

Answer — It is obvious in the instant case that the entire estate of P224,000 is already reserved by law for the benefit of the survivors who are all primary compulsory heirs. As a matter of fact, it is not even sufficient to satisfy the legitimes of the six illegitimate children. Hence, following the doctrine applied in *Chanliongco* (79 SCRA 364), the best that we can do is to give to the survivors their respective legitimes. Thus:

The legitime of A and B is one-half (1/2) of the entire estate, or P112,000, or P56,000 each *(Art. 888, Civil Code)*. The legitime of W is the same as that of A or B, or P56,000 *(Arts. 892, 897, 898, Civil Code)*. That leaves a balance of P56,000. Now, if we give to C one-half (1/2) of the legitime of which either A or B is entitled, or P28,000, and D another one-half (1/2) of the legitime to which either A or B is entitled, or P28,000, nothing will be left for the other illegitimate children. Hence, we shall now apply the rule stated in the last paragraph of Art. 895 of the Civil Code. The balance of P56,000 shall be divided among the six illegitimate children in the proportion of 5:5:5:5:4:4. C shall be entitled to 5/28 of P56,000, or P10,000; D, to 5/28 of P56,000, or P10,000; E, to 5/28 of P56,000, or P10,000; F, to 5/28 of P56,000, or P10,000; G, to 4/28 of P56,000, or P8,000; and H, to 4/28 of P56,000, or P8,000; and H, to 4/28 of P56,000, or P8,000.

Thus, the distribution shall be as follows:

A	.....	P56,000
B	.....	56,000
W	.....	56,000
C	.....	10,000
D	.....	10,000
E	.....	10,000
F	.....	10,000
G	.....	8,000
H	.....	8,000
Estate	.....	P224,000

In view of the new provisions of the Family Code, C, D, E and F as well as G and H are all simply classified as illegitimate children. The share, therefore, of P56,000 shall be divided among the 6 illegitimate children equally and not in the proportion of 5:5:5:5:4:4.

Thus, the distribution shall be as follows:

A	.....	P56,000
B	.....	56,000
W	.....	56,000
C	.....	9,333
D	.....	9,333
E	.....	9,333

F	.....	9,333
G	.....	9,333
H	.....	9,333
Estate	.....	P224,000

However, in those cases where there is still a balance remaining out of the free portion, such as when there is only one acknowledged illegitimate child concurring in the succession, the division of such balance is controversial. As we have seen in the discussion under Art. 983, there are two views advanced by commentators on the New Civil Code. According to one view *(the exclusion theory),* the balance must be given to the legitimate children in conformity with the general order of succession, while according to the other view *(the concurrence theory),* we must still apply the proportions prescribed in Art. 895. The controversy may be illustrated by the following problem: X died intestate, survived by the following: (1) his widow, Y; (2) his legitimate children, A and B; and (3) his acknowledged natural child, C. The estate is P140,000. How shall the distribution be made? According to both concurrence and exclusion theory, the legitime of all the survivors must first be satisfied. The legitime of A is P35,000, B, P35,000, Y, P35,000, and C, P17,500. There is, therefore, a balance of P17,500. How shall this balance be divided or to whom shall it be adjudicated? According to the exclusion theory, it must be adjudicated to A and B. Consequently, the distribution shall be as follows:

A	.....	P 43,750
B	.....	43,750
Y	.....	35,000
C	.....	17,500
		P140,000

On the other hand, according to the concurrence theory, it must be divided among A, B, Y and C in the proportion of 2:2:2:1. A, B and Y shall, therefore, be entitled to 2/7 each of P17,500, or P5,000 each, while C shall be entitled to 1/7 of P17,500, or P2,500. Adding these amounts to their respective legitimes, the distribution shall be as follows:

A	.....	P 40,000
B	.....	P 40,000

Y	.....	P 40,000
C	.....	P 40,000
		P140,000

Most of the proponents of the concurrence theory, however, prefer to apply the proportion of 2:2:2:1 directly considering the fact that under this situation, there can be no possible impairment of the legitime of the survivors. Thus, A, B and Y shall be entitled to 2/7 each of P140,000, or P40,000 each, while C shall be entitled to 1/7 of P140,000, or P20,000.

It is submitted that the concurrence theory is correct. In the first place, it is conformity with Art. 983 which declares that "if illegitimate children survive with legitimate children, the shares of the former shall be in the proportions prescribed by Article 895." Under this theory, the proportions prescribed by Art. 895 are observed; under the exclusion theory, they are disregarded. In the second place, it is in conformity with Art. 999 which declares that the "widow or widower shall be entitled to the same share as that of a legitimate child." Under this theory, this mandate of the law is observed; under the exclusion theory, it is violated.

Art. 999 does not support the position that a widow (surviving spouse) is an intestate heir of his or her parent-in-law. The estate contemplated therein is the estate of the deceased spouse and not the estate of the widow's (or widower's) parent-in-law. Thus, in a case where the widow insisted in getting a share of the estate in her capacity as the surviving spouse of the son of her mother-in-law, the Court held that a surviving spouse is not an intestate heir of his or her parent-in-law. The widow is considered a third person as regards the estate of the parent-in-law. The contingent or inchoate right of the deceased spouse to the properties of the parent as the latter's compulsory heir was extinguished by his death. That is why it is the son of the deceased spouse (grandson of the parent-in-law) and the surviving spouse who succeed from the parent-in-law by right of representation. The grandson did not succeed from his deceased father.

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 be-

tween the surviving spouse and the illegitimate children so that such widow widower shall have one-fourth of the estate, and the illegitimate children the other fourth.[8]

Surviving Spouse, Legitimate Ascendants, and Illegitimate Children. — Under this article, the surviving spouse is placed in the same level or category as the illegitimate children. Thus, if the decedent is survived by his legitimate father and mother, the widow, one acknowledged natural child, and one acknowledged illegitimate child who is not natural, and the estate is P72,000, 1/2 of P72,000 or P36,000, shall be given to the parents or ascendants, 1/4 of P72,000, or P18,000, shall be given the widow, while the remaining 1/4 of P72,000, or P18,000, shall be given to the two illegitimate children which they shall divide in the proportion of 5:4. Consequently, the distribution shall be as follows:

Legitimate father	P18,000
Legitimate mother.....	18,000
Widow.....	18,000
Acknowledged natural child	10,000
Acknowledged illegitimate child who is not natural.....	18,000
	P72,000

(The proportion of 5:4 is no longer applicable in view of the new provisions of the Family Code. Please note that the acknowledged natural child and the acknowledged illegitimate child who is not natural are both classified as illegitimate children. Thus, distribution shall be as follows:

Legitimate father	P18,000
Legitimate mother.....	18,000
Widow.....	18,000
Acknowledged natural child	9,000
Acknowledged illegitimate child who is not natural.....	9,000
	P72,000

[8]Art. 841, Spanish Civil Code, in modified form.

Suppose, however, that the decedent is survived by a legitimate parent, the surviving spouse and an adopted child shall the legitimate parent be excluded by the adopted child or shall we apply the rule stated in the above article considering the provision of No. 4 of Art. 39 (formerly, Art. 343 of the Civil Code) of the Child and Youth Welfare Code (P.D. No. 603), which states "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?" This question was taken up and resolved in *Del Rosario vs. Cunanan* (76 SCRA 136). In this case, it was contended that the provisions which should be applied are Arts. 341 (now Art. 39, P.D. No. 603), 978 and 979 of the Civil Code and not Arts. 343 (now No. 4, Art. 39, P.D. No. 603) and 1000 of the Civil Code. The Supreme Court, however, speaking through Justice Makasiar, held that the governing provision is Art. 343 of the New Civil Code (now No. 4, Art. 39, P.D. No. 603), in relation to Arts. 893 and 1000 of said law, which directs that if the adopter is survived by legitimate parents or ascendants, the latter shall not have more successional rights than an acknowledged natural child. There are three reasons for this. In the first place it would be most unfair to accord more successional rights to the adopted, who is only related artificially by fiction of law to the deceased, than those who are naturally related to him by blood in the direct ascending line. In the second place, in intestate succession, where legitimate parents or ascendants concur with the surviving spouse of the deceased, the latter does not necessarily exclude the former from the inheritance. This is affirmed by Art. 893 of the New Civil Code. In the third place, Art. 343 (now No. 4 of Art. 39 of the Child and Youth Welfare Code) does not require that the concurring heirs should be the adopted child and legitimate parents or ascendants only. The language of the law is clear, and a contrary view cannot be presumed. Thus, Art. 343 should be made to apply, consonant with the cardinal rule in statutory construction that all of the provisions of the New Civil Code must be reconciled and given effect. Consequently, the respective shares of the surviving spouse, ascendant and adopted child should be determined by Art. 1000 of the New Civil Code.

It is interesting to note that the above case became the basis of the following problem which was asked in the Bar Examinations of 1979:

Problem — H died intestate leaving his legal wife, W, and his legally adopted son, AS. In the proceedings for the settlement of his estate, M, the widowed mother of H, intervened and claims for a share in the estate of H. AS opposes the claim of M contending that since under the law he is given the same rights as if he were a legitimate child, he excludes M from the estate of H. Should this opposition be sustained? Why?

Answer — The opposition of AS should not be sustained. Under our law, an adopted child shall be entitled to the same successional rights as a legitimate child, but there is an exception. If the adopter is survived by legitimate parents or ascendants and by an adopted child, the latter shall not have more successional rights than an acknowledged natural child. This merely means that the adopted child cannot exclude the legitimate parents or ascendants of the decedent from the succession and that his legitime or legal share shall be the same as that to which an acknowledged natural child shall be entitled; in other words, he shall be placed in the same category as an acknowledged natural child. The reason behind this is that it would be most unfair to accord more successional rights to the adopted, who is only related artificially by fiction of law to the deceased, than those who are naturally related to him by blood in the direct ascending line. True, the law speaks only of the concurrence of legitimate parents or ascendants and the adopted child in the succession; it does not include the surviving spouse. In the instant case, W, the legal wife of H, also survives. But this is of no moment; the law declaring that the adopted child shall not have more successional rights than an acknowledged natural child is still applicable; otherwise, the purpose of the law would be defeated. Besides, the law does not require that the concurring heirs should be the legitimate parents or ascendants and the adopted child only. The language of the law is clear, and a contrary view cannot be presumed. Consequently, the pertinent provisions of the law of intestate succession, where the survivors are the legitimate parents or ascendants, the surviving spouse and illegitimate children, are directly applicable. *(See Del Rosario vs. Cunanan, 76 SCRA 136).*

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 of their children to the other half.[9]

[9]Arts. 853, 837, Spanish Civil Code, in modified form.

Surviving Spouse and Brothers and Sisters, Nephews and Nieces. — The rule stated in the above article may be illustrated by the following problems:

Problem No. 1 — A died without a will survived by: (a) his widow, W, (b) his legitimate brothers, B and C; and (c) his nephews, E and F, who are the children of a deceased sister, D. The net remainder of his estate is P24,000. How shall such estate be distributed?

Answer — According to Art. 1001 of the Civil Code, "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." Consequently, the estate shall be divided as follows:

W	.....	P12,000,	in her own right
B	.....	4,000,	in his own right
C	.....	4,000,	in his own right
E	.....	2,000,	by right of representation
F	.....	2,000,	by right of representation
		P24,000	

Problem No. 2 — A died without a will survived by: (a) his widow, W; (b) X and Y, children of a deceased legitimate brother, B; and (c) Z, child of a deceased legitimate sister, C. The net remainder of his estate is P24,000. How shall such estate distributed?

Answer — According to Art. 1001 of the Civil Code, 1/ 2 of the estate shall pass to the widow, while the other 1/2 shall pass to the three nephews in their own right. Hence, the estate shall be divided as follows:

W	.....	P12,000,	in her own right
X	.....	4,000,	in his own right
Y	.....	4,000,	in his own right
Z	.....	4,000,	by right of representation
		P24,000	

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 right granted in the preceding articles.[10]

[10]New provision.

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.[1]

Collateral Relatives. — Collateral relatives shall succeed to the entire estate in the absence of legitimate descendants, legitimate ascendants, illegitimate children, and the surviving spouse. When there are legitimate descendants, legitimate ascendants, or illegitimate children, such collateral relatives do not participate in the inheritance; they are excluded altogether from the succession. When they concur with the surviving spouse only, they are also excluded as a general rule. There is, however, an exception, and that is when brothers and sisters or nephews and nieces concur in the succession. In such case, according to Art. 1001, 1/2 of the estate shall be given to the surviving spouse and the other 1/2 shall be given to the surviving spouse and the other 1/2 shall be given to the brothers and sisters or nephews and nieces.

Furthermore, there are certain principles that must always be borne in mind whenever collaterals are called to the inheritance. In the first place, when the law speaks of collateral relatives, it can only refer to those within the fifth degree. In the second place, where two or more collateral relatives concur in the succession, the rule of proximity by virtue of which the nearest in degree shall exclude the more remotes ones is applicable. In the third place, as an exception to the rule of proximity, the right of representation is also recognized, but it is a right which is extended only to nephews and nieces. And in the fourth place, where the survivors are of the same degree, the rule of preference by reason of relationship by the whole blood is also recognized, but it is a rule which can be applied only to brothers and sisters or nephews and nieces and not to other collaterals.

Art. 1004. Should the only survivors be brothers and sisters of the full blood, they shall inherit in equal shares.[2]

[1]Art. 946, Spanish Civil Code, in modified form.
[2]Art. 947, Spanish Civil Code.

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.*[3]

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.[4]

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.[5]

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.[6]

Brothers and Sisters. — Should the only survivors be brothers and sisters of the full blood, they shall inherit in equal shares or *per capita*.[7] The same rule shall also apply should the only survivors be brothers and sisters of the half blood.[8]

Brothers and Sisters, Nephews and Nieces. — 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*.[9] In other words, the former shall inherit in their own right, while the latter shall inherit by right of representation.[10] Thus, if the decedent is survived by A and B, brothers of the full blood, and D and E, children of C, another brother of the full blood who had predeceased him, the inheritance shall be divided into three equal parts — one part to be given to A, another to B, and the rest to D and E in representation of their deceased father, C. If all of the brothers A, B and C had predeceased the decedent, the inheritance shall, of

[3]Art. 948, Spanish Civil Code.
[4]Art. 949, Spanish Civil Code.
[5]Art. 950, Spanish Civil Code.
[6]Art. 915, Spanish Civil Code.
[7]Art. 1004, Civil Code.
[8]Art. 1008, Civil Code.
[9]Art. 1005, Civil Code.
[10]Arts. 972, 975, Civil Code.

course, be given to D and E, which they shall divide *per capita,* but they would be inheriting in their own right and no longer by right of representation. It must be remembered that the only case where the right of representation may take place in the collateral line is when nephews and nieces of the decedent concur with the decedent's brothers and sisters.[11]

The above rules are illustrated by the following case:

Government Service Insurance System vs. Custodio
26 SCRA 658

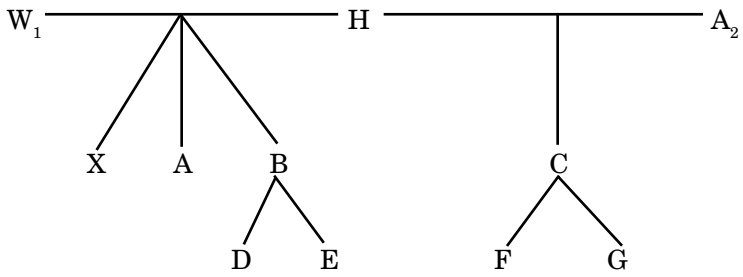
Simeon Custodio, a government retiree, died intestate, survived by his sister Susana Custodio and several nephews and nieces. These nephews and nieces are children of his brothers Vicente, Crispin and Jacinto who had predeceased him. Susana and her nephews and nieces, with the exception of Macario, only child of Crispin, and Luisa and David, two of the six children of Jacinto, entered into an extrajudicial agreement recognizing Susana as sole beneficiary of the retirement benefits of Simeon. How shall such retirement benefits be divided?

Held: The intestate heirs who did not sign the deed of extrajudicial settlement cannot be considered as having recognized Susana Custodio as the only beneficiary of Simeon's retirement money. There is no evidence, the case having been submitted for decision below solely on a stipulation of facts, that these non-signatory heirs had accepted other benefits under the deed of partition, as appellee now claims. These three heirs should inherit *per stirpes* in accordance with Article 1005 of the Civil Code. As Macario C. Custodio is the only child of Crispin, he inherits by representation the one-fourth (1/4) share pertaining to his father, while Luisa Custodio and David Custodio, being two of six children of Jacinto, are each entitled to a sixth of one-fourth (1/6 x 1/4) equivalent to 1/24 of the hereditary mass.

The same rules shall also be applied should brothers and sisters of the half blood survive together with nephews and nieces, who are the children of the decedent's brothers and sisters of the half blood.[12]

[11]Ibid.
[12]Arts. 1007, 1008, Civil Code.

However, if some of the survivors are brothers and sisters of the full blood and the others are brothers and sisters of the half blood, the rules that shall be applied would then be different. In such case, the former shall be entitled to a share double that of the latter.[13] Thus, if the decedent is survived by A and B, brothers of the full blood, and by C and D, brothers of the half blood, and the estate is P30,000, the distribution shall be made in the proportion of 2:2:1:1. A shall be entitled to 2/6 of P30,000, or P10,000; B, 2/6 of P30,000, or P10,000; C, 1/6 of P30,000, or P5,000; and D, 1/6 of P30,000, or P5,000. Should the brothers and sisters survive together with nephews and nieces, who are the children of the decedent's brothers and sisters who predeceased him, such nephews and nieces shall also inherit but by right of representation. This may be illustrated by the following example:



In the above diagram, let us suppose that the decedent, X, is survived by (1) A, a brother of the full blood; (2) D and E, nephews of the full blood, children of B, another brother of the full blood who had predeceased X; and (3) F and G, nephews of the half blood, children of C, a brother of half blood, who also had predeceased X. The decedent's estate is P25,000. How shall it be distributed? According to Art. 975, when children of one or more brothers and sisters of the deceased survived, they shall inherit from the latter by right of representation, if they survive with their uncles and aunts. According to Art. 1005, should brothers and sisters survive together with nephews and nieces, who are children of the decedent's brothers and sisters of the full blood, the former shall inherit *per capita,* and the latter *per stirpes*. According to Art. 1006, should brothers and

[13]Art. 1006, Civil Code. For illustrative case — see Alviar vs. Alviar, G.R. No. L-22402, June 30, 1967, 28 SCRA 610.

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. In the light of these three provisions, the P25,000 shall be divided into three shares in the proportion of 2:2:1. A shall be entitled to 2/5 of P25,000, or P10,000; D and E shall also be entitled to 2/5 of P25,000 or P10,000, by right of representation; while F and G shall be entitled to only 1/5, or P5,000, by right of representation. Consequently, the distribution shall be as follows:

A	.....	P10,000,	in his own right
D	.....	5,000,	by right of representation
E	.....	5,000,	by right of representation
F	.....	2,500,	by right of representation
G	.....	2,500,	by right of representation
		P25,000	

Nephews and Nieces. — If the only survivors are nephews and nieces of the full or of the half blood, such nephews and nieces shall succeed to the entire inheritance in their own right. Consequently, the division of the estate shall be *per capita*.[14] However, if some of them are of the full blood and the others are of the half blood, the rule of preference by reason of whole blood relationship shall be applied. In other words, those of the full blood shall be entitled to a share double that of those of the half blood. Although this rule is not expressly stated by the Code, it can be inferred from Art. 1009, paragraph 2, which declares that in the absence of brothers and sisters or children of brothers and sisters, the other collateral relatives shall succeed to the estate without distinction of lines or preference among them by reason of relationship by the whole blood. From this provision, we can deduce the rule that if there are nephews and nieces surviving the decedent, relationship by the whole or half blood becomes material in the distribution of the estate. This view advocated by Manresa[15] has been applied by our Supreme Court in *Padura vs. Baldovino* and in *Bicomong vs. Almanza*.[16]

[14]Art. 1008, Civil Code.

[15]7 Manresa, 6th Ed., pp. 158-159.

[16]In *Padura vs. Baldovino* (104 Phil. 1065), the Supreme Court did not spell out the reason or reasons for the application of the rule of double share for bull blood collaterals to the case of nephews and nieces. It was not necessary. In *Bicomong vs.*

Problem – Don died after executing a Last Will and Testament leaving his estate valued at P12 Million to his common-law wife Roshelle. He is survived by his brother Ronie and his half-sister Michelle.

(1) If Don failed to execute a will during his lifetime, as his lawyer, how will you distribute his estate? Explain.

(2) Assuming he died intestate survived by his brother Ronie, his half-sister Michelle, and his legitimate son Jayson, how will you distribute his estate? Explain. (2006)

Answer – (1) After paying the legal obligations of the estate, I will give Ronie, as full-blood brother of Don, 2/3 of the net estate, twice the share of Michelle, the half-sister who shall receive 1/3. Roshelle will not receive anything as she is not a legal heir [Art. 1006, NCC].

(2) Jayson will be entitled to the entire P12 Million as the brother and sister will be excluded by a legitimate son of the decedent. This follows the principle of proximity where the nearer excludes the farther" *(Suggested Answers to the 2006 Bar Examination Questions, PALS).*

Art. 1009. Should there be neither brothers and 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.[17]

Almanza (80 SCRA 421), it did. According to the Court, the provisions of Arts. 975, 1006 and 1008 are applicable. Frankly, we do not see any interence or implication either from Art. 975 or from Art. 1008 or from a combination of both in relation to Art. 1006 that where only nephews and nieces will concur in the succession and some of them are children of brothers and sisters of the full blood and others are children of brothers and sisters of the half blood, those of the full blood should be entitled to double the shares of those of the half blood. Art. 1008, for instance, speaks only of children of brothers and sisters of the half blood; it does not speak of children of brothers and sisters of the full blood concurring in the succession. It is different in the case of Art. 1009. In this article, there is a clear inference or implication that so long as the heirs are brothers and sisters or *nephews and nieces,* and some of them are of the full blood and others are of the half blood, the rule of double share for full blood collaterals is applicable.

[17]Art. 954, Spanish Civil Code, in modified form.

In the recent case of *Celedonia Solivio vs. The Honorable Court of Appeals, et al.*, G.R. No. 83484, February 12, 1990, the Court ruled that since the deceased, Esteban Javellana, Jr. died without descendants, ascendants, illegitimate children, surviving spouse, brothers, sisters, nephews or nieces, what shall apply in the distribution of his estate are Arts. 1003 and 1009 of the Civil Code. Therefore, the Court of Appeals correctly held that: "Both plaintiff-appellee and defendant-appellant being relatives of the decedent within the third degree in the collateral line, each, therefore, shall succeed to the subject estate 'without distinction of line or preference among them by reason of relationship by the whole blood', and is entitled to one-half (1/2) share and share alike of the estate.

Art. 1010.The right to inherit *ab intestato* shall not extend beyond the fifth degree of relationship in the collateral line.[18]

Other Collateral Relatives. — In the absence of brothers and sisters or nephews and nieces of the decedent, whether they be of the full or half blood, other collateral relatives shall succeed to the entire estate, subject to the rule of proximity[19] and the rule that the right to inherit *ab intestato* shall not extend beyond the fifth degree of relationship in the collateral line.[20]

According to the Code Commission, limiting the right of succession to the collateral relatives within the fifth degree of relationship from the decedent, instead of within the sixth degree (under the Spanish Civil Code), is in accordance with national economy and social welfare and in keeping with the underlying philosophy of socialization of ownership of property.[21] We might add as another reason the fact that beyond the fifth degree of relationship, the relationship is already so remote that it would be stretching human nature too much to presume that the decedent can still be bound by the bonds of affection to such relatives. Hence, in default of collateral relatives within the fifth degree, the whole estate shall pass to the State.[22]

[18]Art. 955, Spanish Civil Code, in modified form.
[19]Art. 962, Civil Code.
[20]Art. 1010, Civil Code.
[21]Report of the Code Commission, p. 116.
[22]Art. 1011, Civil Code.

Subsection 6. — The State

Art 1011. In default of person entitled to succeed in accordance with the provisions of the preceding Sections, the State shall inherit the whole estate.[1]

The State. — In default of legitimate children or descendants, legitimate parents or ascendants, illegitimate children or descendants, the surviving spouse, and collateral relatives within the fifth degree, the State shall inherit the whole estate. Hence, according to our theory of intestate succession, the State is a legal heir called to the succession by operation of law as in the case of other legal heirs. We have, therefore, discarded the American theory of escheat by the State by which the property of the decedent reverts to its original owner — the State.

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.[2]

Procedure for Escheat. — The above article provides that the pertinent provisions of the New Rules of Court must be observed.

These provisions are the following:

Rule 91, Rules of Court

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.

SECTION 2. *Order for hearing.* — If the petition is sufficient in form and substance, the court, by an order reciting the purpose of the petition, shall fix a date and place for the hearing

[1]Art. 956, Spanish Civil Code, in modified form.
[2]Art. 958, Spanish Civil Code, in modified form.

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.

SECTION. 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; and shall pursuant to law, assign the personal estate to the municipality or city where he 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 may be assigned to the respective municipalities or cities where the same is located. Such estate shall be for the benefit of the public schools, and public charitable institutions and centers in said municipalities or cities.

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.

SECTION 4.*When and by whom claim to estate filed.* — If a devisee, legatee, heir, widow, widower, or other person entitled to such estate appears and files a claim thereto with the court within five (5) years from the date of such judgment, such person shall have possession of and title to the same, or if sold, the municipality or city shall be accountable to him for the proceeds, after deducting reasonable charges for the care of the estate; but a claim not made within said time shall be forever barred.

SECTION 5. *Other actions for escheat.* — Until otherwise provided by law, actions for reversion or escheat of properties alienated in violation of the Constitution or of any statute shall be governed by this rule, except that the action shall be instituted in the province where the land lies in whole or in part.

Requisites for Escheat. — It is clear from the provisions of Sec. 1 of Rule 91 of the Rules of Court that the following requisites must concur in order that the escheat proceedings may be commenced: *first,* that the decedent dies intestate; *second,* that he dies seized of real and/or personal property located in the Philippines; and *third,*

that he leaves no heir or person entitled to such real and personal property.[3]

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.[4]

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.[5]

TABLE OF INTESTATE SUCCESSION

Survivors	Share	Division
1. Any class alone	Whole estate	Rule of Proximity (Art. 962)
2. (a) Leg. children (b) Leg. parents	Whole estate Excluded	Rule of proximity (Art. 962)

[3]For illustrative cases, see In re Estate of Liao Sayco, 21 Phil. 445; City of Manila vs. Arch. of Manila, 36 Phil. 815; Mun. of San Pedro vs. Colegio de San Jose, 65 Phil. 318.

[4]Art. 956, Spanish Civil Code, in modified form.

[5]New provision.

3. (a) Leg. Children (b) Illeg. Children	Concurrence or Exclusion Theory Surviving Spouse entitled to same share or each legitime	*Concurrence theory* – Satisfy their legitimes, and then distribute the disposable portion, if any, to the preferred heir in the order of intestate succession. (Arts. 895, 961, 983, 996, 999) *Exclusion theory* – Satisfy their legitime, and then give the disposable portion, if any, to the preferred heir in the order of intestate succession. (Arts. 895, 961, 983, 996, 999).
4. (a) Leg. Children (b) Surviving spouse		
5. (a) Leg. Children (b) Illeg. Children (c) Surviving spouse	Concurrence or Exclusion theory	
6. (a) Leg. Parents (b) Illeg. Children	1/2 1/2 (5:4)	(Art. 991). If decedent is an illegitimate person, his natural parents are excluded by presence of any illegitimate child.
7. (a) Leg. Parents (b) Surviving spouse	1/2 1/2	(Art. 997). Same shares even if decedent is an illegitimate person.
8. (a) Leg. Parents (b) Illeg. Children (c) Surviving spouse	1/2 1/4 (5:4) 1/4	(Art. 1000).
9. (a) Illeg. Children (b) Surviving spouse	1/2 (5:4) 1/2	(Art. 998).
10. (a) Surviving spouse (b) Brother and sister, nephews and nieces	1/2	(Art. 1001).

11. Collaterals	Whole estate	(Arts. 1003-1010). Principle of proximity.
12. State	Whole estate	(Arts. 1011-1014). Escheat proceedings. Rule 92, Rules of Court).

TABLE OF INTESTATE SUCCESSION UNDER THE FAMILY CODE

Survivors	Share	Division
1. Any class alone	Whole estate	Rule of Proximity (Art. 962, CC)
2. (a) Leg. Children (b) Leg. Parents	Whole estate xcluded	Rule of proximity (Art. 962, CC)
3. (a) Leg. Children (b) Illeg. Children	Concurrence or Exclusion Theory	*Concurrence theory* – Satisfy their legitimes, and then distribute the disposable portion, if any pro-rata (10:5). (Arts. 895, 983, 996, 999, CC: Art. 176, 2nd sentence, FC)
4. (a) Leg. Children (b) Surviving spouse	Surviving spouse entitled to same share or each legitimate child	
5. (a) Leg. Children (b) Illeg. Children (c) Surviving spouse	Concurrence or Exclusion theory Note: The legitime of each illegitimate child shall consist of 1/2 of the legitime of a legitimate child (Art. 176, Family Code.)	*Exclusion theory* – Satisfy their legitimes, and then give the disposable portion, if any, to the preferred heir in the order of intestate succession. (Art. 895, 961, 983, 996, 999, CC)
6. (a) Leg. Parents (b) Illeg. Children	1/2 1/2	If decedent is an illegitimate person, his natural parents are excluded by presence of illegitimate child. (Art. 991).

7. (a) Leg. Parents (b) Surviving spouse	1/2 1/2	Same share event if decedent is an illegitimate person (Art. 997, CC).
8. (a) Leg. Parents (b) Illeg. Children (c) Surviving spouse	1/2 1/2 1/4	(Art. 1000, CC)
9. (a) Illeg. Children (b) Surviving spouse	1/2 1/2	(Art. 998, CC)
10. (a) Surviving spouse (b) Brothers and sisters, nephews and nieces	1/2 1/2	(Art. 1001, CC)
11. Collaterals	Whole state	(Arts. 1003-1010, CC). Principle of proximity.
12. State	Whole state	(Arts. 1011-1014, CC) Escheat proceedings. Rule 92, Rules of Court.

Chapter IV

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 one who renounces or cannot receive his share, or who died before testator, is added or incorporated to that of his co-heirs, co-devisees, or co-legatees.[1]

Concept of Accretion. — The right of accretion, according to the definition given in the above article, occurs when two or more persons are called to the same inheritance, legacy or devise, but, by reason of (1) predecease, or (2) incapacity, or (3) repudiation, a vacancy is created in the inheritance. The effect of such a situation is that the vacant portion which had been previously assigned to the one who died before the decedent, or who is incapacitated to succeed, or who repudiated his inheritance, legacy or devise, is added or incorporated to that of his co-heirs, co-legatees, or co-devisees.

The right takes place both in testamentary and in intestate succession. It is based on the presumed will of the decedent. When a portion of the inheritance, legacy or devise is rendered vacant as a result of predecease, incapacity, or repudiation, in the absence of any expressed will of the *decedent,* the law presumes that had he been able to express his will, he would have given such vacant portion to the co-heirs, co-legatees, or co-devisees.[2]

Idem; Conflict of rights. —When the portion or share reserved for a certain heir either by will of the testator or by operation of law becomes vacant by reason of predecease, incapacity, or

[1]New provision.
[2]7 Manresa, 6th Ed., pp. 311-312.

repudiation, a problem arises because of the possible conflict or concurrence of several rights. In testamentary succession, for instance, shall the vacant share pass to the substitute by right of substitution which is based on the testator's will, or shall it pass to the children or descendants of the original heir by right of representation, or shall the share accrue to the co-heirs by right of accretion? Actually, under our law, the scope or sphere of each right is well defined. If the heir who dies before the testator or who cannot accept his share because of incapacity is a compulsory heir, the only conflict that can possibly arise is one between the substitute and the co-heirs with regard to the free portion, because of the fact that the legitime shall pass to the children or descendants of the compulsory heir by right of representation. This conflict is of course resolved in favor of the substitute because substitution is based on the expressed will of the testator, while accretion is not. However, if no substitute has been designated by the testator, the free portion shall accrue to the co-heirs, provided that the conditions prescribed in Art. 1016 are present. If on the other hand, the heir happens to be a voluntary heir, it is clear that he cannot transmit any right whatsoever to his own children or descendants.[3] Hence, if no substitute has been designated by the testator, the whole vacant share shall pass to the co-heirs by right of accretion. In intestate succession, the rules are much simpler. If a conflict arises between the descendants of the heir who dies before the decedent or who cannot accept his share and the co-heirs, it is always resolved in favor of the former. The right of representation in such case is always superior to the right of accretion. In case of repudiation, however, the vacant share shall pass to the co-heirs by right of accretion.[4]

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.[5]

[3]Art. 856, Civil Code.
[4]Art. 1018, Civil Code.
[5]Art. 982, Spanish Civil Code, in modified form.

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.[6]

Accretion in Testamentary Succession. — In order that the right of accretion will take place in testamentary succession, the following requisites or conditions must concur: first, that two or more persons must have been called in the testator's will to the same inheritance, legacy or devise, or to the same portion thereof, *pro indiviso;* and *second,* that there must be a vacancy in the inheritance, legacy or devise as a result of predeceased, incapacity or repudiation.[7]

Idem; Plurality of subjects, unity of object. — As a consequence of the first requisite, the following circumstances are, therefore, necessary: *first,* plurality of subjects; and *second,* unity of object. "Plurality of subjects" merely means that two or more persons must be instituted as heirs, legatees or devisees. "Unity of object," on the other hand, means that such person must be called to the same inheritance, legacy or devise, or to the same portion thereof, *pro indiviso*. In other words, such persons must be instituted jointly in the testator's will in such a manner that a state of indivision or co-ownership is created among them with respect to the same inheritance, legacy or devise, or with respect to the same portion thereof. It is immaterial whether the testator designates the aliquot or fractional parts or portions which will be given to each of them or not so long as a state of indivision or co-ownership exists among them with respect to the same inheritance, legacy or devise or with respect to the same portion thereof. Using the language of the Code, so long as the designation made by the testator "does not identify the shares of each by such description as shall make each heir the exclusive owner of determinate property," the right of accretion shall still take place. Consequently, the words "one-half for each" or "in equal shares" or

[6]Art. 983, Spanish Civil Code, in modified form.
[7]Art. 1016, Civil Code.

any others shall not exclude the right of accretion.[8] As a matter of fact, even where the heirs, legatees or devisees are instituted to unequal aliquot or fractional parts or portions of the same inheritance, legacy or devise or of the same portion thereof, since such inequality of distribution does not make each heir, legatee or devisee "the exclusive owner of determine property," the right of accretion shall still take place. Thus, if the testator states in his will that he is leaving his entire estate to A, B, and C, in such a way that "they shall inherit in equal shares," or "that A shall inherit 1/2, B, 1/4, and C, the remainder," it is clear that if the testator dies, a state of indivision or co-ownership shall exist among the instituted heirs with respect to the same inheritance. In other words, the designation of the shares of each heir will not result in making each of them the exclusive owner of determinate property. Consequently, if a vacancy is created in the inheritance by reason of predecease, or incapacity, or repudiation, the portion or share which is rendered vacant shall accrue to the co-heirs.

However, if the property bequeathed consists of money or fungible goods, according to the second paragraph of Art. 1017, there shall be a right of accretion only if the share of each heir or legatee is not "earmarked." This provision resolves some of the doubts which existed under the old Code. "Earmarked" simply means that there must be a particular designation or a physical segregation from all others of the same class. Consequently, if the shares of the legatees in the money or fungible goods are not particularly designated or physically segregated from each other, the right of accretion shall take place; conversely, if the shares of the legatees are particularly designated or physically segregated from each other the right of accretion shall not take place. Thus, if the testator bequeaths the balance of his current account at a certain bank to A, B, and C, in such a way that A shall be entitled to 1/2, B, 1/4, and C, 1/4, it is clear that if a vacancy is created by reason of predecease, incapacity or repudiation in any of the designated shares, such vacant share shall accrue to the co-legatees. The reason is that the shares given to each of the legatees are not earmarked. It would be different, however, if the testator states in his will that he is giving to A the P20,000 which he had deposited at a certain bank, to B, the P10,00 which is kept in his safe at his office, and to C, the P10,000 which

[8]Art. 1017, Civil Code.

he had buried under his house. Since the shares given to each of the legatees are earmarked, accretion shall not take place in case any of them is rendered vacant by predecease, incapacity or repudiation.

(Note: There are some authorities, who, following a view advocated by most Spanish commentators, maintains that in order that two or more persons shall be considered as being called to the some inheritance, or to the same portion thereof, *pro indiviso,* it is essential that they should be instituted without designation of their quota or share, or if there is a designation, at least, their respective quotas or shares should be aliquot or fractional and equal at the same time. It is submitted that this restrictive interpretation of the term *pro indiviso* is not sound. We believe that even if the aliquot parts or fractional shares of the co-heirs are unequal, accretion may still take place for the following reasons:

1. Applying the test stated in Art. 1017, it is clear that the designation of the aliquot parts or fractional shares to which the co-heirs are called, although unequal, do not identify such parts or shares by such description as shall make each co-heir the exclusive owner of determinate property. In other words, the designation will still result in a state of co-ownership or indivision.

2. Even the very text of Art. 1017 gives rise to the inference that the aliquot parts or fractional shares may be unequal. The article says: The words "one-half for each" or "in equal shares" or any others x x x shall not exclude the right of accretion. From the phrase "any others", we can deduce the fact that even if the parts or shares are unequal, accretion may still take place.

3. Besides, according to Art. 1019 of the Code, which is a new provision, the heirs to whom the portion goes by right of accretion take it in the same proportion that they inherit. From this provision it can be inferred that even if the parts or shares of each heir are unequal, accretion may still take place.

4. Finally, to apply the rules of accretion is more in accordance with the presumed will of the testator.

Probably, a revisit to the equivalent provisions of the Spanish Civil Code, which have been modified drastically by Arts. 1016 and 1017 of the New Civil Code, will help. Thus:

"Art. 982. In order that in testamentary succession the right of accretion may take place, the following are required:

"(1) That two or more persons are called to the same inheritance or to the same portion thereof without special designation of shares.

"(2) That one. of the heirs designated dies before the testator, renounces the inheritance, or is incapable to receive it.

"Art. 983. It shall be understood that a designation of shares has been made only in cases in which the testator has expressly determined a quota for each heir.

"The phrase "in halves or in equal parts" or other which, though designating an aliquot part, do not fix such part numerically or in such manner as may make each of them the owner of a separate unit of property, do not exclude the right of accretion."

Comparing the above provisions with those of Arts. 1016 and 1017 of the New Civil Code, it is obvious that the opinions of Spanish commentators with regard to their proper interpretation are no longer very relevant, considering the clear and explicit provisions of the New Civil Code, especially of Art. 1017.

It must, however, be noted that just because two or more persons are called to inherit aliquot parts, (such as "in the proportion of 2:2:1"), or fractional shares, (such as "1/4 for A, 1/4 for B, and 1/2 for C"), for the inheritance does not necessary mean that if there is a vacancy in the inheritance as a result of predecease, incapacity or repudiation, the vacant portion accrues to all of the instituted heirs. This may be illustrated by the following example: X instituted as his heirs A and B, with respect to one-third (1/3) of his estate, C and D, with respect to one-third (1/3), and E and F, with respect to the balance. A predeceased X. How shall the estate be divided? It is clear that B alone will be able to inherit by right of accretion. The others cannot because they are not jointly *(pro indiviso)* instituted as co-heirs with respect to the one-third (1/3) portion allotted for A and B. But suppose that both A and B predeceased X, shall C, D, E, and F now inherit by right of accretion? Since they are not instituted jointly as co-heirs with respect to the one-third (1/3) portion which has been rendered vacant, they cannot inherit by right of accretion. Consequently, such vacant portion shall now be merged in the mass of the hereditary estate, and shall be given to the legal heirs of the testator in accordance with the rules of legal or intestate succession *(Art. 1022, Civil Code)*.

In reality, it becomes a matter of construction. Thus if X instituted as his universal heirs, A, B, C, D, E, and F, then

> stated that one-half (1/2) of his estate shall be given to A and B, one-fourth (1/4), to C and D, and the balance, to E and F, the situation is already different. If A predeceased the testator, undoubtedly, only B shall be benefited. He alone shall inherit the portion rendered vacant by right of accretion. The reason is that he and A are the only ones who are called jointly to inherit the one-half (1/2) portion which is affected. But suppose that both A and. B predeceased the testator, who shall inherit the one-half (1/2) portion which has been rendered vacant? It is submitted that C, D, E, and F shall be entitled to this vacant portion by right of accretion. Both of the requisites prescribed by law in order that there will be accretion are obviously present.

Idem; Vacancy in inheritance. — In addition to plurality of subjects and unity of object, it is also essential in order that accretion shall take place in testamentary succession that there is a vacancy in the inheritance, legacy or devise. This vacancy may be caused by any of the following: *first,* predecease of one of the instituted heirs, legatees or devisees; *second,* incapacity of one of the instituted heirs, legatees or devisees; *third,* repudiation by one of the instituted heirs, legatees or devisees; *fourth,* nonfulfillment of the suspensive condition attached to the institution of an heir or the designation of a legatee or devisee; and *fifth,* void or ineffective testamentary dispositions.[9]

Art. 1018. In legal succession the share of the person who repudiates the inheritance shall always accrue to his co-heirs.[10]

Accretion in Intestate Succession. — In legal or intestate succession, since by the very nature of the succession the legal heirs are called by the law to the same inheritance, *pro indiviso,* only one requisite is essential in order that the right of accretion shall take place. There must be a vacancy in the inheritance. This vacancy may be cause by either predecease, incapacity or repudiation. It must be observed, however, that Art. 1018 speaks only of repudiation and not of predecease and incapacity. The reason for this is that, strictly speaking, in legal or intestate succession, a vacancy in the

[9]See Art. 1016, par. 2, Civil Code; Torres and Lopez vs. Lopez, 49 Phil. 504; 16 Scaevola, 302-305.

[10]Art. 981, Spanish Civil Code.

inheritance exists only in case of repudiation. It cannot exist in case of predecease or incapacity.

(Note: We might as well spell it. In the field of civil law, somehow we have fallen into the habit of echoing opinions of Spanish commentators even in those cases where the provisions of the New Civil Code are new or have drastically modified or even changed the equivalent provisions of the Spanish Civil Code. A very good example of this is the problem of accretion in testamentary succession under Arts. 1016, 1017 and 1019 of the Civil Code. We have already discussed this problem in our comments on Arts. 1016 and 1017. Another equally good example is the problem of accretion in legal or intestate succession. In this problem, two provisions of the Civil Code are directly involved. They are Arts. 1018 and 1019. The first is an exact copy of Art. 981 of the Spanish Civil Code, while the second is a new provision. The questions which are usually asked are as follows: In legal or intestate succession, when does the right of accretion take place? In case accretion takes place, is it not true that whether the other heirs inherit by right of accretion or in their own right, the result will still be the same? Practically all commentators in this country answer the first question by saying that in legal or intestate succession, accretion may take place in case of predecease, incapacity or repudiation. In the process they also answer the second question by adding: "At any rate, whether we say that the other heirs shall inherit by right of accretion or in their own right will not make any difference. The result will still be the same".

Actually, in legal or intestate succession, accretion can only take place in case of repudiation; it cannot take place, as a rule, in case of either predecease or incapacity. The reason is that, strictly speaking, in legal or intestate succession, a vacancy in the inheritance exists only in case of repudiation; it cannot exist in case of predecease or incapacity. That explains why under the Civil Code of the Philippines (Art. 1018) and under the Spanish Civil Code (Art. 781), the law speaks only of repudiation as the basis for accretion in legal or intestate succession, but not of predecease or incapacity. And it is not correct to say that whether or not there is accretion in case of predecease or incapacity, the result will still be the same. We submit that the result will not be the same. Otherwise, there would be no sense in speaking of accretion in legal or intestate succession; in other words, the subject of accretion would become material or important only in testamentary succession.

Probably, the following example will serve to clarify the problem:

Problem — X died intestate survived by: (1) his legitimate parents, F and M; (2) his widow, W; and (3) his acknowledged natural children, A and B. The net value of his estate is P480,000.

(a) Suppose that F predeceased X or is incapacitated to inherit from X, how shall the estate be divided?

(b) Suppose that F repudiated his inheritance, how shall the estate be divided?

Answer — (a) The estate of P480,000 shall be divided as follows: M shall be entitled to one-half (1/2), or P240,000; W shall be entitled to one-fourth (1/4), or P120,000; and A and B shall also be entitled to one-fourth (1/4), or P120,000, which they shall divide in equal shares. (See Art. 1000, Civil Code.)

(b) If F had not repudiated his inheritance, the division of the estate, applying Art. 1000 of the Civil Code would have been as follows:

F	P120,000
M	120,000
W	120,000
A	60,000
B	60,000

However, since F had repudiated his inheritance of P120,000, a vacancy is created in the estate. What will happen now to this vacant portion? According to Art. 1018 of the Civil Code, this vacant portion shall accrue to F's co-heirs. Therefore, applying Art. 1019 of the Civil Code, the P120,000, which would have passed to F, shall now pass to M, W, A, and B in the proportion of 2:2:1:1. In other words, M shall be entitled to two-sixth (2/6) or one-third (1/3) of P120,000 by right of accretion; W, two-sixths (2/6) or one-third (1/3) of P120,000 by right of accretion; A, to one-sixth (1/6) of P120,000 by right of accretion; and B, to one-sixth (1/6) of P120,000 by right of accretion. The distribution shall, therefore, be as follows:

M	P120,000,	as legal heir
	40,000,	by right of accretion
W	120,000,	as legal heir
	40,000,	by right of accretion

A	.....	60,000,	as legal heir
		20,000,	by right of accretion
B	.....	60,000,	as legal heir
		20,000,	by right of accretion
		P480,000	

There are some, however, who are more inclined to accept the view that when Art. 1019 says that "the heirs x x x take it in the same proportion that they inherit," the phrase "same proportion" refers to the proportional shares stated in the law itself, which, in the above problem, would be one-half (1/2) for M, one-fourth (1/4) for W and one-half (1/4) for A and B. Thus, M shall be entitled to one-half (1/2) of the portion rendered vacant by the act of repudiation of F; W, to one-fourth (1/4); and A and B, also to one-fourth (1/4), which they shall divide in equal shares. Therefore, according to them, the estate of P480,000 shall be divided as follows:

M	.....	P120,000,	as legal heir
		60,000,	by right of accretion
W	.....	120,000,	as legal heir
		30,000,	by right of accretion
A	.....	60,000,	as legal heir
		15,000,	by right of accretion
B	.....	60,000,	as legal heir
		15,000,	by right of accretion
		P480,000	

It is submitted that the first solution is more logical. If we adopt the second solution, in effect, we shall be saying that the P120,000 rendered vacant by the repudiation by F shall first be merged in the mass of the hereditary estate and then given to the legal heirs of X in their own right. Such a process would not jibe or tally with the concept of accretion. As a matter of fact, under this solution, there would be no accretion after all.

There are, however, two instances under our Code which would justify accretion in intestate succession not only in case of repudiation but even in case of predecease or incapacity. The first is when the right of representation takes place and the share of one of the representatives is rendered vacant. In such case, the vacant share passes to the co-representatives by right of accretion and not to all of the co-heirs in their own right. This

is logical, because, otherwise, the rule enunciated in Art. 974 of the Code to the effect that the division of the estate in such case shall be made in such a manner that the representatives shall not inherit more than what the person represented would have inherited would be nullified. The second is when the decedent is survived only by grandparents in both paternal and maternal lines and the share of one of them is rendered vacant. In such case, the vacant share passes to the other grandparent belonging to the same line by right of accretion and not to all of the grandparents in their own right. This is likewise logical, because, otherwise, the rule enunciated in the second paragraph of Art. 987 of the Code to the effect that the estate in such case shall be divided equally between paternal and maternal lines would also be nullified.[11]

Art. 1019. The heirs to whom the portion goes by the right of accretion take it in the same proportion that they inherit.[12]

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.[13]

Effect of Accretion. — The most important effect of accretion is that the share or portion which is rendered vacant by predecease, incapacity or repudiation is added or incorporated to the share of the co-heirs, co-legatees or co-devisees.[14] However, in testamentary succession, a certain qualification must be made. Where the share which is rendered vacant happens to be the share of a compulsory heir, only that part of the share which is taken from the disposable free portion shall pass to the co-heirs by right of accretion. The legitime is not included. This is clear from the provision of Art. 1021. In case of predecease or incapacity, the legitime shall pass to the children or descendants of the compulsory heir by right of representation. If there are no children or descendants, the other co-heirs shall succeed to it in their own right. In case of repudiation, even if there are children or descendants of the compulsory heir who had repudiated his inheritance, the right of representation cannot

[11]7 Manresa, 6th Ed., pp. 317-318.
[12]New provision.
[13]Art. 984, Spanish Civil Code.
[14]Art. 1015, Civil Code.

take place because of the principle that an heir who repudiates his inheritance cannot be represented.[15] Consequently, whether there are children or descendants or not, the other co-heirs shall succeed to it in their own right and not be right of accretion.[16] In legal or intestate succession, on the other hand, the rule is different. The entire share which is rendered vacant shall pass to the co-heirs by right of accretion.

Idem; Division in Case of Accretion. — Whether the succession is testamentary or intestate; if the right of accretion takes place, the heirs to whom the vacant share or portion is assigned shall divide it in the same proportion that they inherit.[17] This method of distribution may be illustrated by the following example:

> *Problem* — In his will, the testator instituted his three nephews, A, B, and C, as his universal heirs – A, to inherit 2/3 of the entire estate, B, 1/6, and C, also 1/6. After the death of the testator, C repudiated his share. Assuming that the net remainder of the estate is P30,000, how shall the distribution be made?
>
> *Answer* — Had C not repudiated his share, the distribution of the estate would have been as follows:
>
> | | | |
> |---|---|---|
> | A | ..... | P20,000 |
> | B | ..... | 5,000 |
> | C | ..... | 5,000 |
>
> Since both of the requisites for accretion to take place in testamentary succession are present, the P5,000 which would have gone to C and which is now vacant because of C's repudiation, shall be divided between A and B in the proportion of 4:1. In other words, A shall be entitled to 4/5 of P5,000, or P4,000, while B shall be entitled to 1/5 of P5,000, or P1,000. Consequently, the distribution shall be as follows:
>
> | | | | |
> |---|---|---|---|
> | A | ..... | P20,000, | in his own right |
> | | | 4,000, | by right of accretion |
> | B | ..... | 5,000, | in his own right |
> | | | 1,000, | by right of accretion |
> | | | P30,000 | |

[15]Art. 977, Civil Code.
[16]Art. 1021, Civil Code.
[17]Art. 1019, Civil Code.

Ideal; Division in Case of Conflict of Rights. — Probably, the most complicated aspect of the law on succession is when there is a conflict in the succession among three rights – first, the right of representation, second, the right of accretion, and third, the right of legal or intestate succession. This conflict exists when there is a vacancy in the inheritance as a result of either predecease, incapacity, or disinheritance of, or repudiation by, a co-heir, co-legatee or co-devisee. The law, however, becomes simple if we are going to look at it from the point of view of the effects of predecease, incapacity, disinheritance, or repudiation in both testamentary and intestate succession. The following chart will help:

	Testamentary Succession		Intestate Succession
	Legitime	Free Portion	
Predecease	1. R 2. IS	1. A 2. IS	1. A 2. IS
Incapacity	Same	Same	
Disinheritance	Same	—	—
Repudiation	IS	A	A

Summary

A. *In testamentary succession:*

1. *Legitime:*

(a) In case of predecease of an heir, there is representation if there are children or descendants; if none, the others inherit in their own right.

(b) In case of incapacity of an heir, the results are the same as in predecease.

(c) In case of disinheritance of an heir, the results are the same as in predecease.

(d) In case of repudiation by an heir, the other heirs inherit in their own right.

2. *Disposable free portion:*

Accretion takes place when requisites stated in Art. 1016, Civil Code, are present; but if such requisites are not present, the other heirs inherit in their own right.

B. *In intestate succession:*

1. In case of predecease, there is representation if there are children or descendants; if none, the other heirs inherit in their own right.

2. In case of incapacity, the results are the same as in predecease.

3. In case of repudiation, there is always accretion.

The above principles may be illustrated by the following problems:

Problem No. 1 — X died intestate survived by: (1) A, B, D and E, his legitimate children; (2) F and G, legitimate children of C, a legitimate son of X who predeceased him; (3) H and I, legitimate children of D; and (4) J and K, legitimate children of E, D, however, is incapacitated to inherit from X because of an act of unworthiness, while E repudiated his inheritance. If the net value of the hereditary estate is P120,000, how shall it be divided?

Answer — In the instant problem, actually, there are three shares which are rendered vacant. They are: first, the share which C would have inherited if he had not predeceased the decedent; second, the share which D would have inherited if he had the necessary capacity to inherit from the decedent; and third, the share which E would have inherited if he had not repudiated it. Since C is survived by two legitimate children, F and G, such children shall now represent him in the inheritance (Arts. 970, et seq., Civil Code). The same is true in the case of H and I. They shall also represent their father, D, in the inheritance (Arts. 970, et seq., 1035, Civil Code. It is different in the case of J and K. Since an heir who repudiates his inheritance cannot be represented (Art. 977, Civil Code), there will be accretion in favor of the co-heirs, A and B (Arts. 1015, 1018, 1019, Civil Code). Therefore, the hereditary estate of P120,000 shall be divided as follows:

A ..... P 24,000, in his own right
12,000, by right of accretion

B	.....	24,000,	in his own right
		12,000,	by right of accretion
F	.....	12,000,	by right of representation
G	.....	12,000,	by right of representation
H	.....	12,000,	by right of representation
I	.....	12,000,	by right of representation
		P120,000	

Problem No. 2 — Suppose that in the above problem, X died testate. In his will, he instituted his five children, A, B, C, D and E, as heirs to inherit to inherit in equal shares. However, C died before him; D is incapacitated to inherit from him by reason of an act of unworthiness; and E repudiated his inheritance. How shall the P120,000 estate be divided?

Answer — Had it not been for the predecease of C, the incapacity of D and the repudiation by E, the hereditary estate of P120,000 would have been divided as follows:

A	.....	P 12,000,	as a compulsory heir
		12,000,	as a voluntary heir
B	.....	12,000,	as a compulsory heir
		12,000,	as a voluntary heir
C	.....	12,000,	as a compulsory heir
		12,000,	as a voluntary heir
D	.....	12,000,	as a compulsory heir
		12,000,	as a voluntary heir
E	.....	12,000,	as a compulsory heir
		12,000,	as a voluntary heir
		P120,000	

Since C predeceased the testator, the legitime of P12,000 to which he would have been entitled as a compulsory heir shall pass to his legitimate children, F and G, by right of representation, while the free portion of P12,000 to which he would have been entitled as a voluntary heir shall pass to his co-heirs, A and B, by right of accretion. The same is true in the case of D. Since he is incapacitated to inherit from the testator because of an act of unworthiness, the legitime of P12,000 to which he would have been entitled as a compulsory heir shall pass to his legitimate children, H and I, by right of representation, while

the free portion of P12,000 to which he would have been entitled as a voluntary heir shall pass to his co-heirs, A and B, by right of accretion. It is different in the case of E. Since he repudiated his inheritance, he cannot be represented by his children, J and K. Therefore, the legitime of P12,000 to which he would have been entitled as a compulsory heir shall pass to the legal heirs of the testator by intestate succession, while the free portion of P12,000 to which he would have been entitled as a voluntary heir shall pass to his co-heirs, A and B, by right of accretion. Who are the legal heirs of the testator? A is a legal heir; B is a legal heir; F, G, H and I are also legal heirs by right of representation. Hence, the P12,000 legitime repudiated by E shall be divided among them as follows: 1/4 for A; 1/4 for B; 1/4 for F and G; and 1/4 for H and I. Consequently, the division of the entire hereditary estate is as follows:

A	P 12,000,	as compulsory heir
	12,000,	as voluntary heir
	18,000,	by right of accretion
	3,000,	as legal heir
B	12,000,	as compulsory heir
	12,000,	as voluntary heir
	18,000,	by right of accretion
	3,000,	as legal heir
F	6,000,	by right of representation
	1,500,	as legal heir by representation
G	6,000,	by right of representation
	1,500,	as legal heir by representation
H	6,000,	by right of representation
	1,500,	as legal heir by representation
I	6,000,	by right of representation
	1,500,	as legal heir by representation
	P120,000	

Problem No. 3 — Suppose that in the above problem, the testator instituted his five children as heirs to the entire disposable portion of his hereditary estate in the proportion of 1/5 for A, 1/10 for B, 1/10 for C, 1/10 for D, and 1/2 for E, what is the effect of the predecease of C, the incapacity of D by reason of an act of unworthiness and the repudiation by E upon the division of the P120,000 estate?

Answer — Had it not been for the predecease of C, the incapacity of D and the repudiation by E, the estate would have been divided as follows:

A	P 12,000,	as compulsory heir
	12,000,	as voluntary heir
B	12,000,	as compulsory heir
	6,000,	as voluntary heir
C	12,000,	as compulsory heir
	6,000,	as voluntary heir
D	12,000,	as compulsory heir
	6,000,	as voluntary heir
E	12,000,	as compulsory heir
	P30,000,	as voluntary heir

Using the same analysis and the same line of reasoning which we applied in the preceding problem, the estate shall be divided as follows:

A	P 12,000,	as compulsory heir
	12,000,	as a voluntary heir
	4,000,	as his proportionate share by right of accretion because of the predecease of C
	4,000,	as his proportionate share by right of accretion because of the incapacity of D
	20,000,	as his proportionate share by right of accretion because of the repudiation by E
	3,000,	as legal heir because of repudiation by E
B	12,000,	as a compulsory heir 6,000, as a voluntary heir
	2,000,	as his proportionate share by right of accretion because of the predecease of C
	2,000,	as his proportionate share by right of accretion because of the incapacity of D

	10,000,	as his proportionate share by right of accretion because of the repudiation by E
	3,000,	as legal heir because of repudiation by E
F	6,000,	by right of representation
	1,500,	as legal heir by representation because of repudiation by E
G	6,000,	by right of representation
	1,500,	as legal heir by representation because of repudiation by E
H	6,000,	by right of representation
	1,500,	as legal heir by representation because of repudiation by E
I	6,000,	by right of representation
	1,500,	as legal heir by representation because of repudiation by E

We are, of course, aware of some who hold the view that in order that there will be accretion in the above hypothetical case, it is necessary that the legitimate children should have been instituted as heirs without designation of shares, or if there is a designation, they should have been instituted "in equal shares" or "one-fifth for each." Therefore, according to them, since accretion cannot take place in the above case, the shares from the free portion given to the child who predeceased the testator or who is incapacitated to inherit from the testator or who repudiated his inheritance shall be merged in the hereditary estate and given to those who are legally entitled thereto in accordance with the rules of intestate succession. It is submitted, however, that by virtue of the provision of Art. 1017 of the New Civil Code which entirely changed the provision of Art. 983 of the Spanish Civil Code, this view which was adhered to by some commentators under the old law, is no longer sound. Furthermore, under Art. 1019, a new provision, there is a clear inference that the co-heirs may be instituted to unequal shares. Finally, the solution that we have given is more in accordance with the presumed will of the testator, which after all is the basis of accretion.

Problem No. 4 — X died intestate survived by: (1) B and C, his legitimate children; (2) D, E, F and G, legitimate children

of A, a legitimate child of X who predeceased him; (3) H and I, legitimate children of B; and (4) J and K, legitimate children of C. B, however, had been previously convicted of an attempt upon the life of his father more than ten years ago. C, on the other hand, repudiated his inheritance. If the hereditary estate is worth P120,000, how shall it be divided?

Answer — Since A predeceased his father X, his legitimate children D, E, F and G shall now represent him in the succession. The same is true in the case of B. Since he is incapacitated to inherit from his father because of an act of unworthiness, his legitimate children H and I shall represent him in the succession. It is different in the case of C. An heir who repudiates his inheritance cannot be represented (Art. 977, Civil Code). Therefore, the portion which C repudiated shall now accrue to his co-heirs (Arts. 1018, 1019, Civil Code). But his co-heir A is dead; his other co-heir B is incapacitated. There can, therefore, be no accretion. Hence, the vacant portion shall pass to the legal heirs of the decedent. The legal heirs are, of course, the grandchildren, D, E, F, G, H and I, who will divide such portion per stirpes, since they inherit by representation. Thus, the division shall be as follows:

D	.....	P15,000
E	.....	15,000
F	.....	15,000
G	.....	15,000
H	.....	30,000
I	.....	30,000
		P120,000

Idem; Transmission of Rights and Obligations. — Another effect of accretion is that the heirs to whom the vacant inheritance or portion accrues shall succeed to all the rights and obligations which would have pertained to the heir who died before the decedent, or who is incapacitated to succeed, or who has repudiated his inheritance.[18]

There is, however, one question that is ordinarily taken up in connection with this effect. Can the co-heirs to whom the vacant share will accrue repudiate their shares in the accretion? In other words,

[18]Art. 893, Civil Code.

is the right of accretion voluntary or compulsory? Commentators are divided with regard to the answer to this question. According to one view, since each heir has a potential right not only to be the sole owner of that share to which he is called to inherit, but also of the entire inheritance, it is but logical that when the share of an heir becomes vacant, the co-heirs, in order to comply with the expressed or presumed will of the decedent, must necessarily accept their share in the portion which is vacant. According to a second view, since the acts of acceptance and repudiation are free and voluntary, and since the right of accretion is a right and not an obligation, it is but just that the co-heirs should be granted the option of accepting or repudiating their shares in the accretion. According to a third view, a distinction must be made between testamentary and intestate succession. In the former, since the share which passes to a co-heir by right of accretion is separate and distinct from the share which passes to him by force of the testator's will, it is but proper that when he accepts his inheritance as an instituted heir, he is free to accept or repudiate his share in the accretion. In the latter, however, because of the principle that there can be no partial acceptance or repudiation, once a co-heir accepts his share in the inheritance, he must also accept his share in the accretion. We believe that the second view is the most logical.[19]

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 coheirs shall succeed to it in their own right, and not by the right of accretion.[20]

Effect of Compulsory Succession. — In testamentary succession, when the heir who dies before the testator, or who is incapable of succeeding, or who repudiates his inheritance, is a compulsory heir, the right of accretion shall pertain only to the free portion given to such heir but not to the legitime.[21] What will,

[19]See 7 Manresa, 6th Ed., pp. 330-332; 17 Scaevola 329.
[20]Art. 985, Spanish Civil Code.
[21]Art. 977, Civil Code.

therefore, happen to such legitime? The answer depends upon the cause for the vacancy.

If the vacancy was due to predecease or incapacity, and the heir who died before the testator or who cannot receive his share has children or descendants of his own, such children or descendants shall be entitled to the legitime by right of representation. If there are no children or descendants, it shall be given to the legal heirs of the testator in accordance with the rules of intestate succession.

On the other hand, if the vacancy was due to repudiation, the legitime shall be given to the legal heirs of the testator in accordance with the rules of intestate succession regardless of whether the compulsory heir who had repudiated his share in the inheritance has children or descendants of his own or not. This rule, which is enunciated in the second paragraph of Art. 1021, is in conformity with the principle that an heir who repudiates his inheritance cannot be represented.

These principles may be illustrated by the following:

Problem No. 1 — The testator executed a will instituting his three legitimate children, A, B, and C, as his universal heirs. According to the will, A shall be entitled to 1/2 of the entire free portion, B, 1/4, and C, the remainder. C, however, cannot inherit from the testator, because he had committed an act of unworthiness. He has two legitimate children of his own, D and E. Assuming that the net remainder of the estate after the testator's death is P120,000, how shall it be distributed?

Answer — Had it not been for the incapacity of C, the estate would have been distributed as follows:

A	.....	P 20,000,	as compulsory heir
		30,000,	as voluntary heirs
B	.....	P 20,000,	as compulsory heir
		15,000,	as voluntary heir
C	.....	P 20,000,	as compulsory heir
		15,000,	as voluntary heir

As a result of C's incapacity, there is now a vacancy in the inheritance covering his legitime, to which he would have been entitled by operation of law, amounting to P20,000, and his share of the free portion, to which he would have been entitled by will,

amounting to P15,000. As far as the legitime is concerned, the amount shall pass to D and E by right of representation. As far as the free portion of P15,000 is concerned, the amount shall pass to A and B by right of accretion. D and E shall divide the P20,000 equally. A and B, on the other hand, shall divide the P15,000 in the proportion of 2:1. In other words, A shall be entitled to 2/3 of P15,000, or P10.000, while B shall be entitled to 1/3 of P15,000, or P5,000. Consequently, the distribution will be as follows:

A	.....	P 20,000,	as compulsory heir
		30,000,	as voluntary heir
		10,000,	by right of accretion
B	.....	20,000,	as compulsory heir
		15,000,	as voluntary heir
		5,000,	by right of accretion
D	.....	10,000,	by right of representation
E	.....	10,000,	by right of representation
		P120,000	

Problem No. 2 — Suppose that in the above problem, instead of being incapacitated to succeed, C had repudiated his inheritance, how shall the distribution be made?

Answer — As far as the legitime of P20,000 is concerned, since D and E cannot represent their father, C, the amount shall be given to A and B in accordance with the rules of intestate succession. As far as the share of C in the free portion amounting to P15,000 is concerned, the amount shall be given to A and B by right of accretion. The distribution shall, therefore, be as follows:

A	.....	P 20,000,	as compulsory heir
		30,000,	as voluntary heir
		10,000,	as legal heir
		10,000,	by right of accretion
B	.....	P 20,000,	as compulsory heir
		15,000,	as voluntary heir
		10,000,	as legal heir
		5,000,	by right of accretion
		120,000	

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.[22]

Effect If Accretion Does Not Take Place. — In testamentary succession, when there is a vacancy in the inheritance, but the right of accretion does not take place because the first requisite stated in Art. 1016 for accretion is not present, the share or portion which is rendered vacant shall pass to the legal heirs of the testator in accordance with the rules of intestate succession, who shall receive it with the same charges and obligations. However, if a substitute has been designated in the testator's will, it shall pass to such substitute, who shall receive it with the same charges and obligations.

Art. 1023. Accretion shall also take place among devisees, legatees and usufructuaries under the same conditions established for heirs.[23]

Section 2. Capacity to Succeed by Will or by Intestacy

Art. 1024. Persons not incapacity by law may succeed by will or *ab intestato*.

The provisions relating to incapacity by will are equally applicable to intestate succession.[1]

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.[2]

[22]Art. 986, Spanish Civil Code.
[23]Art. 987, Spanish Civil Code, in a modified form.

[1]Art. 744, 914, Spanish Civil Code.
[2]New provision.

Capacity to Succeed. — Under our Code, there is a disputable presumption that every person, whether natural or juridical, can succeed either *ex testamento* or *ab intestato*. This is evident from the provision of Art. 1024. Consequently, in order to show that a person does not have the necessary capacity to succeed, it must be proved that he falls under an incapacity expressly provided for in the Code.[3] Capacity is, therefore, the general rule, while incapacity is the exception.[4]

Idem; Requisites. — Reading the provision of Art. 1025 in relation to the provision of Art. 1024, it is clear that in order that a person can inherit either by will or by intestacy, the following requisites must concur: *first,* that the heir, legatee or devisee must be living or in existence at the moment the succession opens; and *second,* that such heir, legatee or devisee must not be incapacitated by law to succeed.

It must be noted that the first requisite is not absolute in character. There are certain well-known exceptions. These exceptions are regulated by the provisions of Arts. 1026, 1029, and 1030 of the Code. On the other hand, the right given to the representative to inherit by right of representation does not really constitute an exception because, even in such case, it is essential that the representative must be living at the moment the succession opens.[5] The same is true with regard to the right of a child already conceived at the time of the death of the decedent. Under our law, a conceived child shall be considered born for all purposes that are favorable to it, provided that it be born later with the conditions specified in Art. 41 of the Codes.[6]

Incapacity to Succeed. — Incapacity to succeed may be either absolute or relative. Absolute incapacity is the incapacity of a person, whether natural or juridical, to succeed any person in any form with regard to any property. Relative incapacity, on the other hand, is the incapacity of a person, whether natural or juridical, to succeed by reason of a special relation which he has to the decedent, or to other persons, or to the property disposed of.[7]

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[3]6 Sanchez Roman 225-226.
[4]6 Manresa, 7th Ed., p. 13.
[5]Art. 973, Civil Code.
[6]Art. 40, Civil Code.
[7]13 Scaevola 136; 6 Manresa, 7th Ed., p. 8.

The following are absolutely incapacitated to succeed: *first,* those who are not living or in existence at the time of the death of the decedent, subject to the exceptions provided for in Arts. 1026, 1029 and 1030 of the Code; *second,* those who cannot be identified, such as uncertain persons under Art. 845;[8] and *third,* individuals, associations and corporations not permitted by law to inherit.[9]

Relative incapacity, on the other hand, may be classified as follows: *first,* incapacity based on the possibility of undue influence or on interest, such as those specified in Nos. 1 to 5 of Art. 1027; *second,* incapacity based on morality or public policy, such as those referred to in Art. 1028; *third,* incapacity based on acts of unworthiness, such as those specified in Art. 1032; and *fourth,* incapacity by operation of law, such as the incapacity of the guilty spouse to inherit from the innocent spouse if there is a decree of legal separation,[10] or the incapacity of the adopter to inherit from his adopted child,[11] or the incapacity of illegitimate children and legitimate relatives of the decedent to inherit from each other.[12]

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.[13]

Capacity of Entities or Associations. — The above article expressly recognizes the capacity to succeed not only of juridical persons but also of associations for religious, scientific, cultural, educational, or charitable purposes. It is evident that such associations are not juridical persons; hence, they do not have any juridical existence. It is, therefore, apparent that the right of such associations to

[8]6 Manresa, 7th Ed., p. 8; Resurreccion vs. Javier, 63 Phil. 599.
[9]Art. 1027, No. 6, Civil Code.
[10]Art. 106, No. 4, Civil Code.
[11]Arts. 342, 984, Civil Code; Art. 39, No. 4, P.D. No. 603.
[12]Art. 992, Civil Code.
[13]Art. 746, Spanish Civil Code, in modified form.

succeed *ex testamento* constitutes an exception to the rule stated in the first paragraph of Art. 1025.

Art. 1027. The following are incapable of succeeding:

(1) The priest who heard the confession of the testator during his last illness, or the 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.[14]

Incapacity Based on Undue Influence or Interest. — There are three fundamental characteristics which can be applied to the different incapacities or disqualifications enumerated from No. 1 to No. 5 of the above article. No. 6 is excluded because the individuals, associations and corporations referred to are absolutely and not relatively incapacitated to succeed. In the first place, these incapacities or disqualifications are based either on the possibility of undue influence or on interest. In the second place, they are possible only in testamentary succession. This is clear from the article itself. In the third place, they are not only relative in character, but they

[14]Arts. 745, 752, 753, 754, Spanish Civil Code, in modified form.

are also partial in the sense that if the heir who is incapacitated or disqualified is a compulsory heir, only the free portion given to him is affected, but not his legitime.

Idem; Disqualification of priest or minister. — In order that a priest or minister of the gospel shall be disqualified to succeed, it is essential: *first,* that the priest must have heard the confession of the testator during the latter's last illness, or that the minister must have extended spiritual aid to him during the same period; and *second,* that the testator must have executed the will during such last illness and not before. The second requisite is, of course, essential because if the will had been executed before the testator's last illness, the reason behind the disqualification would no longer exist.

What is meant by "last illness"? It is clear that the qualification of the word "illness" by the word "last" conveys the idea that it must be the illness of which the testator died. However, the fact that the latter died from some other cause does not necessarily exclude the application of the disqualification. Thus, let us take up the case of a testator who has already been pronounced by his physicians as dying from cancer. He dies not from the cancer, but from some other cause, such as an accident. The disqualification in such a case shall still apply. Hence, what is really essential is that there must be an imminent or impending danger of the illness being the last as far as the testator is concerned at the time he executed the will.[15]

There is another problem which arises as a result of this disqualification. Suppose that the testator, after he has been pronounced hopeless by his physicians, executes a will disposing of all of his disposable properties in favor of the minister who is extending spiritual aid to him. After a few months, he is still very much alive and feeling much stronger. He makes no effort to change the testamentary disposition. Can the disqualification be applied if he dies ten months afterwards as a result of a sudden relapse from the same illness? Authorities are evenly divided with regard to the answer to this question. According to one view, there is a presumption *juris et de jure* that the testamentary disposition is void; consequently, there can be no ratification or confirmation of the same.[16] According to a second view, the failure of the testator to

[15]6 Manresa, 7th Ed., pp. 48-49.
[16]6 Sanchez Roman 264.

rectify the testamentary disposition is deemed to be a ratification or confirmation of the same.[17] We believe that the second view is more logical. So long as there is a sufficient time for the testator to meditate on the consequences of his act, his failure to rectify the disposition which he had made clearly indicates that there is a tacit confirmation. After all, the basis of disqualification is the presumption that at the threshold of death the testator becomes an easy prey to the scheming priest or minister. Once such basis is removed he becomes again a free agent. Consequently, his failure to revoke or rectify the disposition is deemed to be a confirmation of the same.[18]

Under paragraph (2), the disqualification of priests and ministers of the gospel is extended to their relatives within the fourth degree as well as to the church, order, chapter, community, organization, or institution to which they may belong. The reason for extending the disqualification is of course the possibility of undue influence. It must be observed, however, that the law does not include among the persons disqualified the spouse of the priest or minister. Hence, if the beneficiary is the wife of the minister of the gospel who extended spiritual aid to the testator during the latter's last illness, she would not be disqualified. Otherwise, we would be reading into the law what is not found there. Besides, capacity to succeed is the general rule, while incapacity to succeed is the exception. Consequently, the rules on incapacity must be strictly construed.

Idem; Disqualification of Guardians. — In order that a guardian shall be disqualified to succeed from his ward, it is essential that the will of the ward must have been executed before the approval of the final accounts of guardianship. The disqualification applies even if the ward should die after the approval thereof. However, it does not apply if the guardian is an ascendant, descendant, brother, sister, or spouse of the testator.

Idem; Disqualification of Witnesses. — Unlike the others, it must be observed that the basis of the disqualification of an instrumental witness, or of his spouse, parents, or children, or of anyone claiming under such witness, spouse, parents or children is not the possibility of undue influence but interest. In other words,

[17]13 Scaevola 244-247.
[18]Ibid.

the fact that the beneficiary is an attesting witness or that he is the spouse, parent, or child of one of the attesting witnesses or that he is claiming under such witness, spouse, parent, or child will be sufficient to disqualify him. The disqualification, however, is not absolute. Under Art. 823 of the Code, such disqualification does not apply "if there are three other competent witness" to the execution of the will.

Idem; Disqualification of Physicians or Nurses. —Any physician, surgeon, nurse, health officer or druggist who took care of the testator during his last illness is also disqualified to succeed by will. The position of the physician or nurse who took care of the testator during his last illness is very similar to that of the priest or minister of the gospel in paragraph (1) of the article under discussion. Consequently, what had been previously stated with regard to the meaning of "last illness" can also be applied here. The disqualification, however, is not extended to the relatives of the physician or nurse, or to the organization or institution to which such physician or nurse may belong. Furthermore, unlike the disqualification of guardians in paragraph (3), here there are no exceptions. Does this mean that if the physician or nurse who took care of the testator during the latter's last illness happens to be his spouse, ascendants, descendant, brother, or sister, the disqualification shall be applied? We believe that in this case it would be difficult to invoke the technicalities of statutory construction by saying that we cannot read into the law what is not found there. Human nature dictates that such relatives should take care of the testator during his illness. To disqualify them because of the possibility of undue influence would be unjust and illogical. Besides, when a husband, wife, parents or child rushes to the bedside of the testator who is about to die, he or she does so because he or she is the spouse, parent, or child and not because he or she is a physician or nurse. It is therefore, submitted that if the physician or nurse who took care of the testator during his last illness is his spouse, ascendant, or descendant, the disqualification specified in paragraph (5) cannot be applied.

Art. 1028. The prohibitions mentioned in Article 739, concerning donations *inter vivos* shall apply to testamentary provisions.[19]

[19]New provision.

Incapacity Based on Morality or Public Policy. — By virtue of the provision of the above article, which incorporates by reference the prohibitions mentioned in Art. 739 of the Code, the following are also disqualified to succeed:

(1) Any person with whom the testator was guilty of adultery or concubinage at the time of the making of the will;

(2) Any person found guilty of the same criminal offense as the testator, where the disposition is the consideration thereof; and

(3) Any public officer or his spouse, descendant, or ascendant, where the disposition is given by reason of the office of such public officer.[20]

In the first, previous criminal conviction is not necessary, while in the second, it is indispensable.[21]

These disqualifications are based on good morals and public policy. Like the disqualifications provided for in the preceding article, they are applicable only in testamentary succession. Furthermore, they are not only relative in character, but they are also partial in the sense that if the heir who is disqualified is a compulsory heir, the incapacity shall apply only to the free portion given to him, but not to his legitime.

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 or 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.[22]

Dispositions for Benefit of Testator's Soul. — In order that the rule stated in the above article can be applied, it is necessary that the following requisites must concur: *first,* that the testator must have disposed of the whole or part of his estate for prayers and

[20]Art. 739, Civil Code.
[21]Ibid.
[22]Art. 747, Spanish Civil Code, in modified form.

pious works for the benefit of his soul; *second,* that the disposition must be in general terms without specifying its application. Once both of these requisites will concur, the executor or administrator of the estate, with the court's approval, shall deliver one-half thereof to the church or denomination to which the testator may belong, to be used for prayers and pious works, and the other half to the State, for the purposes mentioned in Art. 1013 of the Code. Thus, if the testator states in his will that he is disposing of his entire estate to be used for the benefit of his soul, or that he is leaving one-half of his estate to be used for prayers and pious works for the benefit of his soul, Art. 1029 is applicable. But if he imposes a charge upon one of the heirs, or legatees, or devisees to use a certain property or a certain amount for prayers and pious works for the benefit of his soul, or if he specifies the application of the property, such as when he state that one-half or one-fourth of his estate shall be used for prayers and masses dedicated to our Lady of Perpetual Help every Wednesday for a period of ten years from the time of his death, Art. 1029 is no longer applicable. Consequently, the will of the testator must be complied with literally.

Spanish commentators maintain that what is actually contemplated in Art. 1029 is the institution of the testator's soul as heir.[23] This is in deference to the religious and moral ideas of the decedent. Whatever it is, there is no question that it constitutes an exception to the rules of identity and existence with respect to the capacity to succeed. This is so because once the testator has appointed an heir, devisee or legatee charged with the obligation or burden of applying even the whole estate for prayers for the testator's soul, Art. 1029 can no longer be applied.[24] This is so because the law requires that the disposition must be made in general terms without specifying the application of the property disposed of. Hence, it differs from the institution of a *persona incieta* under Art. 845 where the only uncertainty is with regard to the identity of the person instituted but not with regard to his existence; it differs from dispositions made in favor of a specified class or cause (Arts. 786 and 1030) where, although the instituted heir is a universal or abstract concept (*unum in multis)*, yet there are persons, natural or artificial, comprised within such concept.

[23]6 Manresa, 7th Ed., pp. 30-31; 6 Sanchez Roman 243-244.
[24]13 Scaevola 188-193.

Villavicencio vs. Quinio
67 Phil. 367

The third clause of the last will and testament of Eugenia Zuniga del Rosario, which was duly probated, is as follows:

"Tercero: Declaro que tengo bienes inmuebles, muebles, semimovientes, vasa y camarin que he heredado de mis padres y hermanos y, no, teniendo yo heredero forzoso como ya ha dicho mas arriba, he dispuesto que mis citados bienes sean destinados solamente para la paz y felicidad de mi alma y de las mis padres y hermanos, y tambien para el beneficio de la iglesia, en la manera siguiente: x x x"

Relatives of the testatrix within the fifth degree filed a motion, approved by the Bishop of Lipa, praying that they be declared the intestate heirs of the said testatrix on the ground that, after the deduction of the amounts for the alms and masses provided for by the testatrix in her will, there will still be a sizable balance left out of her properties, which, in the absence of any disposition made by the said testatrix, must pass by operation of law to her legal or intestate heirs. The Supreme Court, however, ruled:

"Such contention on the part of the movant is based on something entirely inconsistent with what the testatrix has ordered in the third clause of her will. The testatrix in said clause had disposed of her proportions in accordance with the provision of Article 747 *(now Art. 1029)* of the Civil Code, a disposition absolutely within her right, having no forced heirs.

"The collateral relatives of the deceased, E. Z. del Rosario, not being forced heirs, are not entitled to succeed her as to the remainder of her properties, which does not exist, or as to the naked ownership of the same. The provisions of the will disposing her properties for masses and pious works, the validity of which is not questioned herein, should be complied with because the testatrix, not having forced heirs, may dispose of her properties as she did in her will, for masses and pious works for the benefit of her soul and those of her relatives."

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.[25]

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.[26]

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;

[25]Art. 749, Spanish Civil Code, in modified form.
[26]Art. 755, Spanish Civil Code.

(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.[27]

Incapacity Due to Unworthiness. — There are three fundamental characteristics which can be applied to the different incapacities which are enumerated in the above article. In the first place, they are based on offenses committed by the disqualified person against the decedent which render him unworthy to succeed. In the second place, they are applicable not only in testamentary succession, but also in legal or intestate succession. In the third place, although they are relative in character, they are also total in the sense that if the heir who is disqualified is a compulsory heir, the incapacity shall apply not only to the free portion given to him but even to his legitime.

Unlike the incapacities referred to in Arts. 1027 and 1028, incapacity by reason of unworthiness is applicable not only in testamentary succession, but also in legal or intestate succession. This is so in spite of the fact that Art. 1032 uses the word "testator." Whereas under Art. 1027 and 1028, the reason for disqualification can exist only in testamentary succession, under Art. 1032, the reason can exist in either testamentary or intestate succession.

Most of the acts of unworthiness enumerated in Art. 1032, such as those stated in paragraphs (1), (2), (3), (5), and (6), are also grounds for disinheritance.[28] Consequently, what had been stated under Arts. 919, 920, and 921 with regard to these offenses as grounds for disinheritance are also applicable here. Hence, only those which are not grounds of disinheritance will be discussed.

According to paragraph (4), any heir of full age who, having knowledge of the violent death of the decedent, should fail to report

[27]Arts. 756, 673, 674, Spanish Civil Code, in modified form.
[28]Arts. 919, 920, 921, Civil Code.

it to an officer of the law within a month shall be incapable of succeeding by reason of unworthiness, unless the authorities have already taken action. However, this incapacity shall not apply to cases wherein, according to law, there is no obligation to make an accusation. The following requisites must, therefore, concur: *first,* that the heir must be of full age; *second,* that he must have knowledge of the violent death of the decedent; *third,* that he must have failed to report the matter to the proper authorities; and *fourth,* that there must be a legal obligation to make an accusation. It is clear that the last requisite has rendered the incapacity useless for all practical purposes. In this jurisdiction there is no obligation imposed by the law to make an accusation in such cases.

In paragraph (5), it must be noted that the heir who is incapable of succeeding by reason of unworthiness is the person who is convicted of adultery or concubinage with the spouse of the decedent. The spouse is not included. Hence, as far as the law is concerned, the husband or wife who is convicted of either adultery or concubinage is not unworthy to inherit from the decedent. The only time when such husband or wife cannot inherit is when the offended spouse will act positively either by securing a decree of legal separation[29] or by disinheriting him or her.[30] So strong is the presumption in favor of the solidarity of marriage that even where one of the spouses has been convicted of the most grievious offense against the sanctity of the marriage vows, the law refuses to pronounce judgment. Consequently, whether such spouse can inherit or not is a question which only the offended spouse can decide.

> *Problem* — H caught his wife, W, committing adultery with his own brother, B. The two were subsequently convicted as a result of a criminal action brought by H against them. A few days ago, H died intestate leaving considerable properties. His only surviving relatives are: (a) W; (b) B; and (c) C and D, first cousins. Who shall inherit from him?
>
> *Answer* — W, alone, shall inherit from H. Legally, the criminal conviction of W for adultery is not an act of unworthiness within the meaning of Art. 1032 of the Civil Code. The only time when a guilty spouse is considered unworthy to inherit from the other is when there is a decree of legal separation. *(See*

[29]Art. 106, No. 4, Civil Code.
[30]Art. 921, No. 4, Civil Code.

Art. 106, No. 4, Civil Code). Here, there is no legal separation. It is different in the case of B. He is unworthy to inherit from H because he has been convicted of adultery with the spouse of the decedent *(Art. 1032, No. 5, Civil Code).* In the case of C and D, although there is no question about their capacity to inherit from H, nevertheless, they are excluded from the succession by the presence of W.

In paragraphs (6), (7), and (8), it must also be noted that actually there are six kinds of offenses connected with the execution or revocation of wills which the law considers as acts of unworthiness. These offenses are: (1) causing the testator to make a will; (2) causing the testator to change one already made; (3) preventing the testator to make a will; (4) preventing the testator from revoking one already made; (5) supplanting, concealing, or altering the testator's will; and (6) falsifying a supposed will of the decedent. It is evident that it is only the first, second, third, and fourth where it is necessary that fraud, violence, intimidation, or undue influence must be proved in order that the heir responsible is incapacitated to succeed by reason of unworthiness. In the others, such proof is no longer necessary because the very act itself signifies fraud on the part of the heir responsible.[31]

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.[32]

Pardon of Acts of Unworthiness. — Since acts of unworthiness within the meaning of Act. 1032 are offenses directed against the decedent, only the decedent himself and no other can erase the effects of such acts of unworthiness. He can do this by pardoning the offense either expressly or impliedly. There is an express pardon when the decedent condones the act of unworthiness in writing. There is an implied or tacit pardon when the testator, with knowledge of the act of unworthiness, executes a will instituting the person who has committed the offense as an heir.

[31]6 Sanchez Roman 282.
[32]Art. 757, Spanish Civil Code, in modified form.

Although the law does not expressly say so, it is clear that express pardon can take place in either testamentary or intestate succession, while implied or tacit pardon can only take place in testamentary succession.

The act of the decedent in pardoning an act of unworthiness must not be confused with reconciliation. The first is a unilateral act, while the second is a bilateral act requiring the concurrence of the offender. The fact that there is a reconciliation between the decedent and the unworthy heir does not necessarily mean that the effects of the act of unworthiness are erased. Under our Code, 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.[33] It cannot, however, erase the effects of an act of unworthiness. In order to do so there must be a pardon, which may be either express or tacit, in conformity with the form prescribe by Art. 1033. Thus, if a son of the decedent has committed an act of unworthiness, the mere fact that before the death of the decedent there was a reconciliation between him and his son does not mean that the effects of the latter's act of unworthiness are erased. But if the decedent, before his death, had condoned the offense of his son in writing, or if he had executed a will instituting his son as an heir, with knowledge of the offense committed against him, the result would be different. There would then be a pardon within the meaning of Art. 1033. The effects of the act of unworthiness are erased altogether.

There is, however, a problem arising from the distinction between pardon and reconciliation which is rather controversial in character. The problem may be illustrated by the following example: The testator's wife is convicted of an attempt against his life. Subsequently, he executes a will expressly disinheriting his wife. Later, there is a reconciliation between the two, but the testator dies without changing or revoking the will. Can the wife inherit from her husband? According to one view, the wife cannot inherit from her husband because, although the subsequent reconciliation between her and the decedent has the effect of rendering the disinheritance ineffectual in accordance with Art. 922 of the Code, it cannot have the effect of erasing the act of unworthiness. Under Art. 1033 of

[33]Art. 922, Civil Code.

the Code, the effects of acts of unworthiness can be erased only by either express or implied pardon, and certainly, under the facts stated in the problem, there is no pardon, whether express or implied.[34] According to a second view, the wife can inherit from her husband because from the moment that the testator executed a will disinheriting his wife, the law on disinheritance governs and not the law on incapacity. Consequently, the provision of Art. 922 of the Code regarding the effect of reconciliation is applicable and not the provision of Art. 1033 regarding the effect of pardon.[35] We believe that the first view is more logical.

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.[36]

Time to Determine Capacity. — In general, capacity is determined at the moment of the death of the decedent. The reason for the rule is that it is only then that the property and transmissible rights and obligations of the decedent are actually transmitted to those who are called to succeed either by will or by operation of law. It is, therefore, logical that such persons must have the necessary capacity to succeed at such time. There are, however, three exceptions to this rule. In the first place, in the case of those who may be disqualified under Nos. (2), (3), and (5) of Art. 1032, or No. 2 of Art. 739, it will be necessary to wait until final judgment is rendered; in the second place, in the case of those who may be disqualified under No. (4) of Art. 1032, it will be necessary to wait for the expiration of the month allowed for the report; and in the third place, if the

[34]Manresa, 7th Ed., p. 694; 14 Scaevola 920.
[35]6 Sanchez Roman 1130.
[36]Art. 758, Spanish Civil Code, in modified form.

institution of heirs, or the legacy or devise is conditional, the time of the compliance with the condition shall also be considered.[37]

The third exception refers to an institution of heir, or a legacy or devise which is subject to a suspensive condition. In such case, the law requires that the heir, legatee or devisee must have the necessary capacity to succeed not only at the time of the death of the decedent, but also at the time of the fulfillment of the condition. This rule is logical because when the institution, legacy or devise is subject to a suspensive condition, the heir, legatee or devisee actually acquires a hope or expectancy which is protected by the law from the very moment of the death of the decedent — a hope or expectancy which is finally converted into a perfected right from the moment the condition is fulfilled.

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 usufruct and administration of the property thus inherited by his children.[38]

Effect of Incapacity Upon Compulsory Heirs. — If the heir who is incapable of succeeding is a compulsory heir, whether or not his right to his legitime is affected shall depend upon the cause of his incapacity.

If the incapacity is due to any of the causes specified in either Art. 1027 or Art. 739, only the free portion given to the heir is affected, but not his legitime. In other words, he is incapacitated to succeed only as a voluntary heir or as a legatee or devisee, but not as a compulsory heir. This is clear not only from the phraseology of the law, but also from the very nature and basis of the incapacity itself. Thus, if the testator had executed a will during his last illness, and in the will, he bequeaths P10,000 to the priest who heard his confession, and it so happens that such priest is his own son, certainly, the right of such son to the legitime which the law has reserved for him is not affected. While it is true that under No. 1 of

[37]Art. 1034, Civil Code.

[38]Art. 761, Spanish Civil Code, in modified form.

Art. 1027, he is incapacitated to succeed because there is always the possibility of undue influence, yet such reason cannot possibly be applied to the legitime which is reserved for him, not by force of the testator's will, but by operation of law.

> *Problem* — When the attending physician of X finally informed the latter that he is suffering from the last stages of cancer and that he cannot live longer than one month, he called up his son A, a priest. It was the latter who heard his last confession. After the confession, he executed a will wherein he gave the disposable free portion of his estate in the proportion of "one-third for each" to his two sons, A and B, who are his only compulsory heirs, and to a friend, F. He died ten days afterwards. The net value of his estate is P120,000. During the administration proceedings, B, who was not in good terms with his brother A, contended that the latter is incapacitated to inherit from the testator pursuant to the provisions of No. 1 of Art. 1027 of the Civil Code. Is he correct? Reasons.
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> *Answer* — B is correct. A is certainly incapacitated under No. 1 of Art. 1027 of the Civil Code. There can be no question about that. But B is also incapacitated to inherit from the testator under No. 2 of the same article being a brother of A, and therefore, a collateral relative of the latter within the fourth degree. There can also be no question about that.
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> It must be noted, however, that their legitime will not be affected by their disqualification. What is affected is their share in the disposable free portion. Such shares shall pass to their co-heir, F, by right of accretion pursuant to Arts. 1016 and 1017 of the Civil Code. Therefore, A shall still be entitled to his legitime of P30,000; B, to his legitime of P30,000; and F, to the entire free portion of P60.000.

If the incapacity, however, is due to any of the causes specified in Art. 1032, it is clear that even the legitime of the compulsory heir who has committed the act of unworthiness is affected. It is well-settled not only because of the phraseology of the law, but also because of the very nature of the incapacity itself, that incapacity due to unworthiness has the effect of depriving the heir of any share or participation in the inheritance. This applies not only to the share to which he is entitled by force of the testator's will, but also to the share to which he is entitled by law. It must be noted, however, that the incapacity is personal; it cannot, therefore attach to his own children or descendants. Consequently, in testamentary

succession, if the heir who has committed the act of unworthiness is a compulsory heir in the direct descending line and he should have children or descendants of his own, the latter shall acquire his right to the legitime. If there are no children or descendants who can represent him, then the legitime shall be given to those who are entitled thereto in accordance with the rules of intestate succession. The same principle is also applied in legal or intestate succession. If the legal heir who has committed the act of unworthiness should have children or descendants of his own, the latter shall be entitled to the entire share which is rendered vacant, provided, of course, that the right of representation can properly take place. If there are no children or descendants who can represent him, then the vacant share shall be given to those who are entitled thereto by right of accretion.

Art. 1036. Alienations of hereditary property, and sets 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 heirs.[39]

Effect of Acts of Disqualified Heir. — Alienations of hereditary property by the disqualified heir before he is excluded from the succession by a judicial order of exlcusion are valid as to third persons who acted in good faith. In other words, a purchaser in good faith and for value is protected, but the co-heirs who are ultimately adjudged the real heirs of the decedent shall have to recover the damages from the disqualified heir. Hence, after the decedent's death, if one of the alleged heirs and known to be such, sells his undivided share in the inheritance to a third person who is unaware of any defect or flaw in the vendor's title, such sale shall be valid, if, subsequently, the vendor shall be judicially excluded from the inheritance by reason of any incapacity. Although the alienation is valid, the co-heirs who are prejudiced shall have a right to recover damages from the disqualified heir.

The same rules are applicable with respect to acts of administration performed by the disqualified heir before the judicial order of exclusion. This is especially apparent when the heir is in possession

[39]New provision.

of the property or estate. Third persons who are affected by such acts, relying upon the apparent authority of the possessor, not only as possessor of the property, but also as alleged heir of the decedent, shall be protected. But, again, in such case, the co-heirs shall have a right to recover damages from the disqualified heir.

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.[40]

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.[41]

Art. 1039. Capacity to succeed is governed by the law of the nation of the decedent.[42]

Governing Law If Decedent is a Foreigner. — Under the Civil Code, in case of conflict of laws, generally, we adhere to the nationality principle. Thus, according to Art. 15 of the Code, "family rights and duties or the status, condition and legal capacity of Filipino citizens who are living abroad are governed by Philippine law." This general provision has always been understood, even before the effectivity of the New Civil Code, as implying that in the case of foreigners, it is their national law that shall govern their family rights and duties or their status, condition and legal capacity if they are living in the Philippines, and not Philippine law. Be that as it may, the law of succession is much more explicit. There are four aspects of succession which are governed by the national law of the decedent if he is a foreigner. They are: *first,* the order of succession; *second;* the amount of successional rights; *third,* the intrinsic validity of testamentary provisions; and *fourth,* the capacity to succeed. The

[40]New provision.
[41]Art. 760, Spanish Civil Code, in modified form.
[42]New provision.

first three are enumerated in the second paragraph of Art. 16, while the last is stated in Art. 1039.

> *Problem* — Gold was a citizen of State X under whose law an illegitimate child is not an intestate heir. He died in the Philippines without a will leaving considerable properties in Manila. Can Octavio, an acknowledged illegitimate son of Gold by a Filipina woman, legally claim inheritance by invoking the succession rights of acknowledged illegitimate children under Philippine law. (1974 Bar Problem)
>
> *Answer* — Octavio cannot legally claim inheritance from his father Gold by invoking the successional rights of acknowledged illegitimate children under Philippine law. In this country, where the question before the court involves the legal capacity of the claimant to succeed the decedent who is a foreigner, we adhere to the nationality principle. According to the Civil Code, "capacity to succeed is governed by the law of the nation of the decedent." (Art. 1039). So what is applicable is the law of X State which declares that illegitimate children cannot inherit by intestate succession.

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.[43]

Remedy Against Disqualified Heir. — The action defined in the above article has a two-fold purpose — first, a declaration of incapacity, and second, recovery of the inheritance, devise or legacy. Hence, what is contemplated is a case in which the disqualified heir, devisee or legatee has already taken possession of the property. Therefore, the primary purpose of the action is the restoration of the property.[44]

It is evident that this action for declaration of incapacity and for recovery of the property may or may not be a part of the administration proceedings. If it is not a part of the administration proceedings, it becomes an ordinary action by anyone who may have an interest in the succession.

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[43]Art. 762, Spanish Civil Code, in modified form.

[44]6 Manresa, 7th Ed., pp. 103-104.

Idem; Period of prescription. — The Code gives the executor or administrator or any one who may have an interest in the succession five years from the time the disqualified person took possession of the inheritance, devise or legacy within which to file the action. Beyond that, the action shall prescribed.

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.[1]

Art. 1042. The effects of the acceptance or repudiation shall always retroact to the moment of the death of the decedent.[2]

Concept of Acceptance and Repudiation. — Acceptance refers to the act by virtue of which an heir, legatee or devisee manifests his desire in accordance with the formalities prescribed by law to succeed to the inheritance, legacy or devise. Repudiation, on the other hand, refers to the act by virtue of which an heir, legatee or devisee manifests his desire in accordance with the formalities prescribed by law not to succeed to the inheritance, legacy or devise.

Characteristics. — The three principal characteristics of acceptance or repudiation are the following: *first,* it is voluntary and free,[3] *second,* it is retroactive,[4] and *third,* once made, it is irrevocable.[5]

While it is true that successional rights are transmitted at the very moment of the death of the decedent, it must be observed that before such transmission can take place, it is absolutely necessary that those who are called to the succession either by will or by operation of law must accept their inheritance, legacy or devise. So long as there is no manifestation of such acceptance, there can be no

[1]Art. 988, Spanish Civil Code.
[2]Art. 989, Spanish Civil Code.
[3]Art. 1041, Civil Code.
[4]Art. 1042, Civil Code.
[5]Art. 1056, Civil Code.

transmission of successional rights. The heirs, legatees or devisees, however, cannot be compelled to accept their inheritance, legacy or devise. This is so because acceptance and repudiation are by their very nature voluntary and free. Hence, during that interval between the death of the decedent and the acceptance or repudiation, the inheritance, legacy or devise remains in a state of suspension.[6] But once the heir, legatee or devise manifests his acceptance or repudiation in accordance with the formalities prescribed by law, the effect thereof shall retroact to the very moment of the death of the decedent. It has become irrevocable.

Effects in General. — If the heir, legatee or devisee accepts the inheritance, legacy or devise, his right thereto is perfected or confirmed. On the other hand, if he repudiates such inheritance, legacy, or devise, he throws away a right which the law has conferred upon him.[7] As a result, the inheritance, legacy or devise which is rendered vacant shall pass to those who are entitled thereto either by right of accretion or in their own right.

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.[8]

Requisites for Acceptance or Repudiation. — Before a person may accept or repudiate an inheritance, the following requisites must concur: *first,* he is certain of the death of the person from whom he is to inherit; and *second,* he is certain of his right to the inheritance. The second requisite is, of course, necessary because there is always the possibility that he might not be allowed to inherit. In testamentary succession, for instance, the will by virtue of which he is called to inherit may not be admitted to probate by reason of some fatal defect or the institution of heirs may be invalid for some reason or other. The same is true in intestacy. There might be some heirs who are preferred in the order of intestate succession. In all of these cases, any acceptance or repudiation becomes superfluous.[9]

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[6]17 Scaevola 864.
[7]7 Manresa, 6th Ed., p. 344.
[8]Art. 991, Spanish Civil Code.
[9]7 Manresa, 6th Ed., p. 359.

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 person designated by the testator to determine the beneficiaries and distribute the property, or in their default, to those mentioned in Article 1030.[10]

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.[11]

Art. 1046. Public official establishments can neither accept nor repudiate an inheritance without the approval of the government.[12]

Art. 1047. A married woman of age may repudiate an inheritance without the consent of her husband.[13]

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 the guardians. These guardians may repudiate the same with judicial approval.[14]

Who May Accept or Repudiate. — In order that the heir, legatee or devisee may accept or repudiate, the law requires that he must have the free disposal of his property. Otherwise, if he cannot freely dispose of his property, because he is incapacitated to do so, such as when he is a minor, or a deaf-mute who cannot read and write, or an insolvent judicially declared, or is under civil interdiction, his guardian or legal representative shall be the one

[10]Art. 992, Spanish Civil Code, in modified form.
[11]Art. 993, Spanish Civil Code, in modified form.
[12]Art. 994, Spanish Civil Code.
[13]Art. 995, Spanish Civil Code, in modified form.
[14]Art. 996, Spanish Civil Code, in modified form.

who will accept or repudiate. It must be noted, however, that if such guardian or legal representative declares to repudiate, judicial authorization is necessary.

If the beneficiary happens to be the poor, the right to accept shall belong to the person designated by the testator to determine the beneficiaries and distribute the property. In default of such person, it shall belong to the executor. As far as the right to repudiate is concerned, however, such right may be exercised only by the beneficiaries themselves once they are finally determined.

If the beneficiary happens to be a corporation, association, institution or entity, the right to accept or repudiate belongs to the legal representative, but in case of repudiation, judicial authorization is necessary.

If the beneficiary happens to be a married woman of age, her right to accept is subject to the limitation prescribed by Art. 114 of the Code which declares that she cannot, without her husband's consent, acquire any property by gratuitous title, except from her ascendants, descendants, parents-in-law, and collateral relatives within the fourth degree. However, her right to repudiate is absolute, unless the marriage is governed by the system of absolute community, in which case, according to Art. 200 of the Code, neither spouse may renounce or repudiate any inheritance without the consent of the other.

> *Problem* — Can the successional rights of minors or incapacitated persons be waived?
>
> *Answer* — Art. 1044 of the NCC provides that any person having 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. Parents and guardians may not therefore waive or repudiate the inheritance of their wards without judicial approval. This is because repudiation amounts to an alienation of property which must pass the court's scrutiny in order to protect the interest of the ward.
>
> The Release and Waiver of Claim in the case of *Michael C. Guy vs. CA, G.R. No.163707, Sept. 15, 2006,* is void and will not bar private respondents-minors Karen Oanes Wei and Kamille Oanes Wei, represented by their mother, Remedios Oanes from

asserting their successional rights as heirs of the deceased since the Release and Waiver of Claim has not been judicially authorized. Moreover, the said Release and Waiver of Claims does not state with clarity the purpose of its execution. Considering that the document did not specifically mention private respondents' hereditary share in the estate of Sima Wei, it cannot be construed as a waiver of successional rights. To be valid and effective, a *waiver* must be couched in clear and unequivocal terms which leave no doubt as to the intention of a party to give up a right or benefit which legally pertains to him. A waiver may not be attributed to a person when its terms do not explicitly and clearly evince an intent to abandon a right. Furthermore, it must be emphasized that waiver is the intentional relinquishment of a known right. Where one lacks knowledge of a right, there is no basis upon which waiver of it can rest. Ignorance of a material fact negates waiver, and waiver cannot be established by a consent given under a mistake or misapprehension of fact.

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.[15]

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 though 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 his renunciation should be gratuitous and the co-heirs in whose favor it is made are those upon whom the

[15]Art. 999, Spanish Civil Code, in modified form.

portion renounced should devolve by virtue of accretion, the inheritance shall not be deemed as accepted.[16]

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.[17]

Manner of Acceptance. — The acceptance may be either express or tacit. It is express when it is made in a public or private document; it is tacit when it results 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.

Three examples of implied or tacit acceptance are given in Art. 1050. It must be observed that all of these acts are acts which only one who had already accepted the inheritance may perform. In other words, they are acts of disposition; consequently, they are acts which only the owner is empowered to perform. The enumeration, however, is not complete. There are other instances of tacit acceptance, such as the failure to accept or repudiate within the prescribed period of thirty days after the issuance of the order of distribution of the estate,[18] or acts of preservation or administration if, through such acts, the title or capacity of heir has been assumed, or the filing of a complaint for the partition of the inheritance, or alienations of determinate objects of the inheritance, or compromises regarding objects and rights included in the inheritance, or the exercise of any action which pertained to the decedent during his lifetime and which survives, or the enjoyment of the inheritance itself.[19]

Manner of Repudiation. — The act of repudiation is more solemn and formal than the act of acceptance. Hence, the manner by which it is made must be clear, expressed, and formal. This difference between acceptance and repudiation is based on the following considerations:

(1) Acceptance involves merely the confirmation of the transmission of successional rights, while repudiation renders such

[16]Art. 1000, Spanish Civil Code.
[17]Art. 1008, Spanish Civil Code.
[18]Art. 1057, Civil Code.
[19]7 Manresa, 6th Ed., pp. 398-400.

transmission ineffective. Hence, the consequences of the latter are more violent and disturbing, and therefore, cannot be governed by mere presumptions.

(2) Repudiation is, by its very nature, equivalent to an act of disposition and alienation.

(3) The publicity required for repudiation is necessary for the protection of other heirs and also of creditors.[20]

Consequently, under Art. 1051, there are three ways by which the repudiation of the inheritance, legacy or devise may be made. They are: *first,* by means of a public instrument; *second,* by means of an authentic instrument; and *third,* by means of a petition presented to the court having jurisdiction over the testamentary or intestate proceedings. A public instrument is, of course, an instrument, which is acknowledged before a notary public, which an authentic instrument would be the equivalent of an indubitable writing or a writing whose authenticity or genuine character is admitted or proved.

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.[21]

Effect of Repudiation upon Creditors. — In order that the right granted by the above article to creditors may be availed of, it is necessary that the following requisites must concur: *first,* that the heir who repudiated his inheritance must have been indebted at the time when the repudiation is made; *second,* that the heir-debtor must have repudiated his inheritance in accordance with the formalities prescribed by law; *third,* that such act of repudiation must be prejudicial to the creditor or creditors; and *fourth,* that there must

[20]Ibid., p. 439.
[21]Art. 1001, Spanish Civil Code.

be judicial authorization. Once all of these requisites are present, the creditor or creditors can then accept the inheritance in the name of the renouncer. It must be noted, however, that such acceptance shall benefit the former only to the extent sufficient to cover the amount of their credits. The excess, should there be any, shall not pertain to the renouncing heir, but shall be adjudicated to those to whom, in accordance with the rules established by the Civil Code, it may belong. Consequently, it may pass to the co-heirs in their own right or by right of accretion depending upon the circumstances and conditions of each particular case.

Art. 1053. If the heir should die without having accepted or repudiated the inheritance his right shall be transmitted to his heirs.[22]

Art. 1054. Should there be several heirs called to the inheritance, some of them may accept and the others may repudiate it.[23]

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.[24]

Repudiation as Testamentary or as Legal Heir. — The first paragraph of the above article states the rule that if the person called to succeed is a testamentary heir and a legal heir at the same time and he repudiates his inheritance in his capacity as a testamentary heir, he is considered to have repudiated the inheritance in both capacities. There is, therefore, a presumption that his act of repudiation when called by the testator himself is tantamount to an act of repudiation when called by the law in accordance with the presumed will of the decedent. Or to state the basis of the rule in

[22]Art. 1006, Spanish Civil Code.
[23]Art. 1007, Spanish Civil Code, in modified form.
[24]Art. 1009, Spanish Civil Code.

another way, if such heir refuses to heed the expressed will of such testator, how can he heed the presumed will of the decedent? Hence, once such heir has repudiated his share in the inheritance in his capacity as testamentary heir, the act becomes final or irrevocable. He can no longer accept as a legal heir.

The rule is different if such heir repudiates his share in the inheritance as a legal or intestate heir without knowledge of his being a testamentary heir. In such case, out of respect for the wishes of the decedent, he may still accept his share in his capacity as a testamentary heir.[25]

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.[26]

Irrevocability of Acceptance or Repudiation. — One of the principal characteristics of the right to accept or repudiate an inheritance is its irrevocability. Once made, it becomes irrevocable and cannot be impugned. There are, however, two exceptions to this rule. They are: first, when the acceptance or repudiation was made through any of the causes that vitiate consent; and second, when an unknown will appears. The first, of course, can only refer to those different vices which vitiate consent, such as mistake, violence, intimidation, undue influence, or fraud.[27]

The rule of irrevocability is logical. To permit the heir who renounced to change his mind with respect to the acceptance or repudiation of his inheritance would result in violent disturbance of rights which are already vested or perfected. This is so because the moment the decedent dies, the rights to the succession are opened. Acceptance of the inheritance results in the transmission of rights and obligations to the accepting heir. To allow him to change his mind would destroy the stability of property rights. The same thing can be said with respect to repudiation. If the heir repudiates his inheritance, the vacant portion passes to other heirs either by right

[25]7 Manresa, 6th Ed., pp. 445-446.
[26]Art. 997, Spanish Civil Code.
[27]Arts. 1330, et seq., Civil Code.

of accretion or in their own right. To allow such heir to change his mind would result in chaos and confusion.[28]

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.[29]

Section 4. — Executors or 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.[1]

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 and 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.[2]

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.[3]

[28]287 Manresa, 6th Ed., p. 383.
[29]New provision.

[1]New provision.
[2]New provision.
[3]New provision.

Section 5. — Collation

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.[1]

Concept of Collation. — In general, collation may be defined as the act of returning or restoring to the common mass of the hereditary estate, either actually or fictitiously, any property which a person may have received from the decedent during the latter's lifetime, but which is understood for legal purposes as an advance from the inheritance.[2]

As noted down in the discussion under Arts. 908 to 910, actually, collation, as it is understood in the Civil Code, has three different but interrelated acceptations. In one sense, it is understood as a fictitious mathematical process of adding the value of the thing donated to the net value of the hereditary estate. This is the sense in which it is used in Art. 908 of the Code. It is a process which is applicable to all donations *inter vivos,* whether to compulsory heirs or to strangers. The immediate purpose is to compute the legitime of compulsory heirs. In another sense, it includes not only the process of adding the value of the thing donated to the net value of the hereditary estate but also the subsequent act of imputing *(imputar)* such value against the legitime of the compulsory heir to whom the thing was donated. This is the sense in which it is used in this section of the Code. The immediate purpose is "to compute it in the determination of the legitime of each compulsory heir, and in the account of the partition." The ultimate purpose, however, is to equalize the position of each compulsory heir. In still another sense, it refers to the actual act of restoring to the hereditary estate that part of the donation which is inofficious. The immediate purpose is to prevent the impairment of the legitime of compulsory heirs.

[1]Art. 1035, Spanish Code, in modified form.
[2]7 Manresa, 6th Ed., p. 541.

The basis of collation is the consideration that what a compulsory heir receives from the decedent by gratuitous title during the lifetime of the latter is in the nature of an advance on his inheritance. Hence, in order to equalize the legal portion to which compulsory heirs are entitled and which such heirs shall ultimately or eventually receive, it is necessary that such advance must be returned or brought back, fictitiously, to the hereditary estate.

However, such advance must have been made during the lifetime of the decedent by way of donation or any other gratuitous title. Hence, it may be in the nature of a donation *inter vivos,* or a donation *propter nuptias,* or a remission of a debt, or any other title, lucrative or gratuitous in character.

The same can be said of donations *inter vivos* to strangers. What the decedent during his lifetime had donated to any person who is not a compulsory heir must also be returned or restored to the mass of the hereditary estate fictitiously, so that a proper division can be made of the estate. A person cannot give by way of donation more than what he can give by will. Consequently, if he gives more than what he can dispose of by will, the donation is said to be inofficious with regard to the excess. However, at the time the donation is made, there is no way by which one can tell whether the donation is inofficious or not. It is only when the decedent donor dies that it will be possible to determine what portion of his property is at this free disposal. In order to do this, there must be a collation, fictitious in character, of the value of all donations *inter vivos* to the net value of the estate, and from the aggregate sum thus found, the legitime of compulsory heirs and the portion at the decedent's free disposal can be determined.

From what has been stated, it is clear that all donations, whether to compulsory heirs or to strangers, must be collated. However, at this stage, the collation is merely fictitious in character; it is simply a mathemathical process of adding to the net value of the estate the value of the things donated. After the legitime and the disposable portion have been determined, the value of the donations which had been added to the net value of the estate are charged or imputed against either the legitime or the disposable portion. As a rule, donations to compulsory heirs are imputable against their legitime. Donations to strangers are, of course, imputable against the disposable portion. Again, it must be noted that at this stage, the process is still fictitious in character; it is still a mathematical

process the purpose of which is to determine what has already been advanced by the decedent donor either from the legitime of the donee if he is a compulsory heir from the disposable portion if he is a stranger. If the donations are inofficious in the sense that they cannot be contained within the portion at the decedent's free disposal, there must be a proper reduction of such donations in order not to impair the legitime of compulsory heirs. This reduction will have the effect of an actual restoration. It is at this stage that the process becomes actual in character but only when the donation is inofficious.

Thus, in reality, there are three acts which must always be considered before there can be a partition of the estate. They are collation, imputation and reduction. Aptly stated, they are the three links in a chain, with one single objective and guided by the same principle.[3]

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.[4]

When Collation Shall Not Take Place. — According to the above article, collation shall not take place: *first,* when the donor should have so expressly provided; and *second,* when the donee should have repudiated his inheritance.

What is meant by the law when it says "collation shall not take place?" Does it mean that when the donor expressly provides either in the deed of donation or in his will that collation shall not take place, or when the donee repudiates his inheritance, the obligation to collate ceases altogether so that it will no longer be taken into account in the partition? It is rather unfortunate that the vague provisions of the old Code have been preserved without any change whatsoever. There is no doubt, however, that when the donor expressly provides that the donee who is a compulsory heir shall not collate the donation, the latter in relation to the donation ceases to be a compulsory heir. In other words, the donation is no longer

[3]Ibid.

[4]Art. 1036, Spanish Civil Code.

considered an advance from his legitime. Hence, the value thereof shall not be imputable against such legitime. Since he is considered a stranger, at least with respect to the donation, the value thereof shall not be imputable against the disposable portion in accordance with Art. 909 of the code. Similarly, when the donee repudiates his inheritance, he ceases to be a compulsory heir. He becomes a stranger. Consequently, the value of the donation given to him is also imputable against the disposable portion and not against the legitime. Therefore, when the law says that "collation shall not take place," what is actually meant is that the value of the thing donated shall not be imputed against the legitime of the beneficiary; instead, it shall be imputed against the disposable portion. Hence, there will still be a collation in the sense in which the term is used in Art. 908 of the Code. The value of the thing donated shall still be added to the net value of the estate. The only difference is that it is imputable against the disposable portion and not against the legitime of the beneficiary.

Problem No. 1 — In 1960, X donated a piece of land to his eldest son, A. The value of the land then was P40,000; the value now is P200,000. The deed of donation is silent with respect to whether or not the donation shall be brought to collation. In 1980, X died intestate survived by his four sons, A, B, C and D. The net value of his estate is P280,000. Distribute the estate.

Answer — We must collate or add the value of the land donated at the time when the donation was made to the net value of the estate. The result is P320,000. Although X died intestate, we must now determine the legitime of the four children using this amount as basis. The reason is obvious. The donation given by X to his son, A, in 1960 is considered an advance of the latter's legitime. Additionally, there is always the possibility that the donation is inofficious. In order to be able to determine whether the donation is inofficious or not, we must first determine the disposable free portion of the estate, and this can be done only when we have already determined the legitime of the compulsory heirs. At any rate, using the amount of P320,000 as basis, the legitime of A, B, C and D is 1/2, or P160,000, or P40,000 each. The disposable free portion is P160,000. It is evident that the donation is not inofficious. Against what portion shall the value of the land donated be charged of imputed? The answer is: against the legitime of A. In other words, when X donated to A land valued at P40,000, what he merely did was to advance to the latter his legitime. Pursuant to the mandate of Art. 1061 of

the Civil Code, this must be taken into account in the partition. Since the legitime of A is P40,000, therefore, in the partition, he shall not be entitled to any legitime anymore because he had already received it in advance. Consequently, the distribution of the estate shall be as follows:

A	.....	P 40,000
B	.....	80,000
D	.....	80,000
C	.....	80,000
		P280,000

Problem No. 2 — Suppose that in the deed of donation, X, in the above problem, expressly stated that the donation shall not be brought to collation, how shall the distribution be made?

Answer — Since the donor had expressly stated that the donation shall not be brought to collation, the value thereof shall, therefore, not be considered an advance of the legitime of the donee. Instead, it will be considered as an ordinary donation *inter vivos* to a stranger. Consequently, since it is not inofficious, the net value of the estate shall be divided equally among the four children.

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 remain unimpaired.[5]

Property Left by Will. — The above article provides that "property left by will is not deemed subject to collation." What is meant by the phrase "not deemed subject to collation"? If such phrase is construed in the light of Art. 1061 to mean the act of bringing into the mass of the estate any property which a compulsory heir may have received from the decedent during the lifetime of the latter, how can the Code say that the "property is left by will"? In such case, how can the beneficiary restore or return that which he never had during the lifetime of the decedent? It is clear, therefore, that what is meant is not the restoration alluded to in Art. 1061, but the imputation alluded to in the comments under the preceding article. In other words, such property left by will is not subject to collation

[5]Art. 1037, Spanish Civil Code.

in the sense that it cannot be imputed against the legitime of the compulsory heirs; it can only be imputed against the disposable portion. What is, therefore, contemplated in Art. 1063 are devises or legacies. Such dispositions are, as a general rule, imputable only against the disposable portion, not against the legal portion.

It must be remembered that a compulsory heir may also be a voluntary heir or a legatee or devisee. In such case, there is no longer any equality of the compulsory heirs in the succession. Nevertheless, the will of the testator must be respected. The devisees or legacies shall not, however, impair the legitime of a compulsory heir. If they do, then they shall be reduced in accordance with Art. 911.

The exception provided for in the article under discussion must, therefore, be construed in the light of the foregoing discussion. The general rule is that devises or legacies are imputable against the disposable portion and not against the legitime of compulsory heirs. However, if the devise or legacy is in favor of a compulsory heir, and the testator has provided that the devise or legacy shall be imputed against the legitime of such heir, the general rule, shall no longer apply. Nevertheless, whether it is the general rule or the exception that is followed, the legitime of compulsory heirs must never be impaired.

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.[6]

Collation of Representation. — When a grandchild, who survives with uncles, aunts, or first cousins, inherits by right of representation, he is obliged to bring to collation not only what may have been directly donated to him by the decedent, but also what may have been donated to his father or mother. The reason

[6]Art. 1038, Spanish Civil Code.

for this precept is obvious. If the rule were otherwise there would be no equalization of the heirs. However, it must again be noted that what the law means when it says that the grandchild shall bring to collation all that his father or mother, if alive, would have been obliged to bring, is that the value of the donation shall be imputed against his lifetime as a representative and not against the disposable portion. This may be illustrated by the following problem:

Problem — A died in 1970 without a will survived by his son, B, and his grandson, D, child of a deceased son, C. During his lifetime, he had executed three donations. The first, worth P40,000, was executed in 1950 in favor of a stranger, X; the second, worth P10,000, was executed in 1955 in favor of his son, C, now deceased; and the third, worth P10,000, was executed in 1960 in favor of his grandson, D. The net remainder of the estate after liquidation is P20,000. How shall the distribution be made?

Answer — In the first place, we must collate or add the value of all the donations *inter vivos* to the net remainder of the estate. The result is P80,000. Although A died without a will, yet we must still determine the respective legitimes of B, who is inheriting in his own right, and D, who is inheriting by right of representation, for the purpose of determining whether the donations are inofficious or not. It is evident that the legitime of B is P20,000, while the legitime of D is also P20,000. The disposable free portion, on the other hand, is P40,000. Under Art. 1064 of the Civil Code, D must bring to collation, not only the P10,000 donated to him by the decedent, but also the P10,000 donated to C, the person represented. This means that both donations shall be charged against the legitime because, under the law such legitime has already been advanced to him. How about the donation given to X? According to Art. 909 of the Civil Code, such donation shall be charged against the disposable free portion. Since the free portion is P40,000 and the value of the donation imputable against the free portion is also P40,000, it is clear that nothing remains out of such free portion. It is also equally clear that the donation is not inofficious; consequently, it must be respected.

How then shall the distribution be made? Since the legitime of D had already been advanced to him, and since the legitime of B of P20,000 has not yet been satisfied and the only amount now available for distribution is P20,000, such amount shall, therefore, be given to B.

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.[7]

Donations to Children of Compulsory Heirs. — Parents are not obliged to collate any property which their ascendants may have donated to their children. In such case, the beneficiaries are not the parents, but the children. Hence, with respect to the inheritance coming from an ascendant, the parents are compulsory heirs, while the children of such parents are mere strangers. Therefore, such donation shall be imputed against the disposable portion as in the case of donations *inter vivos* to strangers.

Art. 1066. Neither shall donations to the spouse of the child be brought to collation; but if they have been given by the parents to the spouses jointly, the child shall be obliged to bring to collation one-half of the thing donated.[8]

Donations to Spouse of Child. — The spouse of the child or compulsory heir is a mere stranger to the succession. Consequently, if the donation is given by the parents to such spouse, it shall not be collated; but if it is given to the spouse jointly, the presumption is that one-half of the donation belongs to the child or compulsory heir, while the other half belongs to the spouse or stranger. Hence, the former shall be obliged to collate his one-half undivided share. It shall, therefore, be imputed against his legitime. On the other hand, the other undivided half which belongs to the spouse shall be imputed against the disposable portion.

Art. 1067. Expenses for support, education, medical attendance, even in extraordinary illness, apprenticeship, ordinary equipment, or customary gifts are not subject to collation.[9]

Expenses for Support. — The expenses referred to in this article are not donations. The person giving them does so because it is his moral obligation to give them. Consequently, they do not constitute an advance which must be imputed or charged later on

[7]Art. 1038, Spanish Civil Code.
[8]Art. 1040, Spanish Civil Code.
[9]Art. 1041, Spanish Civil Code.

against the legitime of the beneficiary. They are not, therefore, subject to collation.

Hence, Art. 1067 means exactly what it says: there is no collation, even in the sense of charging what had been given to the free portion. As a matter of fact, the parents or ascendant cannot even provide that such expenses shall be collated. It is, therefore, clear that the precept contained in the article is in the nature of a prohibition.[10]

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.[11]

Expenses for a Career. — According to the above article, expenses incurred by parents in giving their children a professional, vocational or other career are, in general, not to be collated. This rule, however, is subject to the following exceptions: *first,* if the parents so provided; and *second*, if the expenses impair the legitime of compulsory heirs. In both cases the sum which the child would have spent if he had lived in the house and company of his parents shall be deducted from that which shall be collated.

Evidently, the expenses referred to in this article are different from those referred to in Art. 1067. The expenses incurred by parents in giving their children a professional or artistic education are not as necessary as those used for books, tuition and matriculation fees, examination fees, traveling expenses, pensions, diplomas, school equipment, tools, etc. As a result of the difference between the two articles, different rules are applied.[12] It must, however, be noted that whether the expenses fall under Art. 1067 or under Art. 1068, all of them are classified as support.

As in the case of the other properties not subject to collation, expenses for the professional or vocational studies of a compulsory

[10]7 Manresa, 6th Ed., pp. 573-574.
[11]Art. 1042, Spanish Civil Code, in modified form.
[12]7 Manresa, 6th Ed., p. 578.

heir are not to be collated in the sense that they cannot be imputed against the legitime of such heir. They can be imputed only against the disposable portion. This rule, however, cannot apply to the expenses for support, education, medical attendance, apprenticeship or customary gifts referred to in Art. 1067. Such expenses and gifts are so necessary and yet so trivial in character that it would be absurd to collate them to the mass of the hereditary estate and, afterwards, impute them either against the legitime or against the disposable portion. Hence, the rule that such expenses or gifts shall not be collated must be applied in its literal sense. Under Art. 1068 and other articles, however, the phrase "shall not be brought to collation" must be interpreted to mean that such expenses or donations shall be considered as advances of the heir's legitime, and, therefore, shall not be imputable against such legitime but only against the disposable portion. These rules may be illustrated by the following examples: If the child is sick and the parents are obliged to call a physician, the expenses in such case shall not be placed in the same category as donations *inter vivos* either to a compulsory heir or to a stranger. It would indeed be absurd to charge such expenses either against the legitime or against the disposable portion. Or, take the case of a birthday present or any customary gift. It would also be absurd to impute such gifts later on, even if such imputation is directed against the disposable portion. In the case of expenses for a professional or vocational career, the rule is different and rightly so. The amount involved is not so insignificant or trivial. Hence, generally, such expenses should be imputed or charged against the disposable free portion.

It must also be noted that Art. 1068 refers only to expenses incurred by the parents in giving their children a professional, vocational or other career. It does not refer to expenses incurred after the completion of such professional, vocational or other career. Hence, expenses for a law library, medical instruments, a drug store, a vessel for a mariner, or a commercial establishment for a businessman are not within the purview of the article. Such expenses shall be collated and, therefore, are imputable against the legitime of the recipient or beneficiary.[13]

[13]Ibid., pp. 578-579.

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.[14]

Payments for Debts of Children. — This article enumerates several cases in which the parents spend for their children with the obligation on the part of the latter to bring such expenses to collation after the death of the parents in order to equalize the portion which shall pass to each of the compulsory heirs. Actually, such expenses are not different from other kinds of donations *inter vivos*. As a matter of fact, such expenses may even be more detrimental to the successional rights of the children not benefited because they sometimes involve large amounts.

A certain qualification, however, must be made with respect to such expenses. The act of the parents in paying a debt of a child, or in spending for the election of a favorite child to a public office, or in saving a child from disgrace by paying a fine imposed by a court of law, or any similar act involving similar expenses must be an act of liberality, not an act resulting in the creation of a relationship or creditor and debtor. Otherwise, the obligation of the child shall no longer be to collate the amount paid or spent, but to pay the estate such amount. The child becomes a debtor and if the amount is not paid before the death of the decedent, he can always be held liable for the payment of the debt. As a matter of fact, even if he repudiates his inheritance, he shall still be held liable for the full amount of his debt. On the other hand, if the payment is gratuitous in character, the obligation of the beneficiary or donee would only be to collate the amount. And if he chooses to repudiate his inheritance, his position, will be similar to that of a stranger. The amount expended would then be imputable against the disposable portion. As a consequence, the provision of Art. 1062 would be applicable.[15]

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.[16]

[14]Art. 1043, Spanish Civil Code, in modified form.
[15]7 Manresa, 6th Ed., pp. 582-583.
[16]Art. 1044, Spanish Civil Code.

Wedding Gifts. — Generally, wedding gifts coming from parents and ascendants consisting of jewelry, clothing, and outfit are not subject to collation. Hence, they shall not be reduced as inofficious unless they exceed one-tenth (1/10) of the sum which is disposable by will. The excess, therefore, shall be collated in the sense that it shall be imputed against the legitime of the beneficiary.

The reason behind the provision is, of course, to prevent any abuse that may result because of vanity or love, thus prejudicing other compulsory heirs.[17]

Idem; Article applied. — The above article should always be interpreted in the light of the meaning of collation in this section of the Civil Code. In other words, what is meant is that the wedding gift shall not be considered as an advance of the legitime of the recipient so long as it does not exceed one-tenth (1/10) of the disposable free portion. As such, it will be considered as a donation *inter vivos* chargeable against the disposable free portion. However, once it exceeds one-tenth (1/10) of the disposable free portion, the excess will then be considered as an advance of the legitime of the recipient. This is illustrated by the following:

> *Problem* — When his youngest daughter C got married in 1975, X gave to her as a wedding gift jewelries valued at P40,000. He died intestate in 1980, survived by his three daughters, A, B and C. The net value of his estate is P200,000. Divide the estate.
>
> *Answer* — We must first add the value of the gift to the net value of the estate. The result is P240,000. Using this amount as basis, the legitime of the three children is one-half (1/2), or P120,000, or P40,000 for each of them, while the disposable free portion is also one-half (1/2), or P120,000. Now, one-tenth (1/10) of P120,000 is P12,000. The value of the gift (P40,000) is charged against this amount. There is an excess of P28,000. This excess is considered as an advance of the legitime of C. Hence, in the partition, she will be entitled to a legitime of only P12,000. As far as the balance of P108,000 of the disposable free portion is concerned, since X died intestate, said amount will be divided equally among the three daughters. Consequently, the estate shall be divided as follows:

[17] 7 Manresa, 6th Ed., pp. 586-587.

A	P40,000	+	P36,000,	or	P76,000
B	P40,000	+	P36,000,	or	P76,000
C	P12,000	+	P36,000,	or	P48,000
					P200,000

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.[18]

What Must be Collated. — To bring back to the mass of the hereditary estate the same thing donated by the decedent during his lifetime would be impracticable or even impossible at times. Hence, the rule is that only the value of the thing donated shall be brought to collation. This value must be the value of the thing at the time of the donation, even though its just value may not then have been assessed.

The determination of this value is, of course, difficult especially if many years shall have elapsed since the time when the donation was effected and the property is movable property. In the case of real property, the value may be stated in the public instrument itself which conveys the property. If the value is not stated therein or if is not agreed upon by the interested parties, recourse may be made to those appearing in tax assessments or cadastral surveys. In the case of personal property, in the absence of assessments or agreements between the parties, recourse may be made to expert appraisal. However, whether the property is real or personal, there is no question that even if the value has been expressed or agreed upon, the same is not absolutely binding or obligatory upon the parties.[19]

The rule stated in the second paragraph, on the other hand, is in conformity with the rule that once the donation is made or perfected, there is a transfer of ownership. The donee becomes the

[18]Art. 1045, Spanish Civil Code, in modified form.
[19]7 Manresa, 6th Ed., pp. 590-591.

owner of the thing donated. Risks of loss or deterioration, must, therefore, fall upon him *(res perit domino)*. The same is true with respect to any subsequent increase. By the principle of accession, any increase in value would be for the benefit of the donee.

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.[20]

Rule for Donations Made by Both Parents. — The rule stated in the above article is logical. Since, ordinarily, the parents act in concert whenever an advance is given to a favorite child or to a child in need, the donation generally forms a part of the conjugal property. Hence, when the value of the thing donated is brought to collation, one-half of the amount is brought to the inheritance of the father, and the other half to that of the mother. However, that given by one alone shall be brought to collation in his or her inheritance only.

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.[21]

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.[22]

Rules for Equalization of Shares of Heirs. — The rule stated in Art. 1073 is directed or aimed at equalizing the shares of

[20]Art. 1046, Spanish Civil Code, in modified form.
[21]Art. 1047, Spanish Civil Code.
[22]Art. 1048, Spanish Civil Code.

all the heirs. Hence, after the determination of the legitime and the free portion, or, in case of intestate succession after determining the shares of each of the legal heirs, the donee's legitime or legal share as the case maybe, shall be reduced by an amount equal to that already received by him. His co-heirs shall, in turn, receive an equivalent, as much as possible, in property of the same nature, class and quality. This equivalent is, of course, taken from the estate.

The situation contemplated in the first paragraph of Art. 1074, on the other hand, refers to a case in which the property donated is an immovable and it is impracticable to give the co-heirs an equivalent in property of the same nature, class and quality. In such case, the rule is to give the co-heirs its equivalent in cash or securities at the rate of quotation. If this is also impracticable or impossible by reason of lack of cash or marketable securities in the estate the only recourse would be to sell at public auction as much of the other property as may be necessary. The rule is different if the property donated was movable. In such case, the co-heirs shall only have a right to select an equivalent of other personal property of the inheritance at its just price. Absolute equalization of all the heirs is impossible.[23]

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.[24]

Rules Regarding Fruits and Interest. — The rules stated in the above article are in conformity with some fundamental rules of succession. As a matter of fact, they necessary follow from such rules. When the property donated to one of the compulsory heirs, title is vested in such donee once the donation is perfected. It is but natural that the fruits and interest of the property donated shall also vest in the donee from that time. However, once the rights to the succession are opened by the death of the decedent-donor, the

[23]7 Manresa, 6th Ed., p. 599.
[24]Art. 1049, Spanish Civil Code.

obligation to collate the value of the thing or property donated also arises. All of the heirs called to the succession acquire some right with respect to what is collated. In other words, what is supposed to be collated, by legal fiction, becomes a part of the mass of the hereditary estate. The heirs all become co-owners of such estate from the very moment of the death of the decedent. Hence, it follows that the fruits and interest from that moment shall pertain to the hereditary estate.[25]

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 of 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.[26]

Collation in Kind. — Justice J.B.L. Reyes, commenting on this article, states:

> "The provisions of Article 1076 could be applied only to the case of a donation that becomes revoked as inofficious in its totality under the rules of Article 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 on legitime."[27]

Art. 1077. Should any question arise among 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.[28]

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[25]7 Manresa, 6th Ed., pp. 599-600.

[26]New provision.

[27]Observation on the New Civil Code, Lawyer's Journal, Dec. 31, 1950.

[28]Art. 1050, Spanish Civil Code.

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.[1]

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.[2]

Concept and Classification of Partition. — Art. 1079 gives the definition of partition. This definition is supplemented by the provision of Art. 1082.

There are several classes of partition. As regards its extent, it may be total or partial; as regards its duration, it may be provisional or definite; as regards the manner or method by which it is done, it may be extrajudicial or judicial. According to Manresa:

> "It is total, when all of the things comprised in the whole estate are divided among all of the participants or co-owners.
>
> "It is partial, when some of the things are divided among all or some of the participants or co-owners, the rest remaining in a state of indivision or community ownership.
>
> "It is provisional, when the division is merely temporary or transitory until a final or definite division is made.
>
> "It is definite, when it is stable, final and absolute.
>
> "It is extrajudicial, when it is effected by the testator himself, or by some person named by such testator, or by the participants or co-owners themselves amicably or by common accord.
>
> "It is judicial, when the court intervenes in the division."[3]

[1]New provision.
[2]New provision.
[3]7 Manresa, 6th Ed., p. 607.

Under the New Rules of Court, there are four ways by which the estate may be partitioned. They are: *first,* by extrajudicial settlement;[4] *second,* by an ordinary action for partition;[5] *third,* by judicial summary settlement;[6] and *fourth,* by administration proceedings.[7] The last three are judicial in character.

Who May Effect Partition. — The partition may be effected either by the decedent himself during his lifetime by an *act inter vivos* or by will,[8] or by a third person designated by the decedent,[9] or by the heirs themselves,[10] or by a competent court in accordance with the New Rules of Court.[11]

Under Section 1, Rule 74 of the Rules of Court, an extrajudicial settlement of the estate applies only to the estate left by the deceased who died without a will and with no creditors, and the heirs are all of age or the minors are represented by their judicial or legal representatives. If the property does not belong to the estate of the decedent, the same being an exclusive property of the husband, it cannot be the subject matter of an extrajudicial partition.

Since the property in the case of *Emiliana Bautista as heir of the late Manuel Bautista and Evangeline Bautista vs. Special First Division of the Court of Appeals, et al.*, G.R. No. 79958, October 28, 1988, does not belong to the estate of the first wife, the Deed of Extrajudicial Partition is void *ab initio,* being contrary to law, for in effect, it deprives the lawful owner of his property without due process of law. Only the property of the estate of the decedent which is transmitted by succession can be the lawful subject matter of an extrajudicial partition.

Extrajudicial partition cannot constitute a partition of the property during the lifetime of its owner. Partition of future inheritance is prohibited by law.

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[4]Sec. 1, Rule 74, New Rules of Court.
[5]Ibid.
[6]Sec. 2, Rule 74, New Rules of Court.
[7]Rules 79-91, New Rules of Court.
[8]Art. 1080, Civil Code.
[9]Art. 1081, Civil Code.
[10]Arts. 1083, 1084, Civil Code.
[11]Rules 78-90, New Rules of Court.

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.[12]

Partition by Decedent. — Under this article, there are two ways by which a person may effect the partition of his own property or estate — by an act *inter vivos* or by will. The only limitation imposed upon the power of such person to effect the partition is that it must not prejudice the legitime of compulsory heirs. The partition of the estate by an act *inter vivos* may take place in an ordinary public instrument when such is required. In other words, the rules regarding ordinary conveyance of personal and real properties must be followed. The partition by will, must, of course, be effected by a valid will duly executed in accordance with the formalities prescribed by law.

Art. 1056 of the Spanish Civil Code, the source of Art. 1080 of our present law, provides:

> "If the testator makes the partition of his property by an act *inter vivos* or by a last will, it shall be respected in so far as it does not prejudice the legitime of the forced heirs.
>
> "The father who, for the interest of his family, desires to keep undivided an agricultural, industrial or manufacturing enterprises, may make use of his authority, by providing that the legitime of the other children be paid in cash.

Comparing this provision of the Spanish Civil Code with the present law, it will be observed that whereas, the former speaks only of the "testator," the latter speaks of "person." The change is significant. It renders a part of the ruling of the Supreme Court in *Legasto vs. Verzosa*[13] obsolete. The present law means precisely what it says — that any person may make a partition of his estate

[12]Art. 1056, Spanish Civil Code, in modified form.
[13]54 Phil. 776.

by an act *inter vivos*. The Supreme Court, in the *Legasto* case, on the other hand, interpreted the word "testator" to imply that even when the testator partitions his estate by an act *inter vivos,* he must first make a will complying with all of the formalities prescribed by law.

It must be noted that a partition effected by a person by an act *inter vivos* constitutes an exception to the rule declared in the second paragraph of Art. 1347 of the Code that no person can enter into a contract with respect to future inheritance.

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 mandatory, 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.[14]

Partition by Third Person. — What is intrusted or delegated in the above article is the mere power of partition not the power to distribute the hereditary estate. Hence, the act of the person delegated with such power is that of a mere agent or mandatory. The mere physical act of partition, which must not be confused with the act of distribution, must be done pursuant to the latter.

It must be noted that the law states that the mere power of partition may be delegated either by an act *inter vivos* or by an act *mortis causa*. Hence, following the interpretation used in Art. 1080, the delegation may be made either by an act *inter vivos* such as in a public instrument or any other writing or by a will executed in accordance with all of the formalities prescribed by law.

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.[15]

[14]Art. 1057, Spanish Civil Code, in modified form.
[15]New provision.

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.[16]

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.[17]

Who can Demand Partition. — The partition of the estate may be demanded by any of the following: (1) any compulsory heir; (2) any voluntary heir; (3) any legatee or devisee; and (4) any person who has acquired an interest in the estate.

Idem; When partition cannot be demanded. — The partition, however, cannot be demanded in the following cases: (1) when such partition has been expressly prohibited by the testator himself for a period which shall not exceed twenty years;[18] (2) when the co-heirs have agreed that the estate shall not be divided for a period which shall not exceed ten years, renewable for another ten years;[19] (3) when such partition is prohibited by law;[20] and (4) when to partition the estate would render it unserviceable for the use for which it is intended.[21] As far as the first is concerned, even though the partition is prohibited by the testator, the co-ownership may still be terminated provided that any of the causes for which a partnership

[16]Art. 1051, Spanish Civil Code, in modified form.
[17]Art. 1054, Spanish Civil Code, in modified form.
[18]Arts. 1083, 494, Civil Code.
[19]Art. 494, Civil Code.
[20]Ibid.
[21]Ibid.

may be dissolved exists, or that the court finds for compelling reasons that a division should be ordered. Consequently, the existence of any of the causes for the dissolution of a partnership enumerated in Arts. 1830 and 1831 would be sufficient in order to justify a person entitled to do so to demand for partition. As far as the third is concerned, the best examples would be family homes[22] and party walls.[23] As far as the fourth is concerned, it must be noted that what is prohibited is merely the physical division of the estate. The partition may still be demanded if made in accordance with Art. 1086 of the Code.

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.[24]

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.[25]

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.[26]

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 right 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.[27]

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[22]Art. 238, Civil Code.
[23]Art. 658, Civil Code.
[24]Art. 1061, Spanish Civil Code.
[25]Art. 1062, Spanish Civil Code.
[26]Art. 1063, Spanish Civil Code.
[27]Arts. 1330, et seq., Civil Code.

Legal Redemption in Favor of Co-Heirs. — It will be noted that the right of legal redemption recognized by the above article is predicated upon the fact that the sale made by the co-heir is effected before the partition of the estate but after the death of the decedent. Since the rights to the succession are transmitted at the very moment of the death of the decedent, there is no question about the right of an heir to alienate his undivided share in the inheritance. However, he has an obligation to notify the other co-heirs of the alienation. Such notification must be made in writing. In such case, the co-heirs are given one month from the time of such notification within which to exercise their right of redemption by reimbursing the vendee for the price of the sale.

It is, therefore, clear that in order that the right of redemption may be exercised, the following requisites must concur: *first,* that there must be several co-heirs; *second,* that one of them sells his rights to a stranger; *third,* that the sale is made before the partition is effected, *fourth,* that the right of redemption must be exercised by one or more of the co-heirs within a period of one month to be counted from the time that they were notified in writing by the co-heir vendor; and *fifth,* that the vendee is reimbursed for the price of the sale.[28]

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.[29]

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.[30]

[28]7 Manresa, 6th Ed., p. 717.
[29]Art. 1065, Spanish Civil Code, in modified form.
[30]Art. 1066, Spanish Civil Code, in modified form.

Subsection 2. — Effects of Partition

Art. 1091. A partition legally made confers upon each heir the exclusive ownership of the property adjudicated to him.[1]

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.[2]

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.[3]

Art. 1094. An act to enforce the warranty among co-heirs must be brought within ten years from the date the right of action accrues.[4]

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.[5]

Art. 1096. The obligation of warranty among co-heirs shall cease in the following cases:

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[1]Art. 1068, Spanish Civil Code.
[2]Art. 1069, Spanish Civil Code, in a modified form.
[3]Art. 1071, Spanish Civil Code.
[4]New provision.
[5]Art. 1072, Spanish Civil Code, in a modified form.

(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.[6]

Subsection 3. — Rescission and Nullity of Partition

Art. 1097. A partition may be rescinded or annulled for the same causes as contracts.[1]

Art. 1098. A partition, judicial or extrajudicial, 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, then the share to which he is entitled, considering the value of the things at the time they were adjudicated.[2]

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.[3]

Art. 1100. The action for rescission on account of lesion prescribe after four years from the time the partition was made.[4]

Rescission of Partition Due to Lesion. — If in the partition anyone of the co-heirs should receive a share whose value is less, by at least one-fourth (1/4), than the share to which he is entitled, considering the value of the things at the time they were adjudicated, the partition, whether judicial or extrajudicial, may be rescinded

[6]Art. 1072, Spanish Civil Code, in a modified form.

[1]Art. 1073, Spanish Civil Code, in a modified form.
[2]Art. 1074, Spanish Civil Code, in a modified form.
[3]Art. 1075, Spanish Civil Code.
[4]Art. 1076, Spanish Civil Code.

on account of the lesion.[5] Under Art. 1381, there are also two cases where contracts may be rescinded on account of lesion; *first,* those which are entered into by guardians whenever the wards whom they represent suffer lesion by more than one-fourth of the value of the things, which are the object thereof; and *second,* those agreed upon in representation of absentees, if the latter suffer the lesion stated in the preceding number.

If the partition, however, was effected by the decedent himself either by an act *inter vivos* or by will, it cannot be impugned on the ground of lesion.[6] This rule is subject to two exceptions: *first,* when the legitime of compulsory heir is thereby prejudiced; and *second,* when it appears or may reasonably be presumed, that the intention of the testator was otherwise.

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 plantiff.

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.[7]

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.[8]

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.[9]

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

[5]Art. 1098, Civil Code.
[6]Art. 1058, Civil Code.
[7]Art. 1077, Spanish Civil Code, in modified form.
[8]Art. 1078, Spanish Civil Code, in modified form.
[9]Art. 1079, Spanish Civil Code, in modified form.

latter shall be proportionately obliged to pay to the person omitted the share which belongs to him.[10]

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.[11]

Effect of Inclusion of Intruder in Partition. — We may consider the problem presented by the above article under any one of three aspects:

First: One heir shares the inheritance with other heirs who were mistakenly believed to be so during the partition. In this case, Art. 1105 applies. The partition is totally void. Hence, the declaration of nullity shall only result in the delivery of everything that had been adjudicated to the real heir since a new partition is impossible considering that there is only one heir.

Second: There are several heirs, but a third person, without any right, had participated in the partition in the belief that he was one of the heirs of the deceased. It is clear that, although there was consent in the transmission of the share to the intruder, said transmission is void. Hence, Art. 1105 is also applicable.

Third: Through error or mistake, a third person without any right is allotted the share that would have been given to a real heir. In this case, both Arts. 1104 and 1105 shall apply. Under Art. 1104, the partition 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. Under Art. 1105, the partition shall be void, but only with respect to the intruder. Hence, there must be a declaration of nullity of the partition, but only with respect to the share adjudicated to the intruder. This share, including fruits, shall, in turn, be delivered to the omitted heir as payment of his share, without prejudice to any additional obligation incurred under Art. 1104.[12]

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[10]Art. 1080, Spanish Civil Code.

[11]Art. 1081, Spanish Civil Code, in modified form.

[12]7 Manresa, 6th Ed., pp. 777-779. For illustrative case (under the old law, Art. 1081 Spanish Civil Code) — see Reyes vs. Barretto-Datu, G.R. No. L-17818, Jan. 25, 1967, 9 SCRA 85.

APPENDIX

PROVISIONS OF THE FAMILY CODE THAT AFFECT LAWS ON SUCCESSION

Art. 176. Illegitimate children shall use the surname and shall be under the parental authority of their mother, and shall be entitled to support in conformity with this Code. The legitime of each illegitimate child shall consist of one-half of the legitime of a legitimate child. Except for this modification, all other provisions in the Civil Code governing successional rights shall remain in force. (287a)

Art. 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).

COMMENTS AND JURISPRUDENCE ON SUCCESSION

By

DESIDERIO P. JURADO

Associate Justice, Court of Appeals;
Pre-Bar Reviewer-Civil Law

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PREFACE TO THE 2009 EDITION

Dr. Jovito Salonga once wrote that we have books that contain not only simple matters of definitions, distinctions and enumerations but even more, reminding us that life is complex and real, that the law which essays to support and maintain a regime of ordered liberty, upholding basic social values and reconciling demands and interests that overlap and conflict, should cope with its increasing complexities, that it cannot be inert but that it must thrive and flourish, since history has shown that law assumes stability only when it has not lost its capacity for growth.

We hope that Justice Jurado, in this book, just like in his other books, continuously "supplies an acute need for a manual that is well-grounded, comprehensive, balanced in treatment" and able to cope with life's increasing complexities. We also pray that his "wealth of experience which he has gained as a respected scholar and teacher of law" shall continue to satisfy the needs of judges, lawyers, bar candidates and students of law.

We wish to extend our gratitude to Dr. Jovito Salonga who wrote the beautiful Foreword in one of Justice Jurado's books; to the judges, lawyers, bar candidates and students of law who continue to have faith in using not only this book, but also his other Civil Law books. We likewise give our thanks to Mama Nena for the love and inspiration, and to the **Rex Book Store** for the unending support given to us.

Quezon City, Philippines, August 23, 2008.

JUSTICE ROLAND B. JURADO

Associate Justice, Sandiganbayan; Former RTC Judge Branch 76, Malolos, Bulacan; Former MTC Judge, Branch 2, Malolos, Bulacan; Former Fourth Assistant City Prosecutor, Caloocan City; Professor of Law – FEU, UE, MLQU and SSC; BSC; Ll.B. (FEU)

ATTY. ROSARIO JURADO-BENEDICTO

Vice-President and Head, Bank of the Philippine Islands, Legal Services Division; Partner, Benedicto, Verzosa, Burkley & Associates; Former Corporate Secretary/Assistant Corporate Secretary and Legal Officer of the Filinvest Group of Companies, and the Francisco V. del Rosario Group of Companies; Private Practitioner, Dizon, Paculdo, Jurado, Jurado, Vitug and Associates; Former Professor, F.E.U. School of Business; Former Professor of San Sebastian College of Law; A.B. and Ll.B. (U.P. Diliman)

ATTY. RUDOLF PHILIP B. JURADO

Private Practitioner, The Law Firm of R.P.B. Jurado; Former Partner, Culvera, Waytan & Jurado Law Offices; Former Trial Lawyer, Coronel Law Office; Professor, MLQU School of Law; Former Professor U.E. College of Law and Lyceum College of Law; B.S.C., Ll.B. (U.E.)

and

ATTY. ROBERT B. JURADO

Consultant, Housing and Urban Development and Coordinating Council (HUDCC); Private Practitioner; Former Director, Legislative Bills and Index Services, Senate of the Republic of the Philippines and HUDCC; Former Consultant to the Office of the Vice President of the Philippines; Former Trial Lawyer, Marbibi Law Office, Electrical Engineering (N.U.); Ll.B. (F.E.U.)

PREFACE TO THE 1991 EDITION

In the long span of time since its last edition, new precedents, new developments and new trends in the law of succession have emerged. These appear throughout this edition. Painstaking effort had been given to the preparation of this new edition in the true tradition of the author to make it such an indispensable help to law students, bar candidates and law practitioners as it had been from the time of publication in 1980.

Thus, this book is again in circulation with a fervent hope and prayer that it may continue to aid the "two thousand and thirteen loves" of the author's life so that they may further understand and appreciate this "most complicated, yet most interesting, branch of Civil Law".

Quezon City, Philippines, June 1991

By

ATTY. ROSARIO JURADO-BENEDICTO

(Manager, Legal Services Division,
Bank of the Philippine Island;
Attorney-at-Law, Leonen, Ramirez and
Associates; Former Corporate Secretary and Legal
Officer of the Filinvest Group of Companies and the
Francisco V. del Rosario Group of Companies;
Former Professor, F.E.U. School of Business;
A.B.; Ll.B, U.P.);

- and -

JUDGE ROLAND B. JURADO

(Judge, Municipal Trial Court, Branch 2, Malolos, Bulacan;
Former Fourth Assistant City Prosecutor, Caloocan
City; Former Legal Consultant, Metro Manila Commission;
Professor, San Sebastian College of Law;
B.S.C.; Ll.B., F.E.U.)

PREFACE

It is with a sense of pride that we are bringing out once again the revision of this text on Succession.

This work first appeared in mimeographed form in 1951 almost immediately after the effectivity of the New Civil Code. After its appearance, it was adopted as the official text in most of the law schools in Manila and in the provinces. It passed through three revisions. In 1959, it came out in printed form. It ran out of print in 1963, but the author, because of pressure of work in other fields, was unable to revise it. He was, however, able to revise it in 1970. Again, it ran out of print. Encouraged, however, by repeated requests of some professors of Succession and of many fields in both bench and bar to revive the text, the author took time out to revise it. The result is this sixth edition. And it is the proper time too. During the past eight or nine years, the Supreme Court had promulgated some significant decisions which clarify or interpret some provisions of the law on Succession which were considered either obscure or controversial. All of these decisions are now embodied in this text.

So, once again, this book is in circulation. With a prayer, the author hopes that it will still continue to help law students, bar candidates and law practitioners to understand and appreciate what is probably the most complicated, yet most interesting, branch of Civil Law.

D. P. JURADO

Manila

May 23, 1980

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