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Prohibited Substitutions v. The Louisiana Trust Code

Thomas Crichton IV

The cases of *Holt* and *Hamilton* are a natural extension of the broadening interpretation by the federal courts of cruel and unusual punishment. The importance of these cases in Louisiana today is illustrated by a recent decision of the United States Court of Appeals for the Fifth Circuit. The circuit court ordered the United States District Court for Eastern Louisiana to hear the complaint of an inmate of the Louisiana penitentiary at Angola who alleged that the conditions on death row violate his constitutional guarantee against cruel and unusual punishment. The plaintiff complained that death row inmates were subjected to roach-infested food, rusty drinking water, and filthy living conditions. The court said: "Although federal courts are reluctant to interfere with the internal operation and administration of prisons, we believe that the allegations appellant has made go beyond matters exclusively of prison discipline and administration; and that the court . . . should adjudicate the merits of the appellant's contentions of extreme maltreatment."[51]

Hopefully, the result of cases such as these will be the elimination of the deplorable conditions that exist in many local and state prisons. It must be remembered that in some cases the courts were forced to move into this area because the state and local governing bodies did not appropriate adequate funds to allow prison officials to meet the prison needs. These governing bodies should recognize the importance of suitable prisons to our society and meet their obligations in this matter.

Felix Richard Weill

PROHIBITED SUBSTITUTIONS V. THE LOUISIANA TRUST CODE

By last will and testament Mrs. Kate Crichton Gredler provided for two trusts, each to comprise one-half the residue of her succession in favor of two of her nephews.[1] The testatrix then expressed the intention that upon the termination of each trust, if the named beneficiary thereof were not living, the trust assets were to be delivered free of trust to the child or children of the deceased beneficiary, and in the absence of a living child or children, to successively named alternate bene-

51. Sinclair v. Henderson, No. 30025 (5th Cir., Nov. 17, 1970).

1. The first-named beneficiaries stated that they were beneficiaries of both income and principal in accordance with the intent of the testatrix. The terms of the will imply this to be correct.

ficiaries. After the death of the testatrix, a niece and a third nephew attacked the will, principally on the ground that it contained a prohibited substitution in that it contemplated a shift of principal interest.[2] Since Mrs. Gredler died in 1965, all parties conceded that the 1964 Trust Code was applicable.[3] In affirming the court of appeal,[4] the supreme court *held*, the alternate beneficiaries clause of the testamentary trust created a prohibited substitution. As no authorization for such a substitution could be found in the Trust Code, the entire will was an absolute nullity. *Crichton v. Succession of Gredler*, —— La. —, 235 So.2d 411 (1970), *rehearing denied.*

The prohibition against substitutions has long been an aspect of Louisiana civil law.[5] Article 1520 of the Revised Civil Code, as amended in 1962,[6] and Louisiana Constitution Article IV,

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2. The contested portion of the will provided: " 'In the event that either beneficiary, Thomas Crichton third or John Hayes Crichton be not living when this trust is terminated, both income and corpus of such said trust shall be paid over or conveyed by Trustee to the child or children of said deceased beneficiary in equal, undivided portions. In event that neither a beneficiary nor his child or children are living upon the termination of this trust, then said income and corpus shall be paid over or conveyed by the Trustee to the other trust beneficiary or, if he be not living, then to his child or children in equal or undivided portions. In the event that neither beneficiary, no [sic] any of their children be living upon termination of these trusts, as above herein set forth, then the income and corpus of these trusts shall be paid over or conveyed to the children of my deceased brother, Powell Crichton; namely, Powell Crichton Jr., Kate Crichton, Edward B. Crichton and Gloria Crichton McGehee in equal or undivided portions.' " Crichton v. Succession of Gredler, 220 So.2d 714, 716 (La. App. 2d Cir. 1969).

3. Mrs. Gredler died on April 15, 1965. Act 338 of 1964 (LA. R.S. 9:1721-2252 (1964), the Louisiana Trust Code) became effective on July 29, 1964. Therefore, the Trust Code was applicable to the Gredler will on the basis of the reasoning in Succession of Simms, 250 La. 177, 223, 195 So.2d 114, 130-31 (1966).

4. Crichton v. Succession of Gredler, 220 So.2d 714 (La. App. 2d Cir. 1969).

5. La. Digest of 1808, bk. III, tit. II, art. 40; La. Civ. Code art. 1507 (1825), and LA. CIV. CODE art. 1520 (prior to its amendment in 1962) all read substantially as follows:

"Substitutions and *fidei commissa* are and remain prohibited.

"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.

"In consequence of this article the Trebellianic portion of the Civil Law, that is to say, the portion of the property of the testator, which the instituted heir had a right to detain, when he was charged with a *fidei commissa* or fiduciary bequest is no longer a part of our law."

6. LA. CIV. CODE art. 1520, *as amended* by La. Acts 1962, No. 45 provides:

"Substitutions are and remain prohibited, except as permitted by the laws relating to trusts.

"Every disposition not in trust by which the donee, the heir, or legatee is charged to preserve for and to return a thing to a third person is null, even with regard to the donee, the instituted heir or the legatee."

Section 16, as amended in 1962,[7] provide the present legislative basis for the prohibited substitution. The jurisprudence interpreting what constitutes a prohibited substitution is abundant.[8] In the 1958 decision of *Succession of Thilborger* the supreme court said:

> "In explaining the provisions of Article 1520 this court on numerous occasions has said that the simplest test of the substitution prohibited by our law is that it vests the property in one person at the death of the donor and at the death of such person vests the same property in another person, who takes the same directly from the testator but by a title which springs into existence only on the death of the first donee."[9]

As thus viewed, a prohibited substitution is objectionable from a public order viewpoint because it is essentially an attempt on the part of the donor to deprive at least the instituted donee of the power of disposing of the property as he wishes.[10] Whenever a prohibited substitution is found, the entire bequest is rendered an absolute nullity;[11] therefore, neither the instituted donee or legatee, nor the substitute, receives any benefit from the bequest.

Unlike the prohibited substitution, the trust[12] is a compara-

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7. LA. CONST. art. IV, § 16, *as amended* by La. Acts 1962, No. 521, provides in pertinent part: "The Legislature may authorize the creation of express trusts for any purpose. . . . Substitutions not in trust are and remain prohibited; but trusts may contain substitutions to the extent authorized by the Legislature. . . ."

8. *See, e.g.*, Succession of Rougon, 223 La. 103, 65 So.2d 104 (1953); Girven v. Miller, 219 La. 252, 52 So.2d 843 (1951); Succession of Heft, 163 La. 467, 112 So. 301 (1927). Succession of Reilly, 136 La. 347, 67 So. 27 (1914). For other examples of wills that have been held to contain prohibited substitutions, *see* Comment, 1 LOYOLA L.J. 207 (1942).

9. 234 La. 810, 813, 101 So.2d 678, 679 (1958). It should be noted that this definition is not unanimously accepted. Since this appears to be the definition of the "direct" substitution recognized by the Louisiana judiciary, a discussion of its merits is not within the scope of this Note. *See* Tucker, *Substitutions, Fideicommissa and Trusts in Louisiana Law: A Semantical Reappraisal*, 24 LA. L. REV. 439 (1964).

10. Thus a prohibited substitution is generally characterized as "an attempt on the part of the donor or testator to make a testament for his donee or legatee along with his own will." Succession of Reilly, 136 La. 347, 363, 67 So. 27, 32 (1914).

11. LA. CIV. CODE art. 1520, *as amended* by La. Acts 1962, No. 45.

12. The Louisiana Trust Code defines "trust" as follows: "A trust, as the term is used in this Code, is the relationship resulting from the transfer

tively recent innovation in Louisiana.[13] Although the trust device is a "foreign import" from the common law states,[14] its use and adaptation to the Louisiana legal system is highly desirable due to the tax and estate planning benefits it affords.[15]

The most important Louisiana cases involving a confrontation between the terms of a trust and the prohibited substitution were *Succession of Guillory*,[16] *Succession of Meadors*,[17] and *Succession of Simms*.[18] A later case, *Succession of Walters*,[19] construed these cases as holding that a bequest to a trustee in which the vesting of the interest of a third party did not occur until the death of the trust beneficiary was a prohibited substitution.[20] All of these cases involved foreign wills whose phraseology was in terms of Anglo-American executory interests, and thus improper for probate in Louisiana since they seemed to indicate a second transfer of principal interest at a time after the death of the settlor.

The *Guillory* and *Meadors* decisions have been severely criticized because the rather broad language the courts used indicated that a prohibited substitution was presented because ownership was to pass initially to a trustee, and then at the termination of the trust to another. This implication cast doubt

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of title to property to a person to be administered by him as a fiduciary for the benefit of another." LA. R.S. 9:1731 (1964).

13. For a discussion of the history of the trust in Louisiana, *see* Daggett, *Progress Report on Louisiana's Trust Estates Act*. 10 LA. L. REV. 44 (1949); *Report by the Louisiana State Law Institute to Accompany the Proposed Louisiana Trust Code*, WEST LSA-R.S. Vol. 3A at xxxiii-xxxv; 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).

14. *See* Pascal, *Some ABC's About Trusts and Us*, 13 LA. L. REV. 555 (1953); Pascal, *The Trust Concept and Substitution*, 19 LA. L. REV. 273 (1959).

15. Oppenheim, *Why a Revision of the Louisiana Trust Estates Act Is Necessary*, 18 LA. L. REV. 599 (1958). *But see* Pascal, *Of Trusts, Human Dignity, Legal Science, and Taxes: Suggested Principals for a Louisiana Trust Estates Law*, 23 LA. L. REV. 639 (1963).

16. 232 La. 213, 94 So.2d 38 (1957).

17. 135 So.2d 679 (La. App. 2d Cir. 1961), *cert. denied*, 135 So.2d 679(1962).

18. 250 La. 177, 195 So.2d 114 (1966). In reference to the transfers in *Guillory* and *Meadors*, Chief Justice Fournet stated: "In other words, title to the property did not vest in the principal legatees until the trusts terminated, at which time there was a second transfer—a second vesting—of title, referred to by one writer as the 'hallmark of the prohibited substitution.'" *Id.* at 230, 195 So.2d at 133.

19. 202 So.2d 410 (La. App. 4th Cir. 1967), *cert. denied*, 251 La. 395, 204 So.2d 575 (1967).

20. *Id.* at 412.

as to whether it would be possible to have separate income and principal beneficiaries of the same trust without violating the prohibition against substitutions.[21]

Some of the fears raised by *Guillory* and *Meadors* as to the future of the trust in Louisiana were ended by the decision of *Succession of Singlust*.[22] In that case, a testatrix created a testamentary spendthrift trust for her son as income and principal beneficiary, and stipulated that the trust should remain in force during his lifetime. The court of appeal held that since the testatrix neither attempted to further dispose of the property nor control its disposition at her son's death, as was done in *Guillory* and *Meadors*, no prohibited substitution was presented.[23]

The *Guillory* and *Meadors* decisions were further clarified in *Succession of Simms*. In that case the court stated:

> " . . . To have made a valid disposition in compliance with existing law in the Guillory and Meadors cases, the testator should have left the property at death to the one intended as the principal legatee, subject to the conditions of the trust for the beneficiary under the administration of the trustee."[24]

Simms thus indicated that the reason a prohibited substitution

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21. *See* Jackson & Jeter, *The Guillory Case: What Are Its Implications for Private and Charitable Trusts?*, 32 TUL. L. REV. 415, 423-26 (1958); Oppenheim, *A New Trust Code for Louisiana: Some Basic Policy Considerations*, 23 LA. L. REV. 621 (1963); Oppenheim, *A New Trust Code for Louisiana —Some Steps Toward Its Achievement*, 37 TUL. L. REV. 169 (1963); Oppenheim, *Why a Revision of the Louisiana Trust Estates Act Is Necessary*, 18 LA. L. REV. 599 (1958); Note, 22 LA. L. REV. 889 (1962). *Contra*, Lemann, *How Practitioners Can Use the New Trust Code*, 13 LA. B.J. 131, 137-38 (1965). In this last article the author states: "Many lawyers were critical of the decisions in the *Guillory* case . . . and the *Meadors* case . . . , fearing that they evidenced an attitude on the part of the courts that all trusts are substitutions. However, . . . the trouble in both cases was that the wills failed to name principal beneficiaries and that the second title sprang into existence at the termination of the trusts, at some future time—not at the death of the settlor. . . . The decisions, it seems to me were both correct, and would be the same way under the new Trust Code, which does not authorize such substitutions either."

22. 169 So.2d 10 (La. App. 2d Cir. 1964), *cert. denied*, 247 La. 262, 170 So.2d 512 (1965).

23. *Id.* at 13.

24. 250 La. 177, 231, 195 So.2d 114, 133 (1967). For a criticism of the *Simms* decision, *see* Pascal, *The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Trusts*, 26 LA. L. REV. 487 (1966); Comment, 41 TUL. L. REV. 885 (1967).

was found in *Guillory* and *Meadors* (as well as in *Simms*[25]) was due to the apparent vesting of the interest of the principal beneficiaries at a time later than the death of the settlor. This would imply that no prohibited substitution would be presented in the case of separate income and principal beneficiaries, *provided* that there is vesting of principal interest at the settlor's death rather than *in futuro*.

The Legislature also reacted to the threat posed by the *Guillory* and *Meadors* decisions.[26] In 1962, remedial legislation was adopted to clear up confusion in the trust area, to lay the groundwork for the new trust code which was then in preparation, and to initiate an affirmative approach to the use of the trust device in Louisiana.[27] By an amendment adopted in that year to Louisiana Constitution Article IV, Section 16, the Legislature was given the power to authorize substitutions "in trust" to whatever extent it deemed desirable in future years.[28] Article 1520 of the Louisiana Civil Code was amended in the same year to conform with the amended Constitution.[29]

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25. In Succession of Simms, 250 La. 177, 230, 195 So.2d 114, 133 (1967), the court stated: "Since there was no vesting of the property in the principal legatee at the testator's death, only *in futuro*, the fact that it was stipulated in the will the property was bequeathed to the trustee 'in trust' contained on [sic] magic formula to cure this obvious substitution."

26. *Succession of Guillory* and *Succession of Meadors* had employed a *stricti juris* approach to article 1520 of the LA. CIV. CODE, LA. CONST. art. IV, § 16, and the Trust Estates Act to bolster their seemingly restrictive views of the trust in Louisiana. For example, the court in *Meadors* said: "Thus it is seen that the Legislature and the people have sought to retain our traditional prohibitions against substitutions, fideicommissa, and trust estates except to the very limited extent *expressly* provided for in the Trust Estates Law. Therefore, if a trust device . . . is not *expressly* permitted by our Trust Estates Law or is recognized as creating a prohibited substitution, that portion of the will containing the trust device must be a nullity." (Court's emphasis.) 135 So.2d 679, 681 (La. App. 2d Cir. 1961).

27. *See generally* Oppenheim, *A New Trust Code for Louisiana—Some Steps Toward Its Achievement*, 37 TUL. L. REV. 169 (1963).

28. Prior to 1962, LA. CONST. art. IV, § 16 read, in pertinent part: ". . . No law shall be passed authorizing the creation of substitutions, fidei commissas [sic] or trust estates: except . . ." This subsection of the Constitution was amended in 1962 (La. Acts 1962, No. 521) to read in the following positive language: "The Legislature may authorize the creation of express trusts for any purpose. . . . Substitutions *not in trust* are and remain prohibited; *but trusts may contain substitutions to the extent authorized by the Legislature*. . . ." (Emphasis supplied.)

29. The absolute prohibition against substitutions in LA. CIV. CODE art. 1520 (*see* note 5 *supra*) was amended by La. Acts 1962, No. 45 to read. "Substitutions are and remain prohibited, *except as permitted by the laws relating to trusts*. . . . Every disposition not in trust by which the donee, the heir, or legatee is charged to preserve for and to return a thing to a third person is null, even with regard to the donee, the instituted heir, or the legatee." (Emphasis supplied.)

Two years later, the Trust Estates Act[30] was superseded by the Louisiana Trust Code of 1964.[31] The Trust Code provides that a disposition in a trust which would constitute a prohibited substitution if not in trust would be valid if authorized by the Trust Code.[32] But from a reading of the Trust Code, apparently the only provisions therein authorizing dispositions which would constitute substitutions if made free of trust are those on the shifting of principal interest in class trusts and on the invasion of principal situations.[33] In fact, sections 1971 and 1972 of the Trust Code effectively prohibit a shift of principal interest except in the expressly authorized cases.[34] The Trust Code expressly

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30. Former LA. R.S. 9:1791-2212 (1950).

31. La. Acts 1964, No. 338 (LA. R.S. 9:1721-2252 (1964)), entitled the Louisiana Trust Code, became effective on July 29, 1964. For a discussion of various aspects of the new Trust Code, *see* Lemann, *How Practitioners Can Use the New Trust Code*, 13 LA. B.J. 131 (1965); Oppenheim, *A New Trust Code for Louisiana—Act 338 of 1964*, 39 TUL. L. REV. 187 (1965); Robertson, *Some Interesting Features of the Proposed Trust Code*, 24 LA. L. REV. 712 (1964).

32. LA. R.S. 9:1723 (1964) provides: "A disposition authorized by this Code may be made in trust although it would contain a prohibited substitution if it were made free of trust." LA. R.S. 9:1737 (1964) provides: "A settlor may dispose of property in trust to the same extent that he may dispose of that property free of trust and to any other extent authorized by this Code. A trust containing a substitution authorized by this Code is valid."

33. LA. R.S. 9:1961 (1964), Louisiana State Law Institute comment (a) provides: "Although this Code permits the approximate equivalent of shifting of interests in income, it does not permit shifting interests of the Anglo-American type in principal, except as to class trusts and invasion of principal, Secs. 1891-1906, 2067, 2068. However, a transfer of interests in principal to a principal beneficiary's heirs or legatees may occur. Secs. 1961-1965, 1971, 1972. . . ."

34. LA. R.S. 9:1971 (1964) provides: "The interest of a principal beneficiary is acquired immediately upon the creation of a trust, subject to the exceptions provided in this Code." Louisiana State Law Institute comment (c) delineates the exceptions spoken of in the text of section 1971: "An interest in principal may be acquired after the trust is created only under the provisions of Secs. 1891-1906 (by the coming into being of a member of a class of decedents that is comprised of principal beneficiaries), or Secs. 2021-2028 (by an effective modification of the trust to create an additional or different interest in principal)." LA. R.S. 9:1972 (1964) provides: "Upon a principal beneficiary's death, his interest vests in his heirs or legatees, subject to the trust, except as to class trusts." Louisiana State Law Institute comment (b) under section 1972 provides: "The doctrine *le mort saisit le vif* applies upon the death of a principal beneficiary in the same manner in which it would apply if there were no trust." This section would effectively preclude a shifting of principal interest not authorized by the Trust Code.

authorizes separate beneficiaries of income and principal,[35] and successive beneficiaries of income.[36]

The primary importance of the instant case is that it is the first to come before the Louisiana judiciary wherein a testamentary trust, admittedly governed by the 1964 Trust Code, was assaulted with the prohibition against substitutions. Thus, the *Gredler* decision could be termed a "test case" to determine the attitude of the Louisiana judiciary toward the use of the Trust Code.

The contested provision of the Gredler will provided in pertinent part:

> "In the event that either beneficiary . . . be not living when this trust is terminated, both income and corpus of such said trust shall be paid over or conveyed by Trustee to the child or children of said deceased beneficiary in equal, undivided portions."[37]

Since the testament stipulated no term in gross for the duration of each trust, the court correctly applied section 1833 (1) of

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35. LA. R.S. 9:1805 (1964) provides: "There may be one beneficiary or two or more beneficiaries as to income or principal or both. There may be separate beneficiaries of income and principal, or the same person may be a beneficiary of both income and principal, in whole or in part." The Louisiana State Law Institute comment under that Section states: ". . . Even if some or all of the dispositions in trust authorized by this section contain substitutions, the dispositions are not to be considered invalid. The legislature is given the power to authorize substitutions in trust by Const. Art. IV, Sec. 16." This same comment is made with reference to section 1807. *See* note 36 *infra*.

36. LA. R.S. 9:1807 (1964) provides: "Several beneficiaries may be designated to enjoy income successively." Actually this should not be seen as one of the cases of a substitution authorized by the Trust Code since the successive income beneficiaries do not take full ownership. *See* Oppenheim, *A New Trust Code for Louisiana: Some Policy Considerations*, 23 LA. L. REV. 621, 625-26 (1963).

37. The proponents of the will argued that the clause "In the event that either beneficiary . . . be not living when this trust is terminated . . ." constituted a suspensive condition to the shifting of principal. They asserted that a reasonable construction of the will calculated to render it valid would require a finding that the alleged prohibited substitution could not occur because the delivery of the trust property to alternate beneficiaries at the termination of the trust was predicated on an impossible condition (the termination of the trusts *following* the death of the trust beneficiaries). Therefore, on the basis of LA. CIV. CODE art. 1519 there should be no prohibited substitution presented by the will. This view was accepted by Justices Sanders and Hamlin in dissent, but did not sway the majority. Crichton v. Succession of Gredler, 235 So.2d 411, 420 (La. 1970).

the Trust Code,[38] and held that the terminating event of each trust would be the death of its respective beneficiary.[39]

Unlike the testaments in *Guillory*, *Meadors*, and *Simms*, the Gredler will provided for proper initial vesting of principal and income (and therefore full ownership) of the trust capital. But the question in *Gredler* concerned the validity of the testatrix's act of transferring this principal interest again at the termination of the trust. Under the traditional definitions discussed *supra* (developed in cases in which no trust was involved), a prohibited substitution was presented. But the task of the court was made more difficult by the fact that a trust was involved, calling into play various provisions of the Trust Code concerning shifts of principal[40] which had yet to be construed by the courts.

In general, the *Gredler* court approached the problem as the courts had in *Succession of Simms*[41] and *Succession of Walters*,[42] decided before the adoption of the Trust Code. That is, the court looked first at the contested portion of the will in light of the traditional definition of the prohibited substitution. It concluded that Mrs. Gredler's will contained a prohibited substitution, ". . . inasmuch as a substitution consists of successive principal interests, and of the making of a will for the first named legatee by the decendent. . . ."[43]

The court then examined the applicable trust legislation to ascertain its effect upon the ". . . substitution determined to exist in this will under prior law."[44] Finding no authorization in the Trust Code for the contemplated shifts of principal interest at the termination of the trusts, and also recognizing the existence of a prohibited substitution, the court declared the will a nullity on the latter basis alone.[45]

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38. LA. R.S. 9:1833 (1964) provides in pertinent part: "If the trust instrument stipulates no term, the trust shall terminate: (1) Upon the death of the last income beneficiary who is a natural person; or . . . ."

39. 235 So.2d 411, 416 (La. 1970). Each beneficiary here is both income and principal beneficiary of his respective trust. *See* note 1 *supra*. Such an arrangement is expressly permitted under the terms of section 1805 of the Trust Code.

40. *See* note 34 *supra*.

41. 250 La. 177, 195 So.2d 114 (1966).

42. 202 So.2d 410 (La. App. 4th Cir. 1967), *cert. denied*, 251 La. 395, 204 So.2d 575 (1967).

43. 235 So.2d 411, 416 (La. 1970).

44. *Id.*

45. *Id.* at 417.

Both the approach of the court in *Gredler* and the basis of the holding seem inconsistent with the intent and purposes of the Trust Code. Section 1724 states:

> "The provisions of this Code shall be accorded a liberal construction in favor of freedom of disposition. *Whenever this Code is silent, resort shall be had to the Civil Code* or other laws, but neither the Civil Code nor any other law shall be invoked to defeat a disposition sanctioned expressly or impliedly by this Code." (Emphasis supplied.)

This provision, characteristic of the more liberal approach to trusts brought about by the new legislation, requires a court to consult the Trust Code first whenever the validity of a trust is in question; only if the Trust Code provides no solution should the rules of the Civil Code be brought into the picture.[46] In overlooking this provision, the majority in *Gredler* gave no recognition to the changes in the trust law produced by the Louisiana Trust Code.[47]

In the course of its discussion the court stated, seemingly by way of dictum, that

> ". . . [T]he present will provides for the successive interests to vest after the termination of the trust. The substitution is therefore not 'in trust' as the Trust Code could permit. It is, instead, out of trust."[48]

No use was made of this distinction in the majority opinion, but it would seem that the dictum was a reference to article 1520 of the Louisiana Civil Code, Louisiana Constitution, Article IV, Section 16, and Trust Code Section 1723; these parts of our law draw a distinction between a disposition "in trust" and one "not

46. LA. R.S. 9:1724 (1964). Louisiana State Law Institute comment (b) under 1724 seems to indicate clearly the intent of that section: "(b) If no provision is made for a particular situation in the text of this Code, the Civil Code and other laws should be applied. *But the rules of the Civil Code* and of other laws *should be applied only if it is impossible to reach a determination upon the basis of the rules stated in the text of this Code.*" (Emphasis supplied.)

47. *Cf.* Oppenheim, *Introductory Comments to Louisiana Trust Code of 1964*, WEST LSA-R.S., Vol. 3A at xxix: "The entire substitution problem has been made so difficult in Louisiana by court decisions misapplying the substitution concept to trusts, that the best solution was simply to authorize such provisions in the new Trust Code as would seem needed in our present society. Section 9:1723 is clear in pointing out that substitutions in trust are permissible and that *the substitution argument cannot be used as a method of defeating dispositions in trust.*" (Emphasis supplied.)

48. 235 So.2d 411, 416 (La. 1970).

in trust."[49] From a strict reading of these provisions it could be argued that the shift in principal in the instant case would be "not in trust." From this finding, the application of the Civil Code and prohibited substitution jurisprudence rather than the Trust Code to a case actually involving a trust could be neatly rationalized. It is submitted, however, that this application would have been incorrect in the instant case. In *Gredler*, the validity of a trust was in question; therefore, the Trust Code should be applicable whether the tainted disposition was made during the existence of the trust or after its termination. Also, in the instant case, the trustee himself was the one to work the invalid shift of principal interest immediately at the termination of the trust. Certainly it would be within the intent of the new trust legislation to characterize this disposition as "in trust" and to apply the rules of the Trust Code to the situation.

The majority in *Gredler* noted that sections 1971 and 1972 of the Trust Code were applicable to the issue presented, but chose to rest the decision solely on the ground that a prohibited substitution was presented. The reasons given by the court for this crucial decision were (1) because ". . . the primary issue posed by plaintiffs pleadings and briefs is whether the will contains a substitution . . ."[50] and (2) because

> "[i]n the case of the prohibited substitution the entire will is rendered null, whereas if we should confine our decision to a holding that §§ 1971 and 1972 were violated, the invalid provisions of the will could be excised without declaring the entire will null. La. Trust Code § 2251."[51]

These reasons seem inadequate in view of section 1724 of the Trust Code. As the dissent pointed out, the trust dispositions are covered by the Louisiana Trust Code, so ". . . the substitution concept is irrelevant by both constitutional and codal provision."[52]

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49. LA. CIV. CODE art. 1520, *as amended* in 1962, provides, in pertinent part: ". . . Every disposition *not in trust* by which the donee, the heir, or legatee is charged to preserve for and to return a thing to a third person is null, even with regard to the donee, the instituted heir or the legatee." (Emphasis supplied.) LA. CONST. art. IV, § 16, *as amended* in 1962, provides, in pertinent part: ". . . Substitutions *not in trust* are and remain prohibited; but trusts may contain substitutions to the extent authorized by the legislature." (Emphasis supplied.) LA. R.S. 9:1723 (1964) provides: "A disposition authorized by this Code may be made *in trust* although it would contain a prohibited substitution if it were made *free of trust.*" (Emphasis supplied.)

50. 235 So.2d 411, 417, (La. 1970).

51. *Id.*

52. *Id.* at 419.

The vital distinction in the instant case between finding that the disposition was a prohibited substitution and that it was merely an unauthorized shift of principal under the provisions of the Trust Code is obvious. If a prohibited substitution is found, the Civil Code and the jurisprudence *require* that both dispositions be declared null.[53] But if the Trust Code is applied, a *possibility* exists that the trust as well as the first disposition could be saved.[54] In that case, only the second disposition (the unauthorized shift of principal interest) would be invalid. If the court finds that the severance of the invalid provision of the trust would defeat the purpose of the trust, the entire trust must fall. Thus it can be seen that the court in *Gredler* could have reached the same result for all practical purposes without referring to the Civil Code and its accompanying jurisprudence. It is submitted that this would have been the best result, and would have signaled an acceptance of the Trust Code by the Louisiana judiciary.[55]

Apart from the question of trusts and the Trust Code, the court in *Gredler* continued a very dangerous practice of declaring the "entire will" null whenever it finds a prohibited substitution in a testamentary disposition.[56] Such a holding has no basis in the legislation; in fact, the Civil Code speaks only of the "disposition" containing the prohibited substitution as being

53. *See* text accompanying note 11 *supra.*

54. LA. R.S. 9:2251 (1964) provides: "If a *provision in the trust instrument* is invalid *for any reason* the intended trust does not fail, unless the invalid provision cannot be separated from the other provisions without defeating the purpose of the trust." (Emphasis supplied.) LA. R.S. 9:1725 (8) (1964) provides: " 'Trust instrument' means the written document creating the trust and all amendments and modifications thereof." By these provisions, it would seem that a court would have the power to delete an unauthorized (and therefore invalid) shift of principal from the provisions of a trust under this section, provided that the purpose of the trust is not thereby defeated. LA. R.S. 9:2027 (1964) gives the court even more authority in this regard: "The proper court may order the termination *or modification* of the trust if the purpose for which it is created becomes impossible of accomplishment or illegal." (Emphasis supplied.) Common law courts tend to favor severance of trust provisions violative of the Rule Against Perpetuities rather than declare the entire trust invalid, whenever possible. *See* G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 213 (1965).

55. It should be pointed out that the brief of *amicus curiae* (Professor Leonard Oppenheim, Reporter, Trust Revision Project—Louisiana State Law Institute) recommended that the solution to the case be based upon the Trust Code itself and not upon the concept of substitutions.

56. This rule has been followed in: Succession of Simms, 250 La. 177, 195 So.2d 114 (1966); Succession of Johnson, 223 La. 1058, 67 So.2d 591 (1953); Succession of Walters, 202 So.2d 410 (La. App. 4th Cir. 1967), *cert. denied*, 251 La. 395, 204 So.2d 575 (1967). *But see* Succession of Smart, 214 La. 63, 36 So.2d 639 (1948); Succession of Meadors, 135 So.2d 679 (La. App. 2d Cir. 1961), *cert. denied*, 135 So.2d 679 (1962).

null.[57] In the usual case, as in *Gredler*, the will held absolutely null contained only one disposition; therefore, no great damage was done. But if a will provided for multiple dispositions, only one of which was tainted by a prohibited substitution, the jurisprudence stating that the entire will is null might lead the court to an improper result. To avoid this error, the courts should, upon finding a prohibited substitution in a testament, hold only the tainted disposition an absolute nullity, leaving the remainder of the will valid.[58]

In conclusion, it seems that the result in *Crichton v. Succession of Gredler* is correct, but the approach of the court to the problem as well as its reasons for the result cannot be sanctioned under the new Trust Code. It is hoped that the Louisiana courts will take more notice of our new Trust Code in the future, and reach decisions in accord with its affirmative, liberal attitude toward the trust.

*Thomas Crichton, IV**

HUSON AND THE FIFTH CIRCUIT—A RETURN TO SNIPES?

In December, 1965, plaintiff suffered injuries while working on a fixed drilling platform on the outer continental shelf[1] off Louisiana's Gulf Coast. In January, 1968, he filed suit against the owner and operator of the fixed rig in federal district court under Louisiana's general personal injury tort recovery statute.[2]

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57. LA CIV. CODE art. 1520 provides in pertinent part: ". . . Every *disposition* not in trust by which the donee, the heir, or legatee is charged to preserve for and to return a thing to a third person *is null*, even with regard to the donee, the instituted heir, or the legatee." (Emphasis supplied.)

58. An example of this approach is shown in Succession of Smart, 214 La. 63, 67-68, 36 So.2d 639, 640-41 (1948): "The fact that there are bequests of particular legacies in the will that contain prohibited provisions or substitutions such would destroy only those legacies and would not effect [*sic*] the will as a whole. It is well settled that the invalidity of a portion of a will does not destroy the will in its entirety. Succession of Lissa, 195 La. 438, 196 So. 924, and the authorities cited therein to that effect."

*The student Board of Editors wishes it noted that it requested the author to write this Note, despite his having a personal interest as an alternate beneficiary under the trust, since the importance and complexity of the subject matter required maximum access to research data. We believed that he could and would write a scholarly analysis of this important case as unaffected as humanly possible by that personal interest.

1. 2 U.S. CODE CONG. & AD. NEWS 2178 (1953). The continental shelf is an extension of the coastal land which slopes down gradually to 600 feet below sea level. In the Gulf of Mexico, the shelf extends to a maximum of 200 miles out and the average distance is 93 miles.

2. LA. CIV. CODE art. 2315.