The Universality of a Curse: "Future Interests" in the French Law

F. Hodge O'Neal

Repository Citation
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol3/iss4/6
THE UNIVERSALITY OF A CURSE: “FUTURE INTERESTS” IN THE FRENCH LAW

A plague o’ both your houses!
Shakespeare, Romeo and Juliet, Act iii, sc. 1, 1.94.

The property systems of civil law jurisdictions in sharp contrast with those of common law origin, have long enjoyed a reputation for remarkable simplicity. That “wonderful calculus” of possessory estates and future interests, commonly known simply as “future interests,” is the doctrinal structure responsi-

1. The standard definition of a “future interest” is more redundant than informative. For instance, 1 Simes, The Law of Future Interests (1936) 2, § 1, describes a “future interest” as “an interest in land or other things in which the privilege of possession or of enjoyment is future and not present.”
ble for many of the complexities of the Anglo-American property system. In the civil law such a structure is said to be non-existent. The present comment seeks to test this assertion by analyzing the property concepts of France to determine whether functional equivalents of "future interests" exist in that important civilian jurisdiction. Included among the concepts examined are the substitution fidéicommissaire, the "permitted" substitutions, the fideicommis simple, the legacy de residen, the conditional grant, the fiducia, the stipulation pour autrui, the usufruct, and the fondation. Such an examination may show that the alleged civilian simplicity is more specious than remarkable.

The French system of property law offers a fertile field for the contemporaneous division of ownership. According to the traditional French view, "ownership" expresses the idea of the most complete power which the government allows an individual over a thing. This is "ownership" in its fullest sense. But, the commentators unanimously tell us, "ownership" is sufficiently plastic to be susceptible of limitations and adaptations almost without number. Following the classical Roman analysis, the French separate "ownership" into the usus, the fructus, and the abusus. Usus is the privilege to make all those uses of a thing which are compatible with its nature; fructus is the attribute

2. Professor Rheinstein has pointed out that "a comparison of the real property idea and approaches of the civil law and the common law encounters the initial difficulty that there is no longer such a thing as 'Civil Law'," Rheinstein, Some Fundamental Differences in Real Property Ideas of the "Civil Law" and the Common Law Systems (1936) 3 U. of Chi. L. Rev. 624. Cf. Wisdom, A Trust Code in the Civil Law, Based on the Restatement and Uniform Acts: The Louisiana Trust Estates Act (1938) 13 Tulane L. Rev. 70, n. 1. The variation in the property laws of the civilian jurisdictions makes impractical any general treatment of civil law property concepts. Limitations of time and space preclude a separate study of the laws of each jurisdiction. For the above reasons the present study is confined to the law of a single nation.

3. Art. 544, French Civil Code: "La propriété ... peut se définir, le droit en vertu duquel une chose se trouve soumise, d'une manière absolue et exclusive, à la volonté et l'action d'une personne." 2 Aubry et Rau, Cours de Droit Civil Français (5 ed. 1897) 255-256, § 190.

4. For an attack upon the classical view that "ownership" is an absolute right, see The New Conception of Property as a Social Function, The Progress of Continental Law in the Nineteenth Century, II Continental Legal History Series (1913) 129-146, §§ 44-53.

5. "La propriété, telle que nous l'avons étudiée, jusqu'à présent, c'est la propriété dans toute sa plénitude, c'est le droit commun de la propriété. Mais ce droit commun comporte des variantes, des adaptations, des limitations; le droit de propriété, dont la plasticité est presque infinie, se prête à des modalités qui constituent en même temps des restrictions." 1 Josserand, Cours de Droit Civil Positif Français (3 ed. 1938) 989, no 1778.


7. 2 Aubry et Rau, op. cit. supra note 3, at 270, § 191; Baudry-Lacan-
which permits an owner to receive the fruits derived from a thing, whether these fruits are natural or civil; abusus consists of the privilege to dispose of the thing, either materially, by transforming it or destroying it entirely, or legally, by sale, donation, or testamentary disposition. The usus, the fructus, and the abusus need not be united in the same individual: one may have the usus alone, or both the usus and the fructus, or the full ownership—the usus, the fructus, and the abusus. Furthermore, each of these elements is in turn subdivided into a multitude of attributes—"sub-elements" so numerous that they defy enumeration—and each of these attributes may be "owned" by a different individual. It would be surprising if a system so liberal in permitting the establishment of contemporaneous divisions in ownership should offer any great obstacle to the creation of successive interests.

One French property concept well suited as a tool to create complex future interests—the substitution fidéicommissaire—has played a major role in French legal history. The characteristic elements of this device are:

1. the disposer gives property successively to two or more persons;
2. the institute (the first donee) receives the fruits but is to preserve the property itself;
3. on the institute's death, the property is to be transferred to the substitute.

In other words, the substitution fidéicommissaire is created when A grants property to B to be preserved, and on his (B's) death, to be transferred to C. This concept was one of the main props of the power of the feudal aristocracy. Prior to the French Revolution substitutions existed in enormous numbers: ninety-theorie et Chauveau, Traité Théorique et Pratique de Droit Civil, Des Biens (3 ed. 1905) 155, no 204. Cf. Huc, Commentaire Théorique & Pratique du Code Civil (1893) 102, no 76.


9. 1 Josserand, op. cit. supra note 5, at 809, no 1469.
10. "But if these three elements need not be in the same person, they must all exist in someone. The most frequent division is usus and fructus in one person, abusus in the other." Le Paule, op. cit. supra note 6, at 1140.
11. 5 Planiol et Ripert, Traité Pratique de Droit Civil Français (1933) 291, no 282.
five percent of the land of France was taken out of commerce.\(^{12}\) The evils which resulted from the establishment of such a large number of substitutions are well summarized by K. A. Cross:

"the legal order of succession was permanently changed, the titles to property were clouded and involved in wasteful law suits, landed property was withdrawn from commerce, and as the motives for improvement weakened when they were not sustained by family affection or pride, waste and dilapidation were too often indulged, in order to gratify the luxurious tastes and ostentatious pleasures of careless courtiers."\(^{13}\)

Guided by the desire to suppress the political power of the landed aristocracy and an idea—generated by economic liberalism—that the common good would be best served by the greatest possible marketability of land,\(^{14}\) the redactors of the Civil Code determined to abolish the substitution *fidéicommissaire*.\(^{15}\) This purpose was accomplished by Article 896: \(^{16}\)

"Substitutions are prohibited.

"Every provision by which a donee, an heir appointed, or a legatee shall be required to keep property and to return it to a third party shall be void, even as against the donee, the heir appointed or the legatee."\(^{17}\)

The first sentence of this article would seem to indicate that all substitutions are prohibited. Not so. In accordance with a well-recognized civilian rule of statutory construction, that

---

13. Cross, A Treatise, Analytical, Critical, and Historical, on Successions (1891) 115.
15. Even under the Ancient Régime the practice of creating successive life-interests was regulated to some extent. An Ordonnance of 1560 limited future settlements to two lives; and a Law of 1566 imposed a general retrospective limit of four lives. Amos & Walton, Introduction to French Law (1935) 126, n. 2.
16. The *fidéicommissa familiarum*, by which an individual manor or some other piece of property could be inalienably settled upon the members of the settlor's family, was swept away by the French Revolution. Law of November 14, 1792.

"Toute disposition par laquelle le donataire, l'héritier institut, ou le légataire, sera chargé de conserver et de rendre à un tiers, sera nulle, même à l'égard du donataire, de l'héritier institut, ou du légataire."

The renunciation by either the institute or the substitute will not validate the disposition as to the other party; if, however, either the institute or the substitute predeceases the testator, the other will take in full ownership. Nabors, Restrictions upon the Ownership of Property in Louisiana—Trusts, *Fidei Commissa*, and Substitutions (1929) 4 Tulane L. Rev. 190, 204.
sentence is restricted by the specific provision which follows. The narrower provision, by setting forth the characteristic elements of the substitution *fidéicommissaire*, confines the prohibition to that type of substitution. The "vulgar" substitution, a disposition by which a second party is called to take the gift in case the first donee predeceases the donor or refuses to accept the liberality, is specifically authorized by Article 898 of the Civil Code.

If a particular device does not present all three of the elements which characterize the substitution *fidéicommissaire*, the device is not reprobated by law.18 A number of property concepts are quite similar to the prohibited substitution but lack one or more of these elements. The *fidéicommiss simple* is a gift subject to a charge that it shall be transferred immediately to a second party. The *fidéicommiss for a term* is a device by which the enjoyment of the property is given to one party for a period of time with a charge that it be transferred to a second party at the end of the stipulated period.19 In both the *fidéicommiss simple* and the *fidéicommiss for a term* the party first gratified is a mere mandatary,20 and in neither case is the institute's death the event which brings about the transfer to the ultimate beneficiary. Akin to the *fidéicommiss simple* and the *fidéicommiss for a term* is the *fiducia*, an ancient French concept characterized by a right in *rem* remarkably similar to the right created by many common law trusts.21 The fiduciary in this French counterpart of the trust is an heir in name only. He is charged to hold as a depository the property donated and to administer it until the day he is to transfer it to the true donee.22 As a simple administrator, he is not privileged to retain for himself the fruits produced by the property.23 A *fiducia* is distinguished from the substitution by the intention of the donor: a person who uses the former device does not intend to confer a benefit on the fiduciary; while the party who sets up a substitution wishes to bestow a real and substantial benefit on the institute.24

Another disposition which is not within the scope of the

18. See 5 Aubry et Rau, op. cit. supra note 3, at 204, § 694.
20. Dalloz, op. cit. supra note 8 (1856) Vo Substitution, no 34; Id. (Supp. 1895) at Vo Substitution, no 15.
21. Le Paulle, op. cit. supra note 6, at 1127.
22. Dalloz, op. cit. supra note 8 (1856) Vo Substitution, no 37, 43; Id. (Supp. 1895) at Vo Substitution, no 16; 18 Demolombe, Cours de Code Napoleon (1876) 107, no 105; 6 Huc, Commentaire Théorique & Pratique du Code Civil (1894) 26, no 18.
24. Id. at no 39.
prohibition against the substitution fidéicommissaire is the legacy de residuo vel de eo quod supererit, which grants the property to one party, indicating that he is to have the power to alienate it, but commands that the part of the property which remains at his death be turned over to another person. Such a legacy lacks one of the essential characters of the prohibited estate—a charge to preserve the property donated—for the institute is given an absolute privilege to dispose of the things which are the object of the liberality. But the French do not stop with the upholding of an ordinary legacy de residuo. The French courts have held that the prohibited estate does not result even though a donor forbids the party first gratified to dispose of the property by any gratuitous title. Their rationale for this position is that the party first gratified may alienate by onerous title. But Josserand, one of the leading modern commentators, contends that a donor, by inserting a stipulation forbidding alienation by gratuitous title, manifests an intention to impose a charge to preserve the property; and that a substitution fidéicommissaire should be deemed to result.

The effectiveness of Article 896 is still further diminished by "exceptions," set out in other articles of the Code, which in certain circumstances sanction the establishment of even the pure substitution fidéicommissaire. The "permitted substitutions" are given legislative fiat by Articles 1048 and 1049. The former article provides:

"The property of which fathers and mothers have the right to dispose can be given by them in whole or in part, to one or several of their children by an instrument inter vivos or by will, with the obligation of returning the same to the children born or which may thereafter be born in the first degree only of said donees."

25. Id. at n° 66; Id. (Supp. 1885) at Vo Substitution, n° 66; Id. (Supp. 1885), Vo Substitution, n° 27; 18 Demolombe, op. cit. supra note 22, at 146-148, n° 133; 6 Huc, op. cit. supra note 22, at 35, n° 22.
26. 3 Josserand, op. cit. supra note 5, at 957, n° 1872. A fortiori is the disposition valid when the donor merely forbids the alienation of the property by testament.
28. 3 Josserand, op. cit. supra note 5, at 957.
29. The English translations of Articles 1048 and 1049 were taken from Cachard, The French Civil Code (1895).
30. French text: "Les biens dont les pères et mères ont la faculté de
Article 1049 states:

“A provision made by a decedent by an instrument inter vivos or by a will, for the benefit or one or several of his brothers or sisters, of all or part of the property composing the succession which is not reserved by law, with obligation to return the same to the children born or which may thereafter be born in the first degree only of the said brothers and sisters who are donees, shall be valid in case the decedent dies without issue.”

These articles permit a substitution *fidéicommissaire* if the donor is either the father or mother of the institute; or, if he has no children and is the brother or sister of the institute. The only limitation is that the substitution be to the profit of all the children of the institute—not only those who were born when the substitution was constituted but also those who were conceived subsequently thereto. Stating the same principle somewhat differently: A may give or bequeath his property to B (one of A's children) subject to the obligation to transmit the same to all the grantee’s children equally; (2) A (provided he dies childless) may give or bequeath his property to B (one of his brothers or sisters) subject to the obligation to transmit the same to all his (B's) children equally. Thus, in the very situations in which a donor is most likely to desire to create a substitution *fidéicommissaire*, such a substitution is permitted by express Code provision.

---

31. French text: "Sera valable, en cas de mort sans enfants, la disposition que le défunt aura faite par acte entre vifs ou testamentaire, au profit d’un ou plusieurs de ses frères ou sœurs, de tout ou partie des biens qui ne sont point réservés par la loi dans sa succession, avec la charge de rendre ces biens aux enfants nés et à naître, au premier degré seulement, desdits donataires."

32. The "permitted substitutions" may be made by either a donation inter vivos or by a testamentary disposition.

33. Since the rights of the institute are to fall when the substitution occurs in favor of the ultimate beneficiaries, it is important that third parties be notified of the existence of the substitution: otherwise the fact that the institute is ostensible owner of the property would create a false credit in his favor. For this reason, Article 1069 of the French Civil Code requires a recording of the grant establishing a substitution on the register of the office of mortgages of the place where the property is situated.

34. If one of the children of the institute predeceases the institute, the issue of the predeceased child “represent” their parent and receive the portion that he would have received. Art. 1051, French Civil Code.

35. The exceptions to the rule prohibiting the substitution *fidéicommissaire* are also exceptions to the rule that a person, in order to be capable
In those instances in which a disposition cannot be brought within the scope of either the *fidéicommis* simple, the *fidéicommis* for a term, the *fiducia*, the legacy *de residuo*, or the "permitted" substitutions, other techniques are available. A non-legal method of controlling the future disposition of property is the precatory request—"a simple wish, desire, prayer, or recommendation" inserted in an act of donation. The precatory request is not a prohibited substitution because it leaves the legatee a complete legal freedom; his obligation is moral, completely outside the domain of the law. In the fact that a legal obligation is not created lies the weakness of the precatory request as a device for controlling the future disposition of property: the donor can never be certain that the legatee will comply with his request or recommendation. A more satisfactory method of reaching the desired result is the use of an alternative conditional legacy—a disposition functionally identical with the prohibited substitution. Such a legacy is created by the grant under a resolutory condition of certain property to one person and a simultaneous grant under a suspensive condition of the same property to a second party. As a general rule ownership may be conveyed subject to either a suspensive or a resolutory condition. The only doubt is as to whether the particular event which is of the essence in the creation of a substitution *fidéicommisaire*—namely, the death of the institute—can operate as the resolutory condition which terminates the institute's ownership and at the same time be the suspensive condition the fulfillment of which brings the second party's rights into immediate existence. At one time the French courts would not permit a donor

---

36. See Nabors, op. cit. supra note 17, at 203.
38. A resolutory condition is one which, when it is fulfilled, brings about the cancellation of the obligation and puts things back in the same state as if the obligation had not existed. Art. 1183, French Civil Code.
39. An obligation assumed under a suspensive condition is one which depends either upon a future and uncertain event, or upon an event which has actually taken place but is still unknown to the parties. Art. 1181, French Civil Code.
40. A gift may be subjected to either a suspensive or a resolutory condition, so long as the condition does not reserve to the donor the privilege of revocation at will. Amos, Perpetuities in French Law (1912) 13 J. Soc. Comp. Leg. 47, 51.
41. The conveyance of property subject to a suspensive or a resolutory condition creates a "divided interest"; in either case to convey a clear title
to circumvent Article 896 by the use of the alternative conditional legacy.\textsuperscript{42} Today, however, substitutions no longer have the odious reputation which they had under the Old Régime; there is no longer a fear that they will be put to the service of a landed aristocracy;\textsuperscript{43} consequently, attempts to circumvent the rule against the substitution fidéicommissaire by the use of alternative conditional legacies have been treated with indulgence by the courts.\textsuperscript{44}

The French writers state that the distinction between the prohibited substitution and the alternative conditional legacy is that in the former there is a "successive order" by which one party takes after the other, the institute preserving the property for the substitute; while in the latter there is but a "single transmission," both parties taking directly and immediately from the testator.\textsuperscript{45} Professor Nabors properly criticizes this distinction as one of phraseology rather than substance.\textsuperscript{46} Josserand, however, defends the distinction and claims that the courts have been consistent in its application. He states that the courts will strike down a disposition as a substitution fidéicommissaire in disguise if the donor is attempting through the use of a technical artifice to evade the prohibition against successive orders; but that they will not hesitate to uphold a disposition if the donor, instead of seeking to establish successive orders, actually attaches prime importance to the event which conditions the legacy.\textsuperscript{47}

The alternative conditional legacy does not as a general rule provide a means of "tying up" property beyond a single generation; for Article 906\textsuperscript{48} provides:

\begin{flushleft}
before the condition has materialized, the concurrence of two persons is necessary.
\end{flushleft}

\textsuperscript{42} 3 Josserand, op. cit. supra note 5, at 960, no 1877.
\textsuperscript{43} Id. at 959, no 1876.
\textsuperscript{44} For a testamentary disposition which was upheld by the Court of Cassation although it was functionally equivalent to a substitution fidéicommissaire, see Nabors, op. cit. supra note 17, at 200.
\textsuperscript{45} 14 Laurent, Principes de Droit Civil Francais (5 ed. 1876) 489, no 435; Dalloz, op. cit. supra note 6 (Supp. 1895) Vo Substitution, nos 83, 94.
\textsuperscript{46} Nabors, op. cit. supra note 17, at 201. "In both cases the testator intends for the first legatee to have only the use and enjoyment of the property, and for the bare ownership to go to his heirs if he has any, and if he has none, for the bare ownership to go to a third party. Beyond this, the testator in each case probably had no definite conception of the details of the estate which he wished to create."
\textsuperscript{47} 3 Josserand, op. cit. supra note 5, at 960, no 1876.
\textsuperscript{48} French text: "Pour être capable de recevoir entre vifs, il suffit d'être conçu au moment de la donation.

"Pour être capable de recevoir par testament, il suffit d'être conçu à l'époque du décès du testateur.

"Néanmoins la donation ou le testament n'autant que l'enfant sera né viable."
"To be capable of receiving a donation inter vivos it is necessary that one should be conceived at the time of the donation.

"To be capable of receiving under a will it is sufficient that one should be conceived at the time of the death of the testator.

"Nevertheless, the donation or the will only bears effect in case the child born can live."

By virtue of this article, an alternative conditional legacy which contains a gift or property to B, subject to a resolutory condition, and a gift of the same property to C subject to a suspensive condition, is valid only if B and C are in existence at the times specified by Article 906. However, an unusual case decided by the Appeal Court of Bordeaux seems to depart from the rule of Article 906. A former bishop of Péruix gave 30,000 francs to the town of Péruix to support schools taught by the Frères de la doctrine Chrétienne, providing that in the event of the school's ceasing to be so taught the fund should revert to the donor's successors in the bishopric. The condition having been realized—that is, the municipality having adopted secular education—the episcopal successor sought to enforce the stipulation requiring that the property be turned over to him. The donor's legal heirs, on the other hand, purported to revoke the gift, and claimed restitution of the fund. The court decided in favor of the bishop, and held that the conditional gift was a valid stipulation pour autrui, the fact that the beneficiary was indeterminate being immaterial. In other words, the conditional gift to the episcopal successor of the donor was held valid by the use of the stipulation pour autrui although the successor was not in existence at the time of the donation. Insofar as the beneficiary of a stipulation pour autrui need not be in existence at the time the

49. The translation was taken from Cachard, op. cit. supra note 29.
50. Bordeaux, 18 février 1891, Sirey 1892.2.89.
51. The stipulation pour autrui is a stipulation for the benefit of a third party.
52. Art. 1121, French Civil Code: "On peut pareillement stipuler pour au profit d'un tiers, lorsque telle est la condition d'une stipulation que l'on fait pour soi-même ou d'une donation que l'on fait à un autre. Celui qui a fait cette stipulation ne peut plus la révoquer, si le tiers a déclaré vouloir en profiter."
53. See discussion of the case in Amos, op. cit. supra note 40, at 51.
donation is made, an important exception is created to the rule of Article 906, and a true “future interest” is created.55

The preceding sections of this comment have been devoted to a discussion of functional equivalents of the supposedly reprobated substitution fidéicommissaire. The following pages will deal with French concepts which lend themselves to an equal, if not a greater, involution of property tenures. One device which can be used to create complicated property interests is the simple conditional grant.56 Merely illustrative of the conditions to which a grant may be subjected is the case often cited by the commentators: Primus can grant property to Secundus on the condition that he shall be married and living in France at Primus’ death. Among the interests which can be created by the simple conditional grant are some which are surprisingly similar to the common law “possibility of reverter” and “right of entry for breach of a condition subsequent.” The “possibility of reverter” has been defined as the interest “created by conveying a fee simple, terminable, however, upon the happening of an event certain to occur at some unpredictable time.”57

If A makes a gift to B subject to a resolutory condition, he has, to use the common law terminology, created a “condition in defeasance of an estate of freehold” with a reversionary interest in his own favor. A conveyance “while the Dixie elm shall stand” or “until the Washington monument shall fall” would be just as valid under French as under common law.58 A “right of entry for breach of a condition subsequent” is the interest which is created when “a fee simple (or lesser estate) is conveyed with a right reserved to enter and terminate it upon breach of a certain condition which is usually with relative explicitness described as such.”59 No reason exists which would make such an interest invalid under French law.60

54. The French jurisprudence and doctrine is in confusion with regard to the circumstances which require that the beneficiary of a stipulation pour autrui be in existence at the time the stipulation is established.
56. Art. 2125, French Civil Code: “Those who have over the real estate a right depending upon a condition, or revocable in certain cases, or which may be cancelled, can merely grant a mortgage subject to the same condition or to the same cancellation.” Translation from Cachard, The French Civil Code (1895).
58. Conditional grants are not limited in French law to donations inter vivos or mortis causa. Conditional interests can be created by acts of sale. Art. 1564, French Civil Code, provides: “A sale may be made absolutely or under a resolutory condition.”
59. Philbrick, op. cit. supra note 57, at 253. The Restatement of the Law of Property describes this interest as a “power of termination.”
60. The French writers state that “conditions are retroactive.” Amos,
Another device for controlling the future disposition of property is the stipulation against alienation. In French law an absolute prohibition against the alienation of property is void. A fortiori if the prohibition is not confined to a reasonable protection of a legitimate interest of either the donor, the donee, or some third party. Such stipulations are contrary to public policy in that they prevent the free circulation of property. If inserted in an act of donation, they are regarded as not written and the donee takes absolutely. Formerly, a condition providing for temporary inalienability also was deemed to be void. Now, by evolution in the jurisprudence, French law is even more liberal than common law in upholding clauses of temporary inalienability. Since 1858, the Court of Cassation has upheld a clause of inalienability if the following conditions are fulfilled:

(1) The clause must be inserted in an act of alienation.

Usually the act of alienation is an act by gratuitous title, that is, the donor “ties up” the property which is the object of his gift by stipulating that it shall be inalienable. Theoretically, there is nothing to prevent the stipulation from figuring in an act under onerous title, such as a sale. Practically, however, a purchaser will rarely agree to such a clause; from the moment he pays the price he wants the privilege of disposing of the thing purchased.

op. cit. supra note 40, at 49. By this they mean that the realization of a condition avoids all acts which are incompatible with the newly created rights. Thus, if A, after granting property to B subject to suspensive condition grants the same property to C, and still later the condition is realized, B gets the property free from C's claim. That “conditions are retroactive” does not imply that a grantee whose title is subject to a suspensive condition is, upon the realization of that condition, entitled to an accounting for fruits and revenues received from the property by the previous holder. Whether the conditional grantee is entitled to an account for the fruits, depends, in an act of donation on the intention of the donor, and in an onerous contract on the intention of the contracting parties. Cf. Arts. 1040-1041, French Civil Code.

61. A condition is equally illicit which deprives an owner of the power to mortgage his property. 4 Huc, op. cit. supra note 7, at 103-105, n° 73.


63. Dalloz, op. cit. supra note 8 (1856) Vo Dispositions entre-vifs et testamentaires, n° 179; Id. (Supp. 1895) at Vo Dispositions entre-vifs et testamentaires, n° 54; 18 Demolombe, op. cit. supra note 22, at 298, n° 278.

64. If a perpetual prohibition against alienation is inserted in a conveyance for value it avoids the grant entirely.

65. 1 Josserand, op. cit. supra note 5, at 1022-1024, nos 1840-1844. For an article discussing the antagonism of the common law to devices designed to produce inalienability, see Schnebly, Restraints upon the Alienation of Legal Interests (1935) 44 Yale L.J. 961, 1186, 1380.

66. 1 Josserand, loc. cit. supra note 65.
(2) The clause of inalienability must be temporary.

As to what is a reasonable time to "tie up" the property, no strict rule has been laid down; but the courts appear to have considered the lifetime of a living person to be the extreme limit. On the other hand, prohibitions against alienating the property for thirty and forty years have been upheld.

(3) The clause of inalienability must be justified by a legitimate interest.

The legitimate interest may be that of the alienor, the acquirer, or even a third party. One example of such an interest is the case where A give property to B directing the latter to pay an annual allowance to C. In this situation, the French courts will uphold a proviso forbidding the donee to alienate the property bequeathed during the lifetime of the recipient of the allowance: the maintenance of the prohibition against alienation serves to secure the payments stipulated. Another illustration is furnished when the donor is the ascendant of the donee: the law grants the donor the privilege of having the gift returned if the descendant predeceases without posterity and the property given is found in the succession of the deceased descendant. In such a situation the clause of inalienability may be inserted to protect this privilege.

The Civil Code itself expressly provides for a certain class of property to be inalienable. By marriage contract, it is lawful to constitute property biens dotaux. This kind of property, during the continuance of the marriage, cannot be alienated by either the husband or the wife, or by both together.
The device most frequently employed in French law to create successive property interests through time is the usufruct—the French counterpart of the common law "life estate." Article 578 defines usufruct as "the right to enjoy things of which another has the ownership, in the same manner as the owner himself, but on condition of not altering the substance thereof." The usufructuary, since he possesses in the same manner as the owner, is entitled to receive the fruits, both natural and civil, which the thing produces. A usufruct is established either by will, by convention of the parties, or by operation of law. The law does not permit the creation of a usufruct which would extend beyond the life span of the usufructuary. A usufruct for a term of years terminates on the expiration of the period, or on the death of the usufructuary, whichever event first occurs. If a usufruct is created in favor of a "moral person"—a corporation for instance—its duration cannot in any case exceed thirty years.

The usufructuary, like the "life tenant" of the common law, is not privileged to commit waste. The law imposes upon him the obligation to enjoy the property like a bon père de famille, i.e., "to use it in a spirit of conservation and to administer it in a manner to merit the approbation of a just and intelligent man." The usufructuary cannot excuse imprudent acts by contending that he has administered the property as if it were his own. If he commits waste or allows the property to deteriorate for want of repairs, the court in its discretion may order cancellation of the usufruct; or, if it chooses, it may decree that the owner...
recover the enjoyment of the thing subject to the condition that he make annual payments to the usufructuary.

That which is left of the "full ownership" after a usufruct is carved out is called the "naked ownership" (nu propriété). Upon the cessation of the usufruct, for whatever cause, the enjoyment of the property reverts to the "naked owner." The "naked owner" owes no positive obligation to the usufructuary. His only duty is to refrain from creating obstacles to the usufructuary's enjoyment of the property.

By the use of the usufruct an almost unlimited number of complicated property interests can be created. First, successive usufructs can be established on a piece of property, that is, a number of usufructs can be created for the benefit of several persons who will be called one after the other to enjoy the things which are subject to the usufruct. The validity of successive usufructs is subordinated, so far as the persons called in the second and third order are concerned, to the requirement that such beneficiaries exist (or at least be conceived) at the time of the creation of the usufruct if the usufruct is created by an inter vivos act, or, at the moment of the decease of the donor if the usufruct is established by testament. Second, alternative usufructs may be established, in accordance with which the beneficiaries alternate periodically in the enjoyment of the property. Third, a usufruct may be created so that the usufructuary is privileged to choose from among several things that one of

82. Dalloz, op. cit. supra note 8 (1862) Vo Usufruit, no 587; Id. (Supp. 1896) at Vo Usufruit, no 269; 10 Demolombe, op. cit. supra note 22, at 567, no 652.
83. Dalloz, op. cit. supra note 8 (1862) Vo Usufruit, no 588; Id. (Supp. 1896) at Vo Usufruit, no 269.
84. Dalloz, op. cit. supra note 8 (1862) Vo Usufruit, no 102; Id. (Supp. 1896) at Vo Usufruit, nos 40 et seq.; 2 Aubry et Rau, op. cit. supra note 3, at 665, § 228.
85. The intention of the grantor should be the basis for interpreting acts establishing usufructs. Dalloz, op. cit. supra note 8, Vo Usufruit, nos 119-121; Id. (Supp. 1896) at Vo Usufruit, no 48. By virtue of this rule, a stipulation of successive usufructs, the second to open at the decease of the first legatee, is construed to mean that the second usufruct is opened also by the renunciation of the first legatee. Req. 23 mars.1869, Dalloz 1869.1.508. But a usufruct for the benefit of a designated person and "his heirs" is null. Dalloz, op. cit. supra note 8 (1862) Vo Usufruit, no 103; Id. (Supp. 1896) at Vo Usufruit, no 41. In the latter instance the courts cannot, by a fair interpretation of the usufruct, regard it as successively established in favor of the person designated and of such heirs as were already born or conceived. Ibid.
86. Dalloz, op. cit. supra note 8, Vo Usufruit, no 103; 2 Aubry et Rau, op. cit. supra note 3, at 665, § 228; Baudry-Lacantinerie et Chauveau, op. cit. supra note 7, at 517, no 471.
87. Dalloz, op. cit. supra 8 (1862) Vo Usufruit, no 118.
which he prefers the enjoyment.\textsuperscript{88} Fourth, a usufructuary can create another usufruct on his right of usufruct.\textsuperscript{89} The second usufructuary acquires during his life time all of the rights of the first usufructuary;\textsuperscript{90} but, if the former predeceases, the enjoyment of the property reverts to the latter. Fifth, a "naked owner"—the holder of the residuary rights after a usufruct has been carved out of the "full ownership"—can establish a usufruct on his own interest.\textsuperscript{91} In this case, the usufructuary has only a contingent right and may never actually have the enjoyment of the property. Sixth, a usufruct can be constituted on a right of lease,\textsuperscript{92} on a contract of emphyteusis,\textsuperscript{93} or on a servitude.\textsuperscript{94} Seventh, property subject to a "permitted substitution" can be granted in usufruct.\textsuperscript{95} Eighth, a gift of the usufruct coupled with a conditional gift of the "naked ownership" is valid.\textsuperscript{96} Even further complications can be introduced by superimposing usufructs subject to suspensive and resolutory conditions in the situations enumerated above.\textsuperscript{97}

The creator of a usufruct may retain the "naked ownership" in himself or he may convey it to another party. If the grantor retains the "naked ownership," the property burdened with the usufruct reverts to him on the usufruct's termination. At common law the grantor's interest would be called a "reversion."\textsuperscript{98}

\textsuperscript{88} Id. (Supp. 1896) at Vo Usufruit, no 47.
\textsuperscript{89} Id. (1882) at Vo Usufruit, no 236.
\textsuperscript{90} Ibid. Consequently the second usufructuary can mortgage his interest, but this mortgage is extinguished on his death. Ibid.
\textsuperscript{91} A legacy of the usufruct of property of which the testator has only the "naked ownership" takes effect only after the existing usufruct terminates.
\textsuperscript{92} Dalloz, op. cit. supra note 8, Vo Usufruit, no 130; 2 Aubry et Rau, op. cit. supra note 3, at 661, § 226.
\textsuperscript{93} Dalloz, op. cit. supra note 8, Vo Usufruit, no 131.
\textsuperscript{94} Id. at no 134.
\textsuperscript{95} Id. at no 132. Cf. Art. 1053, French Civil Code.
\textsuperscript{96} The gift of a usufruct to B, followed by a conditional gift of the "naked ownership" to such of B's children as are living at the testator's death and survive B, followed in the event of B's dying childless, by a gift of the "naked ownership" to B, is valid disposition. Amos & Walton, op. cit. supra note 15, at 130, § 52.
\textsuperscript{97} Dalloz, op. cit. supra note 8, Vo Usufruit, no 111. Cf. Art. 1169, French Civil Code. Where a usufruct is created which is to terminate upon the happening of an uncertain event, and the realization of this event becomes impossible, the usufructuary continues in possession of the property just as though the usufruct were for life. Dalloz, op. cit. supra note 8, Vo Usufruit, no 709.
\textsuperscript{98} "A reversion is that portion left of any estate after its holder creates out of it a lesser estate in another person or persons, or several estates of a total lesser quantity in several persons." Philbrick, op. cit. supra note 57, at 245. See also 1 Simes, op. cit. supra note 1, at 59, § 42.
ownership" of the same property to C, the interest which C has in the property would be either a "remainder" or an "executory interest" at common law. After the termination of the usufruct, the property passes to C instead of "reverting" to A.

Similar to the usufruct are the right of use and the right of habitation. Use is a restricted form of usufruct, the beneficiary being entitled only to such fruits as are required for personal consumption by him and his family. Habitation is the right of use applied to a dwelling.

The contract of *emphyteusis* is worthy of mention. Emphyteusis is a contract similar to a long-term lease. Its maximum term is ninety-nine years, while its minimum term is eighteen years. This limitation is not derived from the Civil Code, which is silent on the subject of emphyteusis, but from the Law of June 25, 1902. The holder of the right of emphyteusis is entitled to the use and the enjoyment of the thing on which his right bears; he receives the fruits which it produces (for example, he may exploit the mines which were opened by the previous proprietor); and finally, he may dispose of the right of which he is the owner. Unlike the case of a usufruct, the decease of the title-holder does not terminate the emphyteusis.

Another device which the French sometimes employ in order to control the future disposition of property is the *fondation*—quite similar to the Anglo-American foundation. The *fondation* is described by the French as "the manifestation of a human desire to organize the future." It is a legal person, separate and distinct from the individual who creates it. Its aim is not to grant property to this or that individual but rather to allocate funds to the accomplishment of a fixed service. As a device for 1941
controlling the future disposition of property, the *fondation* is of only limited usefulness, for it can have as its object only the performance of services of "general utility"—that is, social, religious, scientific, artistic or literary services.\textsuperscript{107}

No provision of the Civil Code refers, either directly or indirectly, to the *fondation*. This absence of Code material has hindered development of the device. The courts, to satisfy the aspirations of wealthy individuals, have had to draw upon the instruments at their disposal—instruments which all too often were poorly adapted to the end desired. The net result of the courts' efforts has been to permit the establishment of *fondations* by any of the following procedures:

1. by the appropriation of ear-marked funds to a pre-existing moral person or legal entity;
2. by donation to a natural person of the necessary funds and the imposition upon him of a charge to utilize the funds to achieve the objectives of the *fondation*;
3. by the direct creation of a new establishment to carry out the ideas of the founder.\textsuperscript{108}

The legal validity of the first of these procedures is beyond dispute. The only prerequisite is that the pre-existing entity obtain from the administrative courts authorization to accept the liberality.\textsuperscript{109}

The validity of the second combination has been contested on the ground that it approximates a prohibited substitution. The answer of the jurisprudence to this contention has been that the donee and the *fondation* are not on equal planes: that the one does not succeed the other; that there is no successive order; and finally that the death of the legatee is not the legally operative fact which confers the enjoyment of the property on the *fondation*.

As to the third procedure, a distinction must be made between a *fondation* created by act *inter vivos* and one established by testament. The *inter vivos* *fondation* presents no difficulty. The founder himself constructs the necessary physical plant, a hospital for instance; then he has the plant declared to be an *établissement d'utilité publique*; finally he obtains author-

\textsuperscript{107} Ibid.
\textsuperscript{108} 8 Josserand, op. cit. supra note 5, at 975-979, nos 1905-1912.
\textsuperscript{109} France has two separate and distinct systems of courts: the regular courts and the administrative courts.
ization for the establishment to accept a further liberality to meet operating costs.

The testamentary fondation, on the other hand, is of doubtful legality. A sharp conflict between the administrative courts and the "regular" courts complicates the question. The Court of Cassation, the highest of the "regular" courts, refuses to recognize the validity of a legacy to a fondation. This refusal is grounded on the proposition that a "future work" cannot be a determinate legatee. The court reasons that a "future work" has no legal personality; that the declaration d'utilité publique occurs subsequent to the death of the testator and does not have a retroactive effect; and that, therefore, at the time of the donation there is no legatee in existence who has legal capacity to accept the donation. On the other hand, the Conseil d'État, the highest of the administrative courts, not being bound to follow the strict letter of the codal rules, has recognized the validity of a legacy to a "future" person. Josserand suggests that the Court of Cassation might have reached the same result as the Conseil d'État by refusing to apply to cases in which the legatee is a "moral person" the rule requiring a legatee to be in existence at the time of the death of the testator. He supports his position by the argument that the redactors in all probability did not have "moral persons" in mind when they drafted Article 906, for in 1804 such entities were few in number, especially in the domain of private law; and furthermore, that the very tenor of the article shows that it was meant to be applied only to natural persons.

A concept which is sufficiently plastic to permit the creation of functional equivalents of practically every "future interest" known to the common law, and many of which would be repugnated in that law as constituting perpetuities, is the donation avec charge. This type of donation contains a clause by which the donor imposes upon his legatee "the obligation to give, to do, or to refrain from doing, a certain thing." The donation avec charge is a very adaptable device: the donor can stipulate in the most exact detail the future disposition of his property. The device is further strengthened in that the ultimate beneficiaries can sue for specific performance of the "charges" imposed. Its only weakness as a device for planning the future

110. See Art. 906, French Civil Code.
111. 3 Josserand, op. cit. supra note 5, at 979, nº 1911.
112. Berthomieu, Du Legs avec Charge (1896) 55.
113. Le Paulle, op. cit. supra note 6, at 1138.
of property lies in the fact that the donor's heirs can revoke the donation for non-performance of the charge and thus defeat the rights of the beneficiary altogether.\textsuperscript{114} This danger can be avoided. The donor can deprive his representatives of the power to revoke the legacy, leaving them only the power to require specific performance.\textsuperscript{115}

\textbf{CONCLUSION}

French lawyers and their clients can create, and in many instances have created, property interests which in complexity rival those established in common law jurisdictions. Such devices as the "permitted" substitutions, the \textit{donation avec charge}, the \textit{stipulation pour autrui}, the alternative conditional legacy, the usufruct, the \textit{fiducia} and the \textit{fondation} lend themselves to almost infinite complication, and evidence that not only the common law property system, but the civilian system as well, is sadly in need of drastic reform.\textsuperscript{116} Complex "future interests" and their civilian equivalents, which today prop up the privileged few just as the substitution \textit{fidéicommissaire} once did the feudal aristocracy of France, might well be relegated to history and remembered only for their resistance to necessary reform.

F. HODGE O'NEAL *

\textbf{THE LOUISIANA FAIR TRADE ACT AND INTERSTATE TRANSACTIONS}

\textit{The Krauss Company Case}

Plaintiff, a manufacturer, instituted an action in the federal district court seeking to enjoin defendant, a retailer, from selling the plaintiff's trade-marked goods at less than the minimum price fixed by fair trade agreements which plaintiff had made with more than a hundred retail dealers in Louisiana under Act 13 of 1936,\textsuperscript{1} popularly known as the Louisiana Fair Trade Act.

\textsuperscript{114} A contract containing a \textit{stipulation pour autrui} can be used to accomplish many of the results obtained by the \textit{donation avec charge}; but the \textit{stipulation pour autrui} can be used only inter vivos.

\textsuperscript{115} Le Paulle, op. cit. supra note 6, at 1137.

\textsuperscript{116} Louisiana's property system is far simpler than either those of common law origin or that of France. Even in Louisiana, however, there is need for considerable reform.

* Member of the Louisiana Bar.