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It was also emphasized that the defendant was a commercial owner. It is to be noted that the court did not find negligence or impose liability but merely held that the facts alleged stated a cause of action. It is submitted that this was a sound conclusion. It required little imagination on the part of the defendant to suspect that the one who had purloined the keys would return for the car. The defendant also had reason to suspect that the keys had been taken by an incompetent driver since he knew that children were in the habit of playing on the lot. In view of these facts, it does not seem to be an undue burden on the defendant to hold that reasonable execution of his duty to the public required that he change the ignition lock or take some other precaution to prevent the car from being taken by an incompetent driver. This inconvenience is certainly slight when compared with its effectiveness in minimizing the risk.

It is suggested, however, that the decision should be limited to its facts and should not be extended to cases where the keys are not stolen prior to the theft of the automobile or where the owner has little or no reason to suspect that the thief would be an incompetent driver. In the absence of facts which would lead the reasonable man to anticipate the theft and subsequent injury, leaving the keys in the switch of an unattended automobile should not of itself be considered negligence or disregard for the safety of others such as will justify the imposition of liability. In determining when an owner should be held to anticipate such misconduct it is suggested that among the factors to be considered should be the location of the unattended automobile, the length of time and the time of day that it was left unattended, and whether the owner knew that the keys had been previously stolen.

Frank Fontenot

TRUSTS — PROHIBITED SUBSTITUTIONS

The recent case of *Succession of Meadors*¹ illustrates how the Louisiana courts have restricted the utility of trusts under the Trust Estates Law.² In that case a Tennessee domiciliary be-

1. 135 So.2d 679 (La. App. 2d Cir. 1961); cert. denied, 135 So.2d 679 (La. 1962).

2. LA. R.S. 9:1791-2212 (1950). The legislature is authorized to provide for trust estates under LA. CONST. art. IV, § 16. Discussions of the Trust Estates Law are found in Daggett, *Comments by Harriet S. Daggett*, 3 WEST'S LOUISIANA

queathed property in trust which included immovable property in Louisiana. The terms of the trust were: (1) the income was to be paid to decedent's wife and sister during their lives and, upon the death of either, to the survivor until her death; (2) the trustee was authorized to encroach upon the principal to provide for emergency needs of the wife; and (3) at the death of the surviving wife or sister, the trustee was to distribute the trust property to decedent's heirs and next of kin as determined by Tennessee law. The Second Circuit Court of Appeal construed the third disposition to be a prohibited substitution³ and on that basis, without commenting on the other dispositions in the trust, declared the entire trust unenforceable under Louisiana law.

In the *Meadors* case the court based its decision on *Succession of Guillory*.⁴ The trusts in the two cases, however, were not identical. In *Guillory* the testator devised immovable property in trust for the life of a named income beneficiary and, at his death, to a church organization. The Louisiana Supreme Court held the disposition to contain a prohibited substitution and declared it invalid both as to the trustee and as to the church organization. The court presumably construed the disposition to contain two separate successive donations of full ownership, the first to a trustee for the life of the income beneficiary and the second to the church organization.⁵ In *Meadors* the testator devised the immovable property in trust for the lives of named income beneficiaries but *charged the trustee with transferring the property* to his heirs and next of kin at the termination of the trust. Thus, if the *Guillory* case contained a substitution it

REVISED STATUTES 352 (1950); Oppenheim, *Limitations and Uses of Louisiana Trusts*, 27 TUL. L. REV. 41 (1952); Roos, *Trust Procedure in Louisiana Banks*, 13 LA. BUSINESS BULL. No. 3, p. 5 (1951); Wisdom, *A Trust Code in the Civil Law, Based on the Restatement and Uniform Acts: The Louisiana Trust Estates Act*, 13 TUL. L. REV. 70 (1938).

3. Certain substitutions are prohibited by LA. CONST. art. IV, § 16, and LA. CIVIL CODE art. 1520 (1870). For a discussion of prohibited substitutions, see *Succession of Bartels*, 234 La. 810, 101 So.2d 678 (1958); *Succession of Johnson*, 223 La. 1058, 67 So.2d 591 (1953); *In re Courtin*, 144 La. 971, 81 So. 457 (1919); *Succession of Hall*, 141 La. 860, 75 So. 802 (1917); *Succession of Stephens*, 45 La. Ann. 962, 13 So. 197 (1893); Pascal, *The Trust Concept and Substitution*, 19 LOUISIANA LAW REVIEW 273 (1959); Roos, *Trust Procedure in Louisiana Banks*, 13 LA. BUSINESS BULL. No. 3, p. 5 (1951); SAUNDERS, LECTURES ON THE CIVIL CODE OF LOUISIANA 299 (1925).

4. 232 La. 213, 94 So.2d 38 (1957). For an extensive discussion of the possible implications of this case see Jackson & Jeter, *The Guillory Case: What Are Its Implications for Private and Charitable Trusts?*, 32 TUL. L. REV. 415 (1958).

5. The only reason given by the court in holding the trust unenforceable was that the bequest was "a prohibited substitution, and, as such, violative of the public policy of this state as expressed in our basic and statutory law." *Succession of Guillory*, 232 La. 213, 217, 94 So.2d 38, 39 (1957).

was direct, or non-fideicommissary in character, as the second donation would have been accomplished by the direct effect of the expressed volition of the testator. But if the *Meadors* will contained a substitution it was indirect or fideicommissary in character, as the second donation would have been accomplished through the charge imposed on the trustee. The Louisiana Constitution and the Civil Code prohibit both (direct) substitutions and fidei commissa (indirect substitutions),⁶ but neither prescribes the effect of a direct substitution. However, under the jurisprudence such a disposition has been treated as invalid as to both the first and the second donees.⁷ Thus, if the *Guillory* disposition was a direct substitution, the decision in that case was consistent with the jurisprudence. The Civil Code does declare a fideicommissary substitution invalid as to both donees,⁸ but the jurisprudence nevertheless has upheld the disposition as to the first donee and considered it invalid as to the second.⁹ Thus, if the *Meadors* disposition was a fideicommissary substitution, the decision in that case was consistent with the Civil Code but inconsistent with the jurisprudence.

Although there is some distinction between the *Guillory* and *Meadors* trusts, it would seem that the courts in both cases were led to consider the respective dispositions to contain substitutions because of the fact that in each "title" to property was given to a trustee and thereafter was to be received by another. It is submitted that a prohibited substitution does not come into being merely because "title" is conveyed to a trustee for the duration of a trust and thereafter to another. At the end of every trust the trustee must divest himself of his "title" to whomever is to have the property free of the trust. Even if this is a substitution it should not be considered a prohibited substitution because the same section of the Louisiana Constitution which forbids substitutions also expressly authorizes trusts.¹⁰ This being the case, the prohibition against substitutions would apply only to double or successive dispositions of *beneficial own-*

6. LA. CONST. art. IV, § 16; LA. CIVIL CODE art. 1520 (1870).

7. Succession of Johnson, 223 La. 1058, 67 So.2d 591 (1953); Succession of Reilly, 136 La. 347, 67 So. 27 (1914).

8. "Every disposition by which the donee, the heir, or legatee is charged to preserve for or to return a thing to a third person is null, even with regard to the donee, the instituted heir or the legatee." LA. CIVIL CODE art. 1520 (1870).

9. Succession of Johnson, 223 La. 1058, 67 So.2d 591 (1953); Succession of Reilly, 136 La. 347, 67 So. 27 (1914).

10. "No law shall be passed authorizing the creation of substitutions, fidei commissas [sic] or trust estates; except that the legislature may authorize the creation of trust estates." LA. CONST. art. IV, § 16, as amended.

ership. The trustee's "title" is only "legal" without beneficial interest;¹¹ it is a "title" which confers only powers of control and management over property in the interest of others who have beneficial rights. The prohibition against substitutions should not be directed against such powers any more than it is directed against the powers of a tutor, curator, custodian, executor, or administrator.

It is necessary, therefore, to consider whether the *Guillory* and *Meadors* trusts contained prohibited substitutions of *beneficial interests*. The fact that the principal beneficiaries in *Guillory* and *Meadors* were not expressly given enjoyment of their interests at the time of the creation of the trusts should not necessarily render such trusts invalid as containing prohibited substitutions. The Louisiana Civil Code permits legacies subject to a term or condition.¹² Outside of trust, one may give income interests to specific persons and ownership of the principal to others at the end of the lives of those receiving the income interests.¹³ The heirs of the donor retain the ownership of the principal until the fulfillment of the condition or term. Since this is possible outside of trust, it should be permissible within a trust.

Although there would seem to be no objection to postponing the enjoyment of interests by the principal beneficiaries until the termination of the trust, it should be mentioned that the Louisiana Trust Estates Law requires beneficiaries to be "in being" and ascertained at the time the trust is created.¹⁴ If the *Meadors*

11. "A trust shall be created when a person . . . transfers the legal title to property to a trustee in trust for the benefit of himself or a third person." LA. R.S. 9:1811 (1950). For a discussion of the role of the trustee see Pascal, *The Trust Concept and Substitution*, 19 LOUISIANA LAW REVIEW 273 (1959); RESTATEMENT, TRUSTS § 2 (1935).

12. LA. CIVIL CODE arts. 1527, 1698-1699, 2005-2006, 2030 (1870); Pascal, *The Trust Concept and Substitution*, 19 LOUISIANA LAW REVIEW 273, 283 (1959).

13. It is required, however, that the donees be in being and ascertained at the time the donation is to take effect. "Two things must concur to enable a legatee to take under our laws; 1st. He must be in existence at the time of the opening of the estate; 2d. He must have capacity to receive at that time, if the legacy be absolute; if it be conditional, it is sufficient if the capacity to receive exists at the time of the fulfillment of the condition." *Milne's Heirs v. Milne's Executors*, 17 La. 46, 54 (1841). LA. CIVIL CODE arts. 953-957, 1473-1474, 1482 (1870); SAUNDERS, LECTURES ON THE CIVIL CODE OF LOUISIANA 285 (1925).

14. LA. R.S. 9:1902 (1950). The meaning of "in being" is found in LA. CIVIL CODE art. 1482 (1870): "In order to be capable of receiving by donation *inter vivos*, it suffices to be conceived at the time of the donation. In order to be capable of receiving by last will, it suffices to be conceived at the time of the decease. But the donations or the last will can have effect only in case the child should be born alive."

trust is subject to the interpretation that the heirs and next of kin be determined at the termination of the trust, this provision would be invalid because the beneficiaries would not necessarily be "in being" and therefore, ascertainable at the time of the creation of the trust. However, under Anglo-American law a disposition in favor of heirs and next of kin such as is found in the *Meadors* case would be construed to refer to the heirs and next of kin ascertained and in being at the testator's death.¹⁵ Such a construction should not be objectionable under Louisiana law.¹⁶

Insofar as the disposition of the income in the *Meadors* trust is concerned, objection was raised to the provision which authorized the shifting of income to the survivor of the income beneficiaries.¹⁷ But such a disposition does not appear to be objectionable under Louisiana law. Successive usufructs are authorized and are not considered prohibited substitutions.¹⁸ An income interest is a kind of usufruct under the Civil Code.¹⁹ Successive income interests should be as valid as successive usufructs and not be considered prohibited substitutions.

The validity of the provision in the *Meadors* trust authorizing the trustees to invade the principal is questionable, although such is permitted under the Trust Estates Law.²⁰ The reason is that this type of provision is in the nature of a substitution because the interest in the principal beneficiary can be made to shift from him to another. The Constitution authorizes the creation of Anglo-American type trusts, but the dispositions within a trust must not violate the constitutional prohibition against sub-

15. SIMES, FUTURE INTERESTS § 97 (1951).

16. Every consideration should be given to the fact that wills such as in the *Meadors* case are drafted in other jurisdictions according to Anglo-American law techniques and conflict of law principles would require the Louisiana courts to uphold the validity of the wishes of the testator if the will is capable of both a lawful and an unlawful interpretation. Such a result would be required under Louisiana law as well. "[I]f it can be said that the will is equally and easily susceptible of either of the two interpretations . . . we would under the law be compelled to adopt the one which would save the life of the will rather than the one which would strike it down." *Swart v. Lane*, 160 La. 217, 220, 106 So. 833, 834 (1926). See *Succession of May*, 109 La. 994, 34 So. 52 (1903); *Succession of Meunier*, 52 La. Ann. 79, 26 So. 776 (1899); *Heikamp v. Succession of Solari*, 54 So. 2d 347 (La. App. Or. Cir. 1951); LA. CIVIL CODE arts. 1712-1713 (1870).

17. *Succession of Meadors*, 135 So.2d 679, 682 (La. App. 2d Cir. 1961). Successive income interests are authorized by LA. R.S. 9:2100 (E) (1950).

18. LA. CIVIL CODE art. 609 (1870); *McCalop v. Stewart*, 11 La. Ann. 106 (1856); *Jackson & Jeter, The Guillory Case: What Are Its Implications for Private and Charitable Trusts?*, 32 TUL. L. REV. 415, 423 (1958); *Pascal, The Trust Concept and Substitution*, 19 LOUISIANA LAW REVIEW 273, 283 (1959).

19. LA. CIVIL CODE art. 607 (1870).

20. LA. R.S. 9:1923 (1950). For an explanation of this section see *Oppenheim, Limitations and Uses of Louisiana Trusts*, 27 TUL. L. REV. 41, 46-47 (1952).

stitutions.²¹ Therefore, the Trust Estates Law may be unconstitutional on this point and this particular provision in the *Meadors* trust would be invalid as to Louisiana property.²²

But even if the invasion of the principal provision of the *Meadors* trust were invalid, it should not have the effect of invalidating the entire trust. First, the Trust Estates Law itself provides that if an invalid provision can be separated from the rest of the trust without defeating the purpose of the settlor in creating it, that portion of the trust which is not invalid shall not fail.²³ Second, even though the invasion of principal provision would be considered a fideicommissary substitution and invalid as to both the "instituted" and "substituted" donees according to the Civil Code,²⁴ the provision concerns only the disposition of the beneficial interest in the principal and not that of the beneficial interest in the income from the trust. Hence the *Meadors* trust should have been held valid at least as to the income interest of the named beneficiaries. In that case the heirs of the testator according to Louisiana law (the property being in Louisiana) should have been considered entitled to the land subject to the trust, or, more precisely, as principal beneficiaries under the trust by operation of law. Moreover, under the jurisprudence which strikes down the second disposition in a fideicommissary substitution and not the first,²⁵ the *Meadors* trust should have been upheld in its entirety except for the invasion of principal provision.

It has been the purpose of this Comment to show that the decisions in the *Guillory* and *Meadors* cases are not in harmony with the intent of the constitutional and statutory law providing for trusts in Louisiana. If these cases are an indication as to

21. "No law shall be passed authorizing the creation of substitutions, fideicommissas (sic) or trust estates; except that the legislature may authorize the creation of trust estates." LA. CONST. art. IV, § 16, as amended. LA. R.S. 9:1861 (1950); Pascal, *Some ABC's About Trusts and Us*, 13 LOUISIANA LAW REVIEW 555, 559-60 (1953).

22. Doubt as to the validity of LA. R.S. 9:1923 (1950) authorizing the trustee to invade the principal is also raised in Jackson & Jeter, *The Guillory Case: What Are Its Implications for Private and Charitable Trusts?*, 32 TUL. L. REV. 415, 424 (1958).

23. "If a provision in the terms of the trust be invalid for any of the reasons stated in R.S. 9:1842, or for any other reason, the intended trust shall fail altogether if, but only if, the invalid provision cannot be separated from the other provisions without defeating the purpose of the settlor in creating the trust." LA. R.S. 9:1843 (1950).

24. LA. CIVIL CODE art. 1520 (1870).

25. Succession of Johnson, 223 La. 1058, 67 So. 2d 591 (1953); Succession of Reilly, 136 La. 347, 67 So. 27 (1914).

how the use of the trust will be limited in the future, there is a need for trust law revision. The Louisiana Law Institute is presently preparing a proposed revision of the Trust Estates Law. It is hoped that the Institute will give favorable consideration to recommending legislation which will remove these stumbling blocks to the employment of trusts in Louisiana.

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